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Submission to the UN Committee on Migrant Workers, General Comment No. 5 on Migrants' Human Right to Liberty and their Protection from Arbitrary Detention

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Introduction

It is our honor to submit this report to the Committee. This report consists of ten pages answering the questions sent to stakeholders from the Committee on 26 of Dec 2018. The report also includes three annexes:

No.1 – is a comparison between the CMW and the ECHR on the deprivation of liberty of migrants. The annex has identified current case law and doctrine within the ECHR as well as the points where the ECHR differ in its regulation compared to the CMW.

No. 2 – is a compilation of the materials the Committee, herself has generated. The annex is a systematization of General Comments, Guidelines, Concluding Observations, List of Issues and State Reports on the subject of the detention and the deprivation of freedom under the CMW.

No. 3 – is a categorization of all the UN and ILO instruments that the Committee and the CMW have referenced in previous statements or in the preamble. The annex has identified which documents within this broad material that mentions relevant articles and principles relating to the detention of migrants.

The hope is that the annexes will serve as an overall catalog on Migrants' Human Right to Liberty and their Protection from Arbitrary Detention and will contribute to the overall preparation of the General Comment No. 5.

Part A: General Information

1. Please describe the process by which migrants are detained in your country. Which authorities are tasked with this responsibility? Who or what body oversees these authorities?

Migrants can be detained at the point of entry at the border; airports, ferry stations, train stations, when a proper identity is impossible to establish. A Migrant may also be detained when there is a risk that the person will evade or resist the enforcement of a decision of denial of entry into Sweden, or resist a deportation decision. (Utl. Kap. 10 § 1).

2. Where do arrests and detentions take place? Is force typically used during arrest or detention? Are there standards for treatment of migrants during an arrest? To what extent are migrants informed of what is going on during an arrest (why they are being detained, possible charges against them, etc.)?

Migrants that are detained are held in special facilities run and administrated by the Migration Authorities. These centers are supposed to reflect the administrative character of the situation and therefore being different in their layout and routines from facilities run and administrated through the criminal legal system. A migrant held in detention shall be treated in a humane manner, with the respect of the person's personal integrity, (Utl. Kap. 11 § 1). The person detained shall be informed of the person's rights and duties while detained, (Utl. Kap. 11 § 1). The centers that hold detained migrants shall intrude in the least possible way upon the migrant's personal integrity and rights. (Utl. Kap. 11 § 1). While a Migrant is held in detention the State pays the migrant a stipend for each day the person is held in detention (Utl. Kap. 12 § 13).¹

3. Who are the personnel that staff facilities that hold people in detention (corrections officers, law enforcement, social workers, etc.)? What are the professional qualifications of staff at these detention facilities? Who oversees staff at detention facilities?

The Migration Authority has five detention centers in total in all of Sweden with room for a total number of 400 migrants. One of these facilities is only for women (Märsta). There are also special family-units where the family is maintained intact.² In accordance with the law, each family has to have its own separate housing unit (Utl.

¹ The stipend per day for an adult when food and housing is provided for by the State is about 10 USD per day, and 5 USD per day for each child – Lag (1994:137) om mottagande av asylsökande m.fl. § 17. If need be the Migrant may also qualify for an additional stipend in accordance to § 18 in the same law.

² Riksdagens Ombudsmän, Justitsieombudsman Cecilia Renfors, Inpektion av Migrationsverket, förvarsenheten i Källered, Göteborg den 13-14 mars, Protokoll, Dnr. 939-2018. Para. 3.

Kap. 11 § 3). The staff at these detention centers have undergone ten days of training. From 2018 the education of the staff has expanded into 12 full weeks of training.³

4. Who owns the facilities used to house migrants who are detained? Who operates the facilities used to house detained migrants? Are facilities that house detained migrants public or private?

The Migration Authorities operate the detention facilities and are responsible for the treatment of the persons held in detention (Utl. Kap. 11 §2 st.2).

5. Does your country monitor detention facilities? Who monitors detention facilities? What are the standards that detention facilities must adhere to?

It is the Migration Authorities that run and administrates the detention centers for migrants. The Swedish constitution (RF 13:6) assigns the Parliamentary Ombudsmen the responsibility to monitor all activates operated by the Swedish state bureaucracy. The Parliamentary Ombudsmen is the authority overseeing all the activities within the State Bureaucracy, under which detention of migrants falls. This governmental body is also tasked with the overseeing of the implementation of OPCAT.⁴ The Parliamentary Ombudsmen have made unannounced as well as pre-scheduled visits to detentions centers. Their reports and findings are made public.

6. During detention, do detainees have access to communication with their families, legal counsel, and their own consular authorities? Are detainees provided with information on the process they are going through?

The person in detention shall be given the opportunity to engage in a variety of activities, among others, physical training and to going outdoors. Children held in detention shall be given the opportunity to play and provided activities adjusted to the child's age (Utl. Kap. 11§ 3). The detained shall be given the opportunity to receive visitors, and in other ways to communicate with people outside of the facility (Utl. Kap. 11§ 4). Unless contact specifically would make the running of the facility harder (Utl. Kap. 11§ 4, led.2 st 1). If necessary for the security, it is permitted to supervise the visits. The visit by a public lawyer or an Esq. may only be supervised if the public lawyer or the Esq. so request (Utl. Kap. 11§ 4 st. 2).

7. Are the particular needs of women and other groups of people met? Is consideration given to the status of asylum seekers, victims of torture and trafficking, and other migrants who are particularly vulnerable?

The Migration Authorities operates under an Action Plan for Equality where the management is trained in equality and gender sensitivity (Handlingsplan för

³ Riksdagens Ombudsmän, Justitsieombudsman Cecilia Renfors, Inpektion av Migrationsverket, förvarsenheten i Källered, Göteborg den 13-14 mars, Protokoll, Dnr. 939-2018. Para. 3.

⁴ Lag (1986:765) med instruction for Riksdagens ombudsman §5a.

jämställdhetsintegrering). It is a goal by the Swedish government to mainstream the equality of treatment throughout its bureaucracy. Part of the action plan is to highlight special groups' vulnerabilities. Examples are the education of staff and victims of the legal rights and framework in place protecting women against violence. Another vulnerable group is the LGBTQ – community, special housing provided is provided to this group as an option, if a person feels unsafe in the general population. It is not clear how these considerations affect the time in detention. The separate housing is in regard to open housing-facilities for migrants, run by the Migration Authorities and not when a person is in detention, also run by the Migration Authorities but it is not clear that these facilities can guarantee special protected housing for migrants of LGBTQ community.⁵

When deprived of their liberty, women are held in a separate detention center in Märsta. Family units are kept in specific wards.⁶ This information is, however contradicted by a report from 2016 where women and families were kept at the same facility as men without families, in Flen.⁷ The women had their own TV room that could be locked from the inside and women and families were placed in one section of the facility (section 1) but not separated from the men.⁸

There is a suicide prevention protocol established – SI-30/2016. It is the current team leader or the nurse on location that makes the initial suicide assessment of the mental health of each migrant. The person will when in need of treatment be transferred to a mental health facility. Even if this is the goal, to transfer a person in need of mental health treatment to a mental health facility, this is also one of the conditions that allow for the Migration Authority to take the migrant out of the Migration Center and place the person in a remand facility (Utl. Kap. 10 § 20 & Kap. 11 § 7).

8. Does the detention process look any different if minors are involved?

Children shall as a main rule not be put in detention (Utl. Kap. 10 §§ 1& 2). One important rule is that it is not allowed to separate a child from both its parents, either by detaining only the child, or by detaining its parents (Utl. Kap. 10 § 3). This can lead to that children are deprived of their freedom and placed in detention without any connection to the child's own behavior or needs.

⁵ Migrationsverkets årsrapport s. 44.

⁶ Riksdagens Ombudsmän, Justitsieombudsman Cecilia Renfors, Inpektion av Migrationsverket, förvarsenheten i Källered, Göteborg den 13-14 mars, Protokoll, Dnr. 939-2018. Para. 3.

⁷ OPCAT-inspektion av Migrationsverkets förvarsenhet i Flen den 7-8 mars 2016. Dnr. 843-2016, s. 3.

⁸ OPCAT-inspektion av Migrationsverkets förvarsenhet i Flen den 7-8 mars 2016. Dnr. 843-2016, s. 3.

Part B: Legal Treatment

1. What is the legal basis for detaining migrants in your country? What purpose does detention of irregular migrants serve? How has this purpose been articulated through legislation and through the judicial system and public policies? Please identify any relevant cases in your country's court system.

Migrants can be taken into custody, detained at the point of entry (when proper identity has not been possible to establish). Or when there is a risk that the person will evade or resist the enforcement of denial of entry into Sweden, or a deportation decision. (Utl. Kap. 10 § 1).

2. Is immigration governed by criminal law or administrative law?

Immigration is governed by administrative law.

3. Does the immigration detention proceed *ex officio* or there is an individualized analysis of its pertinence and proportionality?

Detention of Migrants is not a process that proceeds *ex officio* – a separate decision need to be made by either a Court, the Migration Authority or the Police Authority for a person to be detained. (Utl. Kap 10§§ 12-17).

4. Does legislation establish a maximum amount of time for immigration detention? What is the maximum amount of time that someone can be detained? Are there any exceptions or extensions allowed by law?

There are multiple timelines in place when it comes to detained migrants, (Utl. Kap 10§ 4), a person can be held for 48 hours if it is not possible to confirm a person's identity at the point of entry. A person can also be held for two months, or longer; no longer than three months (if the delay is due to lack of cooperation from the detained) or if the gathering of information takes longer, maximum twelve months, if the person's right to enter and reside in Sweden cannot be established, or if detention is necessary for the investigation over the right to entry and reside to be established, or if, it is credible to assume that the person will be denied entry or will be deported, or the detention is part of preparing a denial of entry or deportation. Finally, if there is a risk that the person will commit a crime, or there is a risk of the person absconding, or staying in hiding, or preventing the enforcement of the decision of deportation, a migrant can be detained.

Children can be detained at a maximum of 144 hours (72+72 hours) (Utl. Kap 10§ 5) but absolutely no longer than two weeks (Utl. Kap. 10 sista st).

5. Does legislation provide any mechanism to challenge the legality of the detention?

All detention decisions can be challenged in a Migration Court in accordance with the law (Utl. Kap. 14§ 9), without time limitation.

6. Is there any national legislation that guarantees legal representation or interpreters in immigration proceedings? Is there a guarantee of access to free legal representation?

A publicly appointed legal representative shall be appointed, if it cannot be presumed that a public legal representative is not needed, to the person detained when the person's identity is impossible to determine at point of entry or if in other ways it is impossible to determine the person's right to enter or reside in Sweden (Utl. Kap 18§ 1:4).

For children, a public legal representative shall always be appointed for the above cases (Utl. Kap 18 § 1).

7. Is there any legislation that establishes the right to consular assistance for migrants? Is this right guaranteed in practice?

A person that is deprived of his or her liberty shall without delay be informed of his or her right to contact the nation's consular.⁹

8. Does your country recognize the due process rights of non-citizens to the extent that it recognizes the due process rights of citizens? If not, what are the differences?

It is the regular rules governing administrative procedures that govern migration cases (Utl. Kap 16 § 1 st. 2). This means that the non-citizen will be governed by the same rules as citizens.

9. Is information available to detainees regarding the processes of requesting asylum or applying for refugee status?

The asylum seeker has a right to a publicly appointed legal representative which will guide the migrant through the process and legally represent the person. The Migration Authorities post information on how to apply for asylum on their web page. The information is also available by phone for people to call for information.

10. What do proceedings that determine migration status look like? Who is the decision-maker or decision-makers? What are the qualifications of the decision-makers? Are they appointed or elected?

The process determining a person's asylum status is oral and in person, unless the person has been denied refugee status based on that the person has committed a severe crime and a permit of residency would mean serious danger to the *ordre public* (Utl. Kap. 4 § 3).

⁹ Lag (1989:152) om underrättelseskyldighet m.m. när utlänningar är berövade friheten.

In the first instance, it is primarily, the Migration Authority that makes the initial determination of status, this can also be done by the police authorities. If the decision is made by the Police Authorities the decision can first be appealed to the Migration Authorities. If the decision by the Migration Authorities is appealed, it will be appealed to regular administrative Courts designated as the Migration Court (Utl. Kap. 17 § 9), with regular judges. A decision from the Migration Court can be appealed to the Supreme Migration Court (also the regular Appeals Court of the Stockholm Region) (Utl. Kap. 16 §1).

11. Is there a duty to ensure that decisions are duly motivated by legal reasoning? How is that ensured in practice?

The law requires decisions made by the Migration Authority, The Police and the Courts to be made in writing, with a motivation of the facts upon which the decision was made. (Utl. Kap 13 § 10).

For the case that the Police Authorities are enforcing decisions of deportation the action taken has to be documented by the Police Authorities.¹⁰

12. How much time elapses after arrest before a determination of migration status is made? How long does the initial determination of status process take?

There is no set time limit for the status of a migrant to be determined by, but there are time limits for how long a person can be held in detention. At most for two months, as the main rule, but no longer than 12 months. (Utl. Kap 10§ 4). The normal timeline for the Migration Authorities to determine the migration status of an applicant is 426 days.¹¹

13. What are the consequences of a finding of irregular migration? Is an individual who is found to have entered the country in an irregular manner returned to detention or moved to a different facility? Are the conditions different for individuals found to be irregular migrants? Are irregular migrants eligible to be released on bond/bail until a final determination has been made?

It is not a crime to be an irregular migrant in Sweden. The regulations concerning irregular migrants are regulated by administrative law (Utlänningslagen (2005:716). If the person does not have a passport or in other ways lacks the permission to reside in Sweden. The person can get expelled from Sweden (Utl. Kap. 8 § 6).

14. Is there a right to appeal of finding of irregular migration status? What does the appeal of a finding of irregular migration status look like? How much time elapses from a judgment of irregular migration status to an appeal? What due process guarantees are given during

¹⁰ Polislagen (1984:387) § 27.

¹¹ Migrationsverkets årsredovisning 2018, s. 17.

the appeal process of a finding of irregular migration status? Does the appeal process have suspensive effect regarding deportations?

All decisions regarding a person's status can be appealed (Utl. Kap 14 § 6).

Both decisions denying entry into Sweden and decisions of expulsion from Sweden can be appealed, as well as decisions denying residence permits can be appealed (Utl. Kap. 14 §§ 2, 3, 4a, 4b).

The main rule is that a non-Swedish citizen shall have a passport (from the Country where the person is a citizen) to enter or to reside in Sweden (Utl. Kap. 2 §1). For temporary residence permits, an original passport has to be presented to the authorities (Utl. Kap 2 § 1). If the person does not have a passport or is unable to retrieving a passport the Swedish Authorities can issue a "främlingspass" – passports for non-citizens (Utl. Kap. 2 § 1a). A non-Swedish citizen residing longer than three months in Sweden needs a valid residence permit (Utl. Kap. 2 § 5).

Part D: Alternatives to Detention

1. What alternatives to detention exist in your country? Please describe these alternatives to detention and how they are generally perceived and implemented in your country.

There are two forms of control mechanisms; detention and supervision (Utl. Kap 10). None of these forms of control mechanisms proceeds *ex officio*. There has to be a formal decision that the person's identity cannot be verified, that the person will resist or avoid complying with a decision of deportation or denial of entry into Sweden, or that the person will commit a serious crime, for a decision of detention or supervision to be made.

2. Have all detainees access to alternatives to detention? How many persons get an alternative to detention in comparison with the number of detainees?

There is no right to access alternatives to detention. Most people are not detained. The national capacity for holding migrants in detention is about 400 people in total nationwide. Last year the Migration Authorities ruled in 350 000 migration cases. Of these are 21 000 asylum cases. As a consequence of this, neither supervision or detention is the most common routine.

3. Have there been any policies proposed in your country that could achieve the same objectives as detention? How have these proposals for alternatives to detention been received in your country? Are proposals for alternatives to detention generally met with favor or have they been rejected? Please describe the criticisms of the policies for alternatives to detention by the general public. If these proposals have been rejected, what was the rationale for rejecting them?

The Red Cross for example advocates in a report on children in detention that supervision as a control mechanism is underutilized as an alternative to detention.¹²

Part E. Additional information

Please add any other information that you consider to be relevant for the CMW to take into account in the elaboration of this general comments.

There are three main concerns that might be relevant for the CMW in preparation for the general comments:

The first is the importance of emphasizing the position held by both the Committée and the UN Committée on the Rights of the Child, that children shall not be placed in detention. When children are put in detention it should only be as a last resort. (see annex 2 & 3 to this effect). To be able to determine if the Authorities have treated detention as the last resort, proper documentation over the deliberation over the alternatives to detention has to be made. There is at times insufficient documentation on the deliberation process when children are detained.

The second concern is the blurred line between administrative law and criminal legal effects. That even though the law applied is administrative the consequences can lead to placements in the same facilities as people that are placed in remand facilities in waiting to stand criminal trial. The Migration Authority can make a decision to place a migrant in a facility that hosts persons awaiting criminal trial (Utl. Kap. 10 § 20) when a migrant might jeopardize the order in the migration center, or the person is a severe danger to himself or others (Utl. Kap. 10 § 20 & Kap. 11 § 7). It is when a migrant is a danger to himself or others allowed that the Migration Authorities removes the migrant from the migration centers and transfer the person to regular remand facilities together with a population awaiting criminal trials.

The relationship between multiple legal systems and the European two systems, the European Convention on Human Rights and EU law might at times need clarification and can be hard for both authorities and lawyers to navigate. The European Convention on Human Rights has an expansive case law and the scope of migrants' rights is in some instances wider than of the CMW (as shown in Annex 1 of this report).

¹² The Red Cross, Sweden, Maite Zamacona Aguirre, Barn i förvar (2018).

Annex 1: A European perspective on the right to liberty of migrant workers and their families¹

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¹ Annex 1, Supervised by Prof. Garhn-Farley, written by Marc Favvrelle, Solicitor (Australia), LL.M, Stockholm University, and Alexander Ottosson; LL.M. Uppsala University, Lawyer at the Centrum for Rättvisa (Center for Justice).

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1 Introduction

In this report, the right to liberty of migrant workers and their families is considered from a European perspective. No member of the European Union (the EU) and only seven members of the Council of Europe (the Council) are party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (the Convention or the UNCMW).² However, rights equivalent to those protected in Articles 16 § 1 and 16 § 4 of the Convention are provided for in regional human rights instruments, most importantly Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR) and Article 6 of the Charter of Fundamental Rights of the European Union (the Charter).

Furthermore, all EU and Council member states are parties to the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child (the CRC). European jurisprudence, particularly the case-law of the European Court of Human Rights (the ECtHR, the Court or the Strasbourg court), can as such provide a useful comparison point in the development of interpretative guidelines for the Convention. More specifically, an examination of the interpretation of equivalent protections under ECHR law can help to identify gaps in the Committee's existing guidelines. Furthermore, as the Convention establishes a minimum standard of rights and protections, those State parties who are members of the Council are bound by ECHR law to the extent that this provides a higher level of protection than the Convention.

The remainder of the report is divided into four sections. Section 2 provides a high-level overview of the scenarios in which migrants, including children, face detention in Europe within the framework of the ECHR and EU-law. Section 3 analyses the right to liberty under the ECHR, as interpreted by the ECtHR. Section 4 continues this analysis with a specific focus on procedural safeguards and due process requirements. Finally, section 5 considers requirements relating to the conditions of detention under the ECHR.

2 Scenarios in which migrants may be detained

There are essentially two scenarios in which migrants may face administrative detention by Council and EU member states: (1) the prevention of unauthorised entry into a state of transit or a destination state; and (2) the preparation and

² Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Montenegro, Serbia and Turkey.

carrying out of the migrant's return to their state of origin or habitual residence or removal to a third state. These two scenarios are reflected in the grounds for detention set out in Article 5 § 1 (f) of the ECHR and in secondary EU-law governing detention, namely the Reception Conditions Directive,³ the Returns Directive⁴ and the Dublin regulation.⁵ None of these instruments prohibit the detention of children, although special provisions may apply, particularly in the case of unaccompanied minors.⁶

The purpose of detention in the first scenario is to assist in the determination of the migrant's identity and migration status, that is, their right to enter or remain in a state's territory.⁷ The migrant may, for example, be detained during the processing of an asylum application, though EU-law prohibits detention solely on that basis.⁸ Detention may occur at the border or other point of entry, for example at an airport, or inside a state's territory, for example after a workplace migration control. The point at which the migrant is intercepted and detained can affect the conditions of detention (see section 5).

A migrant may find themselves detained in the second scenario due to a determination that they have no right to asylum or other right to enter or remain in the state. Even if the migrant's status initially permitted them to enter and remain in the state, a return order may have been issued after a loss of that status, for example as a result of a failure to meet the applicable conditions of a visa or other permit, or in connection with a criminal conviction.

3 Protection against arbitrary arrest and detention

3.1 Introduction

Article 5 of the ECHR sets out the right to liberty and security. Its purpose is to safeguard against arbitrary detention and other encroachments on the physical

³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast).

⁴ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

⁵ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

⁶ Reception Conditions Directive, Articles 11(2) and 11(3), Returns directive, Article 17 and Dublin Regulation, Article 28(4).

⁷ Reception Conditions Directive, Article 8 (3).

⁸ Reception Conditions Directive, Article 8 (1).

security of persons. It contains an exhaustive list of legal contexts in which depriving someone of their liberty is permissible. It further provides procedural safeguards with the aim of ensuring due process and preventing abuses of power.

Security of person under Article 5 of the ECHR does, to some extent, include, as it is formulated in Article 16 § 2 of the UNCMW, “protection by the state against violence, physical injury, threats and intimidations”. The case-law on this aspect of Article 5 is, however, limited and the main focus of the text of Article 5 itself is indeed on the right to liberty. Therefore, the primary aim of the following contribution will be to elaborate on the right to liberty.

To that end, the jurisprudence of the Strasbourg Court will be surveyed in order to provide an overview of the scope of the right to liberty under Article 5, the circumstances under which a deprivation of liberty may be justified and the procedural guarantees that must be in place in order to ensure due process. Comparisons will be made with the right to liberty under Article 16 of the UNCMW and some specific areas that may be of interest to the Committee with respect to migrant children will be highlighted.

3.2 The scope of the right to liberty

In simple terms, a deprivation of liberty under Article 5 of the ECHR occurs when someone without valid consent is confined in a certain restricted space for a non-negligible period of time.⁹ The right to liberty under Article 5 exclusively refers to physical liberty in the “classical sense”.

Detention may be classified as a deprivation of liberty also when the person concerned has volunteered to be taken into detention. Especially when there is no legal room to disagree with the detention or when the person concerned is legally incapable of consenting to be taken into detention, the consent has little bearing on whether an issue under Article 5 arises.¹⁰ Having said that, if a person who lacks legal capacity, such as a child, is deemed to understand their situation, their consent or lack thereof, may be of certain relevance in determining whether a deprivation of liberty has taken place.¹¹

It is not in itself decisive whether the measures are taken for the protection or in the interest of the person concerned.¹² The purpose of the measures comes into

⁹ *Stanev v. Bulgaria* [GC], no. 36760/06, § 117, ECHR 2012–I.

¹⁰ *Stanev*, cited above, § 119.

¹¹ *Stanev*, cited above, § 130.

¹² *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 71, ECHR 2016.

play first at a later stage when determining whether the deprivation of liberty pursued a legitimate aim.¹³

The difference under the ECHR between a deprivation of liberty and mere restrictions on movement is, furthermore, not in the nature or substance of the restrictions but in the degree and intensity. The right to liberty under Article 5 only applies when a loss of liberty reaches a certain level of severity and intensity.¹⁴

To determine if there has been a deprivation of liberty, the Court does an autonomous assessment of the concrete situation before it, in view of the type, duration, effects and manner of implementation of the measure in question.¹⁵

Outside of arrest and detention in the formal sense, keeping individuals in airport transit zones¹⁶, on ships and in migration reception facilities¹⁷ and in asylum hotspot facilities¹⁸ has been considered to trigger Article 5.

When determining whether a certain type of confinement constitutes a deprivation of liberty the degree of supervision and control of the detained person's movements, the extent of isolation, availability of social contacts and whether it is possible to leave the confined area, must be taken into consideration.¹⁹ A measure can amount to a deprivation of liberty even though the person concerned is not physically restrained.²⁰

The Strasbourg court has, furthermore, applied a test of strict necessity to identify whether an issue under Article 5 has arisen when the facts would not otherwise bring the case within the ambit of the Article. In *Gahramanov v. Azerbaijan*, a passenger had been detained for two hours in an airport. The Court found that "where a passenger has been stopped by border officials during border control in an airport in order to clarify his situation and where this detention has not exceeded the time strictly necessary to comply with relevant formalities, no issue arises under Article 5 of the Convention".²¹ In *Kasparov v. Russia*, by contrast,

¹³ *Rozhkov v. Russia* (no. 2), no. 38898/04, § 74, 31 January 2017.

¹⁴ *De Tommaso v. Italy* [GC], no. 43395/09, § 80, ECHR 2017 and *Stanev*, cited above, § 115.

¹⁵ *De Tommaso*, cited above, § 80; *Stanev*, cited above, § 115 and *Medvedyev and Others v. France* [GC], no. 3394/03, § 73, ECHR 2010–III.

¹⁶ *Amuur v. France*, no. 19776/92, Reports of judgments and decisions 1996–III; *Shamsa v. Poland*, nos. 45355/99 and 45357/99, 27 November 2003 and *Mahdid and Haddar v. Austria* (dec.), no. 74762/01, ECHR 2005–XIII.

¹⁷ *Khlaifia*, cited above.

¹⁸ *J.R. and Others v. Greece*, no. 22696/16, 25 January 2018.

¹⁹ *Guzzardi v. Italy*, 6 November 1980, § 95, Series A no. 39; *H.L. v. the United Kingdom*, no. 45508/99, § 91, ECHR 2004–IX and *Storck v. Germany*, no. 61603/00, § 73, ECHR 2005–V.

²⁰ *M.A. v. Cyprus*, no. 41872/10, § 193, ECHR 2013–IV.

²¹ *Gahramanov v. Azerbaijan* (dec.), no. 26291/06, § 41, 15 October 2013.

holding the applicant for five hour in a similar context was not deemed strictly necessary for ”verifying formalities associated with airport travel”.²²

In addition, Article 5 contains a positive obligation on the State to take appropriate measures in order to protect individuals against arbitrary detention by non-state actors.²³ This includes preventing any deprivation of liberty the authorities either have or ought to have knowledge of.²⁴ If the state under such circumstances omits bringing to an end a deprivation of liberty at the hands of private individuals, it has not complied with its positive obligations under the ECHR.²⁵

Given the particular relevance of a robust protection for victims of trafficking under the UNCMW, the Committee might want to ask States Parties to specify the extent to which extent the States Parties are taking appropriate measures in order to protect individuals against arbitrary detention by non-state actors.

3.3 Justifications for depriving someone of their liberty

3.3.1 Lawfulness

To be lawful, a deprivation of liberty must be compatible with the applicable substantive and procedural rules under domestic law (and, where appropriate, also under European or international law) and be consistent with the purpose of Article 5 – which, to reiterate, is to protect against arbitrariness.²⁶

The applicable domestic law must also in itself be in accordance with the ECHR, including the general principles inherent in the whole convention.²⁷ The law must, in other words, meet the ”quality of law standard”.²⁸ The relevant principles in this context are essentially those implied by the rule of law, namely legal certainty, proportionality and protection against arbitrariness.²⁹

More concretely, the law authorising deprivation of liberty must be sufficiently accessible, precise and foreseeable in its application in order to avoid all risk of arbitrariness. Sufficient safeguards against arbitrariness must be in place. Relevant

²² *Kasparov v. Russia*, no. 21613/07, §§ 46–47, 3 October 2013.

²³ *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, § 239, ECHR 2012–VI.

²⁴ *Storck v. Germany*, cited above, § 102.

²⁵ *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 319–21, ECHR 2010–I and *Medova v. Russia*, no. 25385/04, §§ 123–25, 15 January 2009.

²⁶ *Medvedyev and Others*, cited above, § 79 and *Thimothawes v. Belgium*, no. 39061/11, § 70, 4 April 2017.

²⁷ *Anguelova v. Bulgaria*, no. 38361/97, § 154, ECHR 2002–IV.

²⁸ *J.N. v. the United Kingdom*, no. 37289/12, § 77, 19 May 2016.

²⁹ *Simons v. Belgium* (dec.), no. 71407/10, § 32, 28 August 2012.

factors in this assessment include the existence of clear legal provisions for ordering detention, for extending detention and for setting time-limits for detention and the existence of an effective remedy by which the applicant can contest the lawfulness and length of his continuing detention.³⁰

In the migration context, it should be noted that under the second limb of Article 5 § 1 (f), it is immaterial whether "the underlying decision to expel can be justified under national or Convention law", since the provision merely posits that action is being taken with a view to deportation or extradition".³¹

3.3.2 *Arbitrariness and proportionality*

Even if the applicable law in itself contains adequate safeguards against arbitrariness, a deprivation of liberty may under the particular circumstances of a specific case fall short of the requirements under the ECHR. Under Article 5 § 1 (f) specifically, a detention must be "carried out in good faith; it must be closely connected to [the ground of detention relied on by the Government]; the place and conditions of detention should be appropriate bearing in mind that 'the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country' [...] and the length of the detention should not exceed that reasonably required for the purpose pursued."³²

A deprivation of liberty under Article 5 § 1 (f) must not, as a general rule, be reasonably considered necessary. A detention may, however, not continue for an unreasonable length of time³³ and the domestic authorities must consider "whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified".³⁴

A necessity test *does*, however, apply with respect to certain vulnerable groups, such as children. For that reason, the Court has expressed reservations to automatic placement of asylum seekers in detention without any individual assessment of their needs and vulnerability.³⁵ Presumably, the same reasoning would apply should migrant workers be automatically put in detention.

³⁰ *J.N.*, cited above, § 77.

³¹ *Chahal v. the United Kingdom* [GC], no. 22414/93, § 112, Reports 1996–V.

³² *Saadi v. the United Kingdom* [GC], no. 13229/03, § 74, ECHR 2008–I; *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 164, ECHR 2009–II and *Kanagaratnam and Others v. Belgium*, no. 15297/09, § 84, 13 December 2011.

³³ *Saadi*, cited above, §§ 72–73 and *A. and Others*, cited above, § 164.

³⁴ *Kim v. Russia*, no. 44260/13, § 53, 17 July 2014.

³⁵ *Thimothawes*, cited above, § 73.

As with all decisions concerning children, their best interests must be paramount.³⁶ When a child is involved, detention must thus be necessary to secure the family's removal in order to be justified, and the national authorities must have verified beforehand that no other less restrictive measure could be put in place.³⁷ It is important to note here that it is not enough to conclude *ex post facto* that there did not exist any less restrictive measures. The national authorities should always carry out that assessment beforehand.

Moreover, for a deprivation not to be arbitrary, the detention order must contain sufficient reasoning as to the grounds for detention and must make reference to relevant legal provisions setting out the conditions for the detention in question.³⁸ Unacknowledged detention is viewed by the Strasbourg Court as one of the gravest forms of Article 5 violations. A deprivation of liberty must thus always be accompanied by a record of the date, time, location of detention, name of the detainee, reasons for the detention and the name of the persons affecting the detention in order to be deemed lawful.³⁹

3.3.3 *Additional comments*

The Committee might consider asking States Parties to elaborate on a “quality of law” standard to further strengthen the protection under the UNCMW. It could be of interest to find out if States Parties interpret “law” to encompass also regional and international law. Moreover, the Committee might be interested in finding out if States Parties has a procedure that takes into consideration if the lawfulness of detention is tied to the lawfulness of the underlying decision to expel. Under the ECHR, this is not the case.

As for arbitrariness and proportionality, some comparative insight might be gleaned from the case-law referred to above and be used to specify the safeguards against arbitrariness and the details of the proportionality test.

³⁶ *Rahimi v. Greece*, no. 8687/08, §§ 108–109, 5 April 2011.

³⁷ *A.B. and Others v. France*, no. 11593/12, §§ 120 and 123, 12 July 2016.

³⁸ *Stašaitis v. Lithuania*, no. 47679/99, §§ 66–67, 21 March 2002 and *Khudoyorov v. Russia*, no. 6847/02, § 157, ECHR 2005–X.

³⁹ *Anguelova*, cited above, § 154.

4 Procedural safeguards and due process

4.1 The right to be informed

4.1.1 Introduction

The right to be informed is one of the most fundamental safeguards afforded by Article 5. If a person is not informed of the reasons for their arrest or detention, they cannot make effective use of the right to have the lawfulness of the detention decided by a court.⁴⁰ Although Article 5 § 2 exclusively uses the terms “arrested” and “arrest”, the scope of the provision also includes people who are detained for the purpose of extradition.⁴¹

The information provided must include the essential legal and factual grounds for the arrest and must “be told, in simple, non-technical language”.⁴² If the person deprived of their liberty is incapable of receiving or understanding the relevant information – for instance because they are a child – it must instead be conveyed to someone who represents their interest, such as a lawyer or guardian.⁴³

4.1.2 Promptness

In contrast to the ECHR, the UNCMW seems to require that information about the reasons for the arrest be provided “at the time of arrest” rather than merely “promptly”. Under both conventions information must be provided promptly about any charges that will be brought.

Under the ECHR, the promptness requirement is fulfilled if the arrested person is informed of the reasons for the arrest within a few hours.⁴⁴ The information does not have to be provided in writing or in any other special form.⁴⁵ It is even sufficient that the reasons for the arrest become apparent during post-arrest interrogations or questioning.⁴⁶ If the arrested person is aware of the details of the alleged offence contained within previous arrest warrants and extradition requests, no additional information must be provided.⁴⁷

⁴⁰ *Fox, Campbell and Hartley v. the United Kingdom*, 30 June 1990, § 40, Series A no. 182 and *Čonka v. Belgium*, no. 51564/99, § 50, ECHR 2002–I.

⁴¹ *Shamayev and Others v. Georgia and Russia*, no. 36378/02, §§ 414–15, ECHR 2005–III.

⁴² *Fox, Campbell and Hartley*, cited above, § 40.

⁴³ *Z.H. v. Hungary*, no. 28973/11, §§ 42–43, 8 November 2012.

⁴⁴ *Fox, Campbell and Hartley*, cited above, § 42.

⁴⁵ *Kane v. Cyprus* (dec.), no. 33655/06, 13 September 2011.

⁴⁶ *Murray v. the United Kingdom* [GC], 28 October 1994, § 77, Series A no. 300-A.

⁴⁷ *Öcalan v. Turkey* (dec), no. 46221/99, 14 December 2000.

What is essential is that the arrested person has sufficient information to be able to apply to a court for the review of lawfulness.⁴⁸ The information requirements are generally lower for arrests for the purpose of extradition, since such arrests do not require a decision on the merits of any charge.⁴⁹

An issue might arise under the UNCMW when a child is concerned if it is not possible to provide information about the reasons for the arrest to someone who represents the child's interests already at the time of the arrest.

4.1.3 Language

It follows from the Strasbourg Court's jurisprudence that the authorities must, if necessary, use an interpreter and phrase the request for interpretation with meticulousness and precision so the persons concerned understands the reasons for the arrest and of any charge against them.⁵⁰

A difference between the UNCMW and the ECHR is that the latter categorically states that information must be provided in a language the arrested person understands, while the former only states that this must be done "as far as possible". Presumably, the reason for adding "as far as possible" is that it would be unreasonable to categorically require that information be provided in a language the arrested person understands when, as is the case under the UNCMW, but not under the ECHR, the information about the reasons for the arrest must be provided at the time of the arrest.

4.2 Automatic judicial control

4.2.1 Introduction

Judicial control is an effective safeguard against the risk of ill-treatment and against the abuse of powers by the authorities.⁵¹ Under Article 5 § 3 of the ECHR, judicial control must be automatic. This means that it cannot be a prerequisite that the detained person applies for review.⁵² The detained person may be incapable of lodging an application precisely because of them being subjected to ill-treatment, or because of their vulnerability – inter alia on account of their young age.⁵³

It should here be noted that both Article 5 § 3 of the ECHR and Article 16 § 6 of the UNCMW concern the situation where someone is arrested or detained on a

⁴⁸ *Shamayev and Others*, cited above, § 427.

⁴⁹ *Suso Musa v. Malta*, no. 42337/12, §§ 113, 23 July 2013.

⁵⁰ *Shamayev and Others*, cited above, § 425.

⁵¹ *Ladent v. Poland*, no. 11036/03, § 72, 18 March 2008.

⁵² *McKay v. the United Kingdom* [GC], no. 543/03, § 34, ECHR 2006-X.

⁵³ *McKay*, cited above, § 34 and *Ladent*, cited above, § 74.

criminal charge. The automatic judicial control requirement does not apply to Article 5 § 1 (f) situations, i.e. when preventing someone from affecting an unauthorised entry into the country, or when action is being taken with a view to deportation or extradition.

From General Comment No. 2, para 33, however, it appears that the Committee has interpreted the UNCMW as requiring an automatic judicial review also when someone is arrested or detained solely for immigration purposes. If that is the case, the basis for this interpretation might, if the Committee so see fit, be clarified in the forthcoming General Comment No. 5.

4.2.2 Promptness

The judicial control must not only be automatic but also prompt in order to keep any unjustified interference with individual liberty to a minimum.⁵⁴ A failure to provide for judicial control within four days generally constitutes a violation of the Article.⁵⁵ Even shorter periods than four days can constitute a violation if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner.⁵⁶

4.2.3 Judge or other officer authorised by law to exercise judicial power

The judicial control must, to be classified as such, be carried out by a “judge or other officer authorised by law to exercise judicial power”. The officer must be independent of the executive and of the parties, hear the detained individual in person, and it must “review the circumstances militating for or against detention, [...] decide by reference to legal criteria whether there are reasons to justify detention, and [...] order release if there are no such reasons”.⁵⁷

4.3 Right to trial within a reasonable time or to be released pending trial

The length of detention pending trial is counted from the day the accused is taken into custody to the day the charge is determined by a court.⁵⁸ For pre-trial detention to be justified, the initial finding of reasonable suspicion justifying the detention is only enough for a short period of time. When the judicial control is carried out, promptly after the arrest, the authorities must, in addition to the reasonable suspicion, provide relevant and sufficient grounds justifying the

⁵⁴ *McKay*, cited above, § 33.

⁵⁵ *McKay*, cited above, § 47.

⁵⁶ *Kandzhov v. Bulgaria*, no. 68294/01, § 66, 6 November 2008.

⁵⁷ *Aquilina v. Malta* [GC], no. 25642/94, § 47, ECHR 1999–III.

⁵⁸ *Solmaz v. Turkey*, no. 27561/02, §§ 23–24, 16 January 2007.

detention. Such grounds may be “a risk of flight, a risk of pressure being brought to bear on witnesses or of evidence being tampered with, a risk of collusion, a risk of reoffending, or a risk of public disorder and the related need to protect the detainee”.⁵⁹ The authorities may not place the burden of proof on the detained person to demonstrate the existence of reasons warranting their release.⁶⁰

The pre-trial detention of minors should “be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults”.⁶¹

In Article 16 § 6 of the UNCMW it is specified that “it shall not be the general rule that while awaiting trial they shall be detained in custody, but release may be subject to guarantees to appear for trial [...]”. The same applies under the ECHR, which puts the national authorities under an obligation to consider alternative measures of ensuring that the person concerned appear at trial.⁶²

4.4 Habeas corpus

4.4.1 Introduction

Article 5 § 4 sets out the principle of habeas corpus. To “take proceedings” under the provision involves a right to actively seek judicial review, by contrast to the automatic judicial review under Article 5 § 3.⁶³ The guarantees under Article 5 § 4 do not come into play if the detention is of a very short duration, such as a few hours.⁶⁴ In *A.M. v. France*, the provision did apply to a period of three and a half days of administrative detention pending expulsion.⁶⁵

Although the text of the ECHR is phrased in the present tense – “[e]veryone who is deprived of his liberty” – the right to initiate proceedings for review of the lawfulness of the detention also applies after the detainee has been released. As the Court has pointed out, a decision on the lawfulness of the detention after release is relevant for the purposes of claiming compensation under Article 5 § 5.⁶⁶

⁵⁹ *Merabishvili v. Georgia* [GC], no. 72508/13, § 222, ECHR 2017 (extracts).

⁶⁰ *Bykov v. Russia* [GC], no. 4378/02, § 64, 10 March 2009.

⁶¹ *Nart v. Turkey*, no. 20817/04, § 31, 6 May 2008 and *Güveç v. Turkey*, no. 70337/01, § 109, ECHR 2009–I.

⁶² *Idalov v. Russia* [GC], no. 5826/03, § 140, 22 May 2012.

⁶³ *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009 and *Rakevich v. Russia*, no. 58973/00, § 43, 28 October 2003.

⁶⁴ *Rozhkov*, cited above, § 65.

⁶⁵ *A.M. v. France*, no. 56324/13, § 36, 12 July 2016.

⁶⁶ *S.T.S. v. the Netherlands*, no. 277/05, § 61, ECHR 2011–III.

No matter if the review is done during or after the detention it must be efficient. Where the detainee has been released, however, the speediness requirement is no longer deemed relevant for the purposes of Article 5.⁶⁷

4.4.2 *Scope and type of review*

The review should encompass not only a test of compliance with domestic law but also compliance with the ECHR.⁶⁸ The “court” conducting the review may be any body that has a “judicial character” and offers certain procedural guarantees, such as impartiality and independence from the parties and the executive.⁶⁹

The detained person must, moreover, be heard in person at reasonable intervals, however not necessarily every time they lodge an appeal against a decision extending the detention.⁷⁰

4.4.3 *Suspensive effect*

As for administrative detention pending deportation under Article 5 § 1 (f), there is no requirement that the taking of proceedings has a suspensive effect on the implementation of the deportation order. The reasoning being that by initiating proceedings, the detainee would in such case prolong the time in detention.⁷¹

4.4.4 *Legal aid and assistance*

Moreover, the Court has held that the detainee does not need to be provided with legal aid for free. The Court has also held that the judge may decide not to wait until a detainee acquires legal assistance before carrying out the review in case the detention proceedings require special expedition.⁷²

4.4.5 *Speediness*

“Speedily” under Article 5 § 4 indicates a lesser urgency than that of “promptly” under Article 5 § 3.⁷³ The term “speedily” cannot be defined in the abstract but must be determined in the light of the circumstances of the individual case.⁷⁴

⁶⁷ *Kováčik v. Slovakia*, no. 50903/06, § 77, 29 November 2011.

⁶⁸ *Khlaifia*, cited above, § 128; see also *A.M.*, cited above, §§ 40–41 specifically concerning the required scope of judicial review under Article 5 § 1 (f)

⁶⁹ *Stephens v. Malta* (no. 1), no. 11956/07, § 95, 21 April 2009 and *Ali Osman Özmen v. Turkey*, no. 42969/04, § 87, 5 July 2016.

⁷⁰ *Çatal v. Turkey*, no. 26808/08, § 33, 17 April 2012.

⁷¹ *A.M.*, cited above, § 38.

⁷² *Karachentsev v. Russia*, no. 23229/11, § 62, 17 April 2018.

⁷³ *Brogan and Others v. the United Kingdom*, 29 November 1988, § 59, Series A no. 145-B.

⁷⁴ *R.M.D. v. Switzerland*, no. 19800/92, § 42, Reports 1997–VI.

In that assessment, the complexity of the proceedings, the conduct by the domestic authorities and by the applicant, what is at stake for the applicant and any specificities of the domestic procedure must be taken into account.⁷⁵ An excessive workload or a vacation period can never justify a period of inactivity on part of the judicial authorities.⁷⁶

In *Kadem v. Malta*, seventeen days in deciding on the lawfulness was found to be excessive.⁷⁷ In *Mamedova v. Russia*, thirty-six, twenty-six, thirty-six, and twenty-nine days to examine the applicant's appeals against the detention orders were found to be excessive.⁷⁸ In *Rehbock v. Slovenia*, a delay of twenty-three days in deciding on the applicant's claim for immediate release was deemed excessive.⁷⁹

4.4.6 Case-law concerning children

In *Popov v. France*, the law did not provide for the possibility of placing minors in administrative detention. Children who had been put in detention together with their parents thus found themselves in a legal vacuum, unable to avail themselves of the same remedies as were available to their parents. This legal vacuum was deemed incompatible with Article 5 § 4.⁸⁰

In *Rahimi v. Greece*, which concerned the detention of an unaccompanied minor in an adult detention centre, there were remedies that the applicant could have availed himself of. However, the Court found that he had not in practice had any possibility of contacting a lawyer and the brochure with available remedies he had been handed was in a language he could not understand. The applicant's rights under Article 5 § 4 had thus been violated.⁸¹

In General Comment No. 5, it would be relevant to identify the potential legal vacuum referred to in *Popov* and suggest what steps State parties should take to avoid it. It would further be important to underline the importance of making the remedies available not only in theory but also in practice.

⁷⁵ *Mooren*, cited above, § 106.

⁷⁶ *E. v. Norway*, 29 August 1990, § 66, Series A no. 181-A and *Bezicheri v. Italy*, 25 October 1989, § 25, Series A no. 164.

⁷⁷ *Kadem v. Malta*, no. 55263/00, §§ 44–45, 9 January 2003.

⁷⁸ *Mamedova v. Russia*, no. 7064/05, § 96, 1 June 2006.

⁷⁹ *Rehbock v. Slovenia*, no. 29462/95, §§ 85–86, ECHR 2000–XII.

⁸⁰ *Popov v. France*, nos. 39472/07 and 39474/07, § 124, 19 January 2012. See also *R.K. and Others v. France*, no. 68264/14, §§ 94–95, 12 July 2016 and *R.M. and Others v. France*, no. 33201/11, §§ 91–92, 12 July 2016.

⁸¹ *Rahimi*, cited above, §§ 120–121.

4.5 The right to compensation

4.5.1 Introduction

As for the right to compensation, the difference between the UNCMW and the ECHR is that the former convention provides for such a right when an “unlawful arrest or detention” has taken place, while the latter convention provides for the same right for “[e]veryone who has been the victim of arrest or detention in contravention of [Article 5]”.

Under the ECHR, the arrest or detention may be in violation of Article 5, and thus provide for a right to compensation, although it is lawful under domestic law.⁸² In General Comment No. 2, para 35, the Committee asserts that the right to compensation does not depend on a violation of Article 16. It is sufficient, the Committee says, that the arrest or detention be found unlawful under national or international law. The Committee might want to ask States Parties to clarify whether there is a right to compensation under Article 16 § 9 of the UNCMW that applies to every deprivation of liberty, or merely in those cases where the arrest or detention not only violates Article 16 but is also at the same time unlawful under domestic law.

4.5.2 Effectiveness

Under the ECHR, the right to compensation must be ensured with a sufficient degree of certainty and must be available both in theory and in practice.⁸³ In General Comment No. 2, para 35, the Committee has already held that “State parties shall ensure that the right to compensation can be effectively enforced before the competent domestic authority” and that “State parties must also ensure that migrant workers and members of their families are not expelled while their claim is being considered.”

4.5.3 Type of compensation

Under Article 5 § 5 the term “compensation” primarily refers to financial compensation. Crediting a period of pre-trial detention towards a penalty does not amount to compensation under the provision.⁸⁴

Financial compensation comprises compensation both for pecuniary and non-pecuniary damage, including damage caused by distress, anxiety and frustration.⁸⁵

⁸² *Harkmann v. Estonia*, no. 2192/03, § 50, 11 July 2006.

⁸³ *Dubovik v. Ukraine*, nos. 33210/07 and 41866/08, § 74, 15 October 2009 and *Chitayev and Chitayev v. Russia*, no. 59334/00, §§ 195–196, 18 January 2007.

⁸⁴ *Włoch v. Poland (no. 2)*, no. 33475/08, § 32, 10 May 2011.

Evidently, only such damage that the applicant has actually suffered must be compensated. States may thus require the applicant to show damage.⁸⁶ Excessive formalism in requiring proof is, however, incompatible with Article 5 § 5.⁸⁷

4.5.4 Amount of compensation

Article 5 § 5 does not entitle the applicant to a particular amount of compensation.⁸⁸ Nonetheless, as pointed out above, the right to compensation must be effective. The compensation may thus not be negligible or wholly disproportionate to the seriousness of the violation.⁸⁹

5 Conditions of detention

5.1 Introduction

The focus of General Comment No. 5 is the content and scope of the right to liberty and protection against arbitrary arrest and detention, as provided for in Articles 16 § 1 and 16 § 4 of the UNCMW. Article 16 does not itself address the conditions of detention of migrant workers and their families. Rather, this matter is governed by Article 17 of the Convention. Nonetheless, the Committee has in its Concept Note identified this as a relevant theme for the General Comment.

In contrast to the UNCMW, the ECHR draws a direct link between the conditions of detention and the right to liberty and protection from arbitrary detention. Detention conditions are admittedly not regulated in the text of Article 5 of the ECHR. Furthermore, inadequate conditions are often assessed in terms of the prohibition against torture, inhuman or degrading treatment or punishment in Article 3.⁹⁰ The case-law of the ECtHR makes clear, however, that failure to meet the relevant standards for the conditions of detention can make otherwise lawful detention arbitrary, resulting in a breach of Article 5 § 1 in addition to Article 3. To avoid a finding of arbitrariness, the place and conditions of detention must be appropriate and related to the ground of permitted deprivation of liberty relied on.

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⁸⁵ *Sahakyan v. Armenia*, no. 66256/11, § 29, 10 November 2015 and *Teymurazyan v. Armenia*, no. 17521/09, § 76, 15 March 2018.

⁸⁶ *Wassink v. the Netherlands*, 27 September 1990, § 38, Series A no. 185-A.

⁸⁷ *Danev v. Bulgaria*, no. 9411/05, §§ 34–35, 2 September 2010.

⁸⁸ *Damian-Burueana and Damian v. Romania*, no. 6773/02, § 89, 26 May 2009.

⁸⁹ *Vasilevskiy and Bogdanov v. Russia*, nos. 52241/14 and 74222/14, § 22 and 26, 10 July 2018 and *Attard v. Malta* (dec.), no. 46750/99, 28 September 2000.

⁹⁰ See e.g., *Rahimi*, cited above and *Dougoz v. Greece*, no. 40907/98, § 46, ECHR 2001–II.

⁹¹ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, no. 13178/03, § 102, ECHR 2006–XI; *Saadi*, cited above, § 74; *Muskhadzhiyeva and Others v. Belgium*, no. 41442/07, 19 January 2010

Apart from the case-law of the ECtHR, immigration detention conditions are regulated in a body of non-binding but persuasive soft law produced by the court itself, the Council, the Committee of Ministers of the Council of Europe (the Committee of Ministers), the Parliamentary Assembly of the Council of Europe (PACE) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT), whose reports are often cited by the ECtHR in its case-law. A codifying instrument of European rules on the detention of migrants is also being developed by the Council. A first draft was released for comment in May 2017 (the Draft Codifying Instrument).

The European Union Fundamental Rights Agency (the FRA) has also produced a commentary on the European legal and policy framework on immigration detention of children, covering both EU-law and the ECHR. Although the focus of this paper is the ECHR, where case-law and soft law is lacking references are also made to relevant FRA commentaries on EU-law.

General requirements regarding detention conditions include: specially designed immigration detention facilities; satisfactory material conditions; qualified and appropriately trained staff; the right to visitors and contact with the outside world; adequate health care; access to recreation and leisure activities; and monitoring and complaint mechanisms. Each requirement is addressed in subsection 5.2.

Children are considered a vulnerable group and additional safeguards therefore apply when they are held in immigration detention,⁹² including: separation of children from adults and facilities suitable for the needs of children; separate and suitable facilities for families; child-specific training for staff; child-specific health care; and child-specific recreation and constructive leisure activities including education. These child-specific requirements are addressed in subsection 5.3.

5.2 General requirements

5.2.1 Specially designed detention facilities

The starting point under the ECHR is that conditions should reflect the administrative nature of the detention. Police stations and prisons are therefore not

(No translation, see instead, ECtHR, *Information Note on the Court's case-law No. 126*, January 2010); *Louled Massoud v. Malta*, no. 24340/08, § 62, 27 July 2010; *Popov*, cited above, § 118 and *Kanagaratnam*, cited above, (No translation, see, ECtHR, *Information Note on the Court's case-law No. 147*, December 2011).

⁹² *S.F. and Others v. Bulgaria*, no. 8138/16, § 79, 7 December 2017. See also, CPT, *19th General Report – 20 years of combating torture*, CPT/Inf (2009) 27, 2009, § 97 and CPT, *Factsheet on Immigration Detention*, CPT/Inf(2017)3, 2017, § 10.

considered appropriate facilities for migrant detainees, who are neither awaiting trial nor serving a criminal sentence.⁹³ Rather, migrants should be held in specially designed immigration detention facilities that provide appropriate conditions reflecting the non-punitive nature of their detention.⁹⁴ This position is adopted by the Draft Codifying Instrument, which contains a presumptive prohibition against the use of ordinary prisons to hold migrants subject to administrative detention.⁹⁵ It also provides that the design and layout of immigration detention facilities should avoid, so far as possible, a prison-like environment.⁹⁶

It is accepted, however, that in some circumstances it may be necessary to hold administrative detainees in police stations or prisons. In such circumstances, migrants should be held separately from persons accused or convicted of criminal offences.⁹⁷ Once again, this position is adopted by the Draft Codifying Instrument, which further provides that the period of detention in such cases shall be kept to a strict minimum.⁹⁸ Similar provisions apply under EU-law,⁹⁹ except in the case of unaccompanied child asylum seekers who may not be detained in prisons under any circumstances.¹⁰⁰

Aside from police stations and prisons, migrants are often held in other facilities that are not specifically designed for immigration detention, particularly holding cells at border posts and airport transit zones. While the conditions in such facilities may be acceptable for shorter periods of detention, longer periods of detention risk violating Articles 3 and 5 of the ECHR.¹⁰¹ See further in subsection 5.2.2 below. The CPT considers that migrants should not be detained in such facilities for more than 24 hours.¹⁰²

⁹³ *Horshill v. Greece*, no. 70427/11, 1 August 2013 (No English translation, see, ECtHR, *Factsheet – Migrants in detention*, November 2018, p. 8). See also, CPT, *Factsheet*, cited above, § 3 and CPT, *19th General Report*, cited above, §§ 77–78.

⁹⁴ Committee of Ministers, *Twenty Guidelines on Forced Return*, 4 May 2005, § 10.1; CPT, *Factsheet*, cited above, §§ 3–5; Committee of Ministers, *Recommendation Rec(2003)5*, 16 April 2003, § 10; PACE, *resolution 1707 (2010)*, §§ 9.2.2 and 9.5.5 and CPT, *19th General Report*, cited above, §§ 78–79.

⁹⁵ B.8, B.10.

⁹⁶ F.4.

⁹⁷ Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 10 and Committee of Ministers, *Twenty Guidelines*, cited above, § 10.4.

⁹⁸ B.11–B.12.

⁹⁹ Article 10(1), first sentence, Reception Conditions Directive; Article 16(1).

¹⁰⁰ Article 11(3), second sentence, Reception Conditions Directive.

¹⁰¹ *Riad and Idiab v. Belgium*, nos. 29787/03 and 29810/03, § 104, 24 January 2008 and *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15 and 3028/16, § 107, 28 March 2017.

¹⁰² CPT, *Factsheet*, cited above, § 3.

These requirements under ECHR law largely correspond to Article 17 § 3 of the UNCMW. Article 17 § 3 simply states that migrants detained for violation of migration provisions shall be held, in so far as practicable, separately from convicted persons or persons detained pending trial. However, the Committee has interpreted this as emphasising the non-punitive nature of administrative detention and requiring that migrant detainees be kept in special facilities that are specifically designed for that purpose.¹⁰³ A potential gap in the Committee's existing guidelines that the Committee might want to address is that any period of detention in non-specialised facilities, whether in prisons, police stations, point of entry holding facilities or airport transit zones, must be kept to a strict minimum.

5.2.2 *Material conditions*

To comply with Article 3 of the ECHR, the material conditions of detention, whether in a specially designed facility or otherwise, must provide for the essential needs of the detainees.¹⁰⁴ Furthermore, they must be compatible with respect for human dignity, the manner and method of the execution of the measure must not subject the detainees to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and the health and well-being of detainees must be adequately secured, given the practical demands of detention.¹⁰⁵

In its assessment, the ECtHR takes account of the cumulative effect of the conditions of detention and the length of detention.¹⁰⁶ As discussed in subsection 5.2.1, conditions that may be suitable for a short period of detention may not be suitable over a longer period. Notwithstanding the absolute nature of Article 3, the ECtHR takes into consideration the impact that a large influx of migrants has on the ability of member states to provide adequate detention conditions.¹⁰⁷

Factors that may contribute to a finding of a violation of Articles 3 include: unhygienic facilities;¹⁰⁸ inadequate access to sanitary facilities;¹⁰⁹ insufficient

¹⁰³ General Comment No. 2, § 38.

¹⁰⁴ *Riad and Idiab*, cited above, § 106 and *Z.A. and Others*, cited above, §108. See also, Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 11.

¹⁰⁵ *M.S.S. v Belgium* [GC], no. 30696/09, § 221, ECHR 2011 and *Z.A. and Others*, cited above, § 103. See also, PACE, *Resolution 1707 (2010)*, § 9.2.1.

¹⁰⁶ *Dougoz*, cited above, § 46 and *Khlaifia*, cited above, § 163.

¹⁰⁷ *Khlaifia*, cited above, §§ 178–185; *J.R. and Others*, cited above, (No translation, see, ECtHR, *Factsheet – Migrants in detention*, November 2018, p. 8). Cf. *M.S.S.*, cited above, §§ 223–224.

¹⁰⁸ *M.S.S.*, cited above, § 230; *Dougoz*, cited above, §§ 45–46; *Khlaifia*, cited above, § 167; *A.A. v. Greece*, no. 12186/08, 22 July 2010 (No translation, see, ECtHR, *Factsheet – Migrants in detention*, November 2018, p. 6) and *Mahmundi and Others v. Greece*, no. 14902/10, 31 July 2012 (No translation, see, ECtHR, *Press Release ECHR 323 (2012)*, 31 July 2012). See also, Committee of Ministers, *Twenty Guidelines*, cited above, § 10.2 and CPT, *Factsheet*, cited above, § 4.

food and drinking water;¹¹⁰ inadequate furnishing, in particular sleeping facilities;¹¹¹ inadequate lighting (including natural light), ventilation and heating;¹¹² overcrowding;¹¹³ limited or no access to outdoor areas and fresh air;¹¹⁴ and lack of privacy.¹¹⁵ The Draft Codifying Instrument contains a detailed set of requirements for the material conditions of detention addressing many of these same issues, including accommodation, food and drinking water, sanitation and hygiene, clothing and bedding, cash and personal possessions and exceptional circumstances.¹¹⁶

The requirements relating to the material conditions of detention under the ECHR partially correspond to Article 17 § 1 of the UNCMW, which provides that migrant detainees shall be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity. The Committee's interpretation of Article 17 § 1 covers some of the issues raised in the case-law of the ECtHR, including the provision of adequate sanitary facilities and food and drinking water.¹¹⁷ However, if the Committee finds it desirable it might be of interest to the Committee to develop its guidelines further, the Committee's existing guidelines do not cover requirements relating to standards of hygiene, furnishing, light, ventilation and heating, overcrowding, access to outdoor areas, fresh air and respect for privacy.

¹⁰⁹ *M.S.S.*, cited above, § 230. See also, CPT, *Factsheet*, cited above, § 4.

¹¹⁰ *M.S.S.*, cited above, § 230 and *A.A. v. Greece*, cited above. See also, CPT, *Factsheet*, cited above, § 4.

¹¹¹ *M.S.S.*, cited above, § 230; *Dougoz*, cited above, §§ 45–46 and 48 and *Z.A. and Others*, cited above, §§ 106–107. See also, Committee of Ministers, *Twenty Guidelines*, cited above, § 10.2 and CPT, *Factsheet*, cited above, § 4.

¹¹² *M.S.S.*, cited above, § 230; *Dougoz*, cited above, §§ 45–46; *Khlaifia*, cited above, § 167 and *Horshill v. Greece*, cited above. See also, CPT, *Factsheet*, cited above, 2017, § 4.

¹¹³ *M.S.S.*, cited above, § 230; *Dougoz*, cited above, §§ 46 and 48; *Khlaifia*, cited above, §§ 164–166; *A.A. v. Greece*, cited above; *Horshill v. Greece*, cited above; *A.F. v. Greece*, no. 53709/11, 13 June 2013 (No translation, see, ECtHR, *Factsheet – Migrants in detention*, November 2018, p. 8); and *Mahmundi*, cited above. See also, Committee of Ministers, *Twenty Guidelines*, cited above, § 10.2 and CPT, *Factsheet*, cited above, § 4.

¹¹⁴ *M.S.S.*, cited above, § 230; *Khlaifia*, cited above, § 167; *Riad and Idiab*, § 104; *S.D. v. Greece*, no. 53541/07, 11 June 2009 (No translation, see, ECtHR, *Factsheet – Migrants in detention*, November 2018, p. 6)

¹¹⁵ *M.S.S.*, cited above, § 230; *Khlaifia*, cited above, § 167 and *Z.A. and Others*, cited above, §§ 106–107.

¹¹⁶ F.1–F.18.

¹¹⁷ General Comment No. 2, § 36.

5.2.3 *Qualified and appropriately trained staff*

Staff in immigration detention facilities should be qualified and appropriately trained to deal with the specific demands presented by migrants.¹¹⁸ In this respect, the CPT considers that prison managers and staff are not appropriately trained to look after migrant detainees.¹¹⁹ It is also inappropriate for immigration detention staff to be equipped like prison staff, for example with batons, handcuffs or pepper spray.¹²⁰ Staff should be trained in interpersonal communication and cultural sensitivity and at least some staff should possess relevant language skills.¹²¹ Staff should also be trained to recognise possible symptoms of stress reaction and take appropriate action.¹²² The Draft Codifying Instrument contains detailed prescriptions for staff in immigration detention facilities, covering not only training but also recruitment criteria and duties and responsibilities.¹²³

The Committee has interpreted Article 17 § 1 of the UNCMW, the obligation to treat migrant detainees with humanity and with respect for the inherent dignity of the human person and for their cultural identity, as requiring that States parties train supervisory and other staff.¹²⁴

5.2.4 *Visitors and contact with the outside world*

In keeping with the administrative nature of their detention, migrants should be afforded every opportunity to maintain contact with the outside world, including family, friends, lawyers, NGOs and religious or spiritual representatives.¹²⁵ In this respect, migrant detainees should be permitted to keep their mobile phones, or have regular access to them or to a telephone to make and receive calls.¹²⁶ They should also be permitted access to computers with Voice over Internet Protocol or Skype facilities and basic internet access.¹²⁷ Visits should be permitted several

¹¹⁸ Committee of Ministers, *Twenty Guidelines*, cited above, §§ 10.1 and 10.3; PACE, *Resolution 1707 (2010)*, § 9.2.13; CPT, *Factsheet*, cited above, § 6 and CPT, *19th General Report*, cited above, § 77.

¹¹⁹ CPT, *19th General Report*, cited above, § 77.

¹²⁰ CPT, *Factsheet*, cited above, § 6.

¹²¹ Committee of Ministers, *Twenty Guidelines*, cited above, § 10.3 and CPT, *Factsheet*, cited above, § 6.

¹²² Committee of Ministers, *Twenty Guidelines*, cited above, § 10.3; CPT, *Factsheet*, cited above, § 6.

¹²³ J.1–J.9.

¹²⁴ General Comment No. 2, § 36 a.

¹²⁵ CPT, *19th General Report*, cited above, §§ 79 and 87 and Committee of Ministers, *Twenty Guidelines*, cited above, § 10.5.

¹²⁶ *S.D v. Greece*, cited above. See also, CPT, *19th General Report*, cited above, §§ 79 and 82 and CPT, *Factsheet*, cited above, § 2.

¹²⁷ CPT, *Factsheet*, cited above, § 5.

times a week, preferably in open, child-friendly conditions.¹²⁸ The Draft Codifying Instrument addresses many of these requirements in more detail.¹²⁹

The right to visitors and contact with the outside world is dealt with in Articles 17 § 1, 17 § 5 and 17 § 7 of the UNCMW. Articles 17 § 5 and 17 § 6 require that migrant detainees be granted the same rights as nationals to visits by members of their families and contact with the outside world, including by telephone.¹³⁰ However, the Committee has interpreted a right to communicate with relatives and friends as implicit in Article 17 § 1, the obligation to treat migrant detainees with humanity and with respect for the inherent dignity of the human person and for their cultural identity.¹³¹

5.2.5 Adequate health care

Migrants must have access to appropriate medical assistance while detained, in order to safeguard their health and well-being.¹³² The CPT considers that all detainees should receive a medical screening on arrival, carried out by a doctor or qualified nurse reporting to a doctor, to identify risks of self-harm, transmissible disease and to record any injuries.¹³³ It further considers that, at a minimum, a qualified nurse should be present at the detention facility on a daily basis to perform screenings, manage doctor referrals and the distribution of prescribed medicines, maintain medical documentation and supervise the general conditions of hygiene.¹³⁴

Patient confidentiality should be maintained. Specifically, non-medical staff should not have access to patient files and should not be permitted to be present while medical examinations are conducted.¹³⁵ Qualified interpreters should be available to assist medical staff to make a proper diagnostic evaluation and migrants should be fully informed about any treatment offered.¹³⁶ The requirement to provide medical assistance encompasses adequate psychological assistance and psychiatric care, including implementation of procedures and

¹²⁸ CPT, *19th General Report*, cited above, §§ 79 and 87; CPT, *Factsheet*, cited above, §§ 2 and 5; PACE, *Resolution 1707 (2010)*, 9.2.8 and Committee of Ministers, *Recommendation Rec(2003)5*, cited above, 8.

¹²⁹ E.1–E.5.

¹³⁰ General Comment No. 2, §§ 41–42.

¹³¹ *Ibid.*, § 36.

¹³² *A.A. v. Greece*, cited above. See also, PACE, *Resolution 1707 (2010)*, § 9.2.7; Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 13 and CPT, *19th General Report*, cited above, §§ 81, 87 and 90.

¹³³ CPT, *19th General Report*, cited above, § 82 and CPT, *Factsheet*, cited above, § 9.

¹³⁴ CPT, *19th General Report*, cited above, § 91 and CPT, *Factsheet*, cited above, § 9.

¹³⁵ CPT, *19th General Report*, cited above, § 92 and CPT, *Factsheet*, cited above, § 9.

¹³⁶ *Ibid.*

training to prevent self-harm and suicide.¹³⁷ The Draft Codifying Instrument consolidates many of these requirements and regulates them in further detail.¹³⁸

The Committee has interpreted a right to access to qualified medical personnel as implicit in the obligation to treat migrant detainees with humanity and respect for the inherent dignity of the human person and for their cultural identity, as provided for in Article 37 § 1 of the UNCMW.¹³⁹ Furthermore, Article 37 § 7 requires that migrant detainees enjoy the same access to health professionals as nationals in the same situation.¹⁴⁰ Guidelines on access to health care under the Convention are however far less detailed than under the ECHR. Potential gaps that the Committee might find of interest to consider in the current guidelines include medical screenings, psychological assistance and psychiatric care, patient confidentiality and consent and the use of qualified interpreters during diagnosis.

5.2.6 Recreation and leisure

In accordance with the administrative nature of immigration detention, detainees should be permitted to move freely within detention facilities and should have access to recreation and leisure activities.¹⁴¹ Appropriately equipped outdoor exercise areas, a day room, library, prayer room, radio, television, newspapers and magazines should all be provided, along with other means of recreation such as board games and sports.¹⁴² Where detainees are held for longer periods, they should be offered more developed activities, such as language classes, IT/computer classes, gardening, arts and crafts and cooking.¹⁴³ Similar requirements are provided for in the Draft Codifying Instrument.¹⁴⁴

While Article 37 § 1 of the UNCMW could be interpreted as implying access to recreation and leisure, the Committee's current guidelines are silent on the issue. All that is provided for is an obligation to ensure adequate opportunities for detainees to practice their faith.¹⁴⁵ Also relevant is Article 17 § 3, which has been interpreted as requiring that detainees not be subjected to greater restriction or severity than is necessary to ensure safe custody and good order.¹⁴⁶ In accordance

¹³⁷ CPT, *Factsheet*, cited above, § 9.

¹³⁸ H.1–H.15.

¹³⁹ General Comment No. 2, § 36.

¹⁴⁰ *Ibid*, § 43.

¹⁴¹ CPT, *Factsheet*, cited above, § 5.

¹⁴² Committee of Ministers, *Twenty Guidelines*, cited above, § 10.2; CPT and *Factsheet*, cited above, § 5.

¹⁴³ CPT, *Factsheet*, cited above, § 5.

¹⁴⁴ G.1–G.3.

¹⁴⁵ General Comment No. 2, § 36.

¹⁴⁶ *Ibid*, § 38.

with Article 17 § 7, detainees shall enjoy the same rights as nationals in the same situation, including access to education.¹⁴⁷ There is, however, clearly scope for more expansive and detailed guidelines on access to recreation and leisure.

5.2.7 Monitoring and complaint mechanisms

Independent monitoring and effective complaint mechanisms are considered important for safeguarding against ill-treatment of detainees and for ensuring satisfactory conditions of detention generally.¹⁴⁸ Detention facilities should be inspected frequently, without prior warning, and monitoring bodies should be empowered to interview detainees confidentially.¹⁴⁹ Complaint mechanisms should also be confidential, and complainants and witnesses should be protected against retaliatory treatment.¹⁵⁰ The Draft Codifying Instrument regulates both monitoring¹⁵¹ and complaint mechanisms¹⁵² in further detail.

Article 17 of the UNCMW does not explicitly cover monitoring and complaint mechanisms. However, the Committee has interpreted Article 17 § 1 as obliging States parties to enable regular and independent monitoring, ensure that migrant detainees have access to effective and independent complaint mechanisms and investigate complaints of torture or other forms of ill-treatment.¹⁵³ Where ECHR law goes beyond the Committee's current guidelines is in stipulating that monitoring should be unannounced, monitoring bodies should be empowered to interview detainees confidentially and that complaint mechanisms should be confidential.

5.3 Child specific requirements

5.3.1 Separate facilities suitable for the needs of children

Except where they are held with family members,¹⁵⁴ children in immigration detention must be held separately from adult detainees.¹⁵⁵ Simply separating

¹⁴⁷ Ibid, § 43.

¹⁴⁸ CPT, *19th General Report*, cited above, § 89 and CPT, *Factsheet*, cited above, § 8.

¹⁴⁹ PACE, *Resolution 1707 (2010)*, § 9.2.15; CPT, *19th General Report*, cited above, § 89 and CPT, *Factsheet*, cited above, § 8.

¹⁵⁰ Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 18; Committee of Ministers, *Twenty Guidelines*, cited above, § 10.6; PACE, *Resolution 1707 (2010)*, § 9.2.14 and CPT, *Factsheet*, cited above, § 8.

¹⁵¹ I.14–I.15.

¹⁵² C.11–C.14.

¹⁵³ General Comment No. 2, § 36 b–d.

¹⁵⁴ See footnote 163 and accompanying text.

¹⁵⁵ PACE, *resolution 1810 (2011)*, § 5.9; PACE, *recommendation 1985 (2011)*, § 9.4.4; Committee of Ministers, *Twenty Guidelines*, cited above, § 11.2; Committee of Ministers,

children from adults is, however insufficient. The facilities themselves must be specially adapted to meet the specific needs of children.¹⁵⁶ In several cases the ECtHR has found that detaining child migrants in facilities unsuited to the needs of children constitutes a violation not only of Article 3,¹⁵⁷ but also Article 5, on the basis that the place and conditions of detention are inappropriate and unrelated to the ground of permitted deprivation of liberty relied on.¹⁵⁸

For example, in one case the Court considered that facilities were ill-adapted to the presence of children where there were “no children’s beds and adult beds with pointed metal corners, no activities for children, a very basic play area on a small piece of carpet, a concreted courtyard of 20 sq.m. with a view of the sky through wire netting, a tight grill over the bedroom windows obscuring the view outside, and automatically closing bedroom doors with consequent danger for children.”¹⁵⁹ In the context of EU-law, the FRA emphasises that child-friendly spaces means no barbed wire or bars on windows.¹⁶⁰

Whereas the ECtHR links the need for child-appropriate facilities directly to the prohibition against arbitrary detention, the Committee relies on Article 37 of the CRC in stipulating similar requirements under the UNCMW.¹⁶¹ The Committee might find it helpful to draw information from the case-law of the ECtHR as inspiration for examples of what does and does not constitute facilities suitable for the needs of children.

5.3.2 *Separate and suitable facilities for families*

The conditions of immigration detention must ensure respect for private and family life in accordance with Article 8 of the ECHR.¹⁶² At a minimum this requires that children be detained with adult family members or relatives, unless

Recommendation Rec(2003)5, cited above, §14; CPT, *19th General Report*, cited above and CPT, *Factsheet*, cited above, § 10.

¹⁵⁶ PACE, *recommendation 1985 (2011)*, § 9.4.4; Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 22; Committee of Ministers, *Twenty Guidelines*, cited above, § 11.4; CPT, *19th General Report*, cited above, § 100 and CPT, *Factsheet*, cited above, § 10.

¹⁵⁷ *Rahimi*, cited above. (No translation available, see instead, ECtHR, *Press Release ECHR 297 (2011)*, 5 April 2011, p. 4).

¹⁵⁸ *Mubilanzila*, cited above, §§ 50–58, 102–105; *Muskhadzhiyeva*, cited above; *Popov*, cited above, §§ 102–103 and 118–121 and *Kanagaratnam*, cited above.

¹⁵⁹ *Popov*, cited above, § 95.

¹⁶⁰ FRA, *European legal and policy framework on immigration detention of children*, 2017, p. 73.

¹⁶¹ General Comment No. 2, § 44.

¹⁶² PACE, *resolution 2020 (2014)*, § 5 and Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 14.

that is not considered to be in the best interests of the child.¹⁶³ Families should however be held in separate facilities specifically designed for that purpose, ensuring adequate privacy for the family and adapted to the specific needs of children.¹⁶⁴ The ECtHR has accordingly found violations of Articles 3 and 5 even in cases where families have been detained together in separate family facilities, on the basis that the conditions of those facilities were not suitable for children.¹⁶⁵ These principles are reflected in the Draft Codifying Instrument.¹⁶⁶

As with the requirement for child-appropriate facilities, the Committee draws on Article 37 of the CRC in stipulating that children detained with their parents should be held in special family units.¹⁶⁷

5.3.3 *Child-specific qualifications and training for staff*

In addition to the general qualification and training requirements discussed above, staff should be provided with training on the needs of vulnerable groups, including children.¹⁶⁸ The CPT also considers that the presence of both male and female staff can have a beneficial effect on the conditions of detention, by fostering a degree of normality.¹⁶⁹ The need for child-specific training is recognised in the Draft Codifying Instrument.¹⁷⁰

While acknowledging the need for staff training and the requirement that children be treated in an age-appropriate manner, the Committee's existing guidelines do not explicitly address the need for child-specific qualifications and training or the issue of gender-balance amongst staff.¹⁷¹

5.3.4 *Child-specific health care*

Like all detainees, children have a right to adequate health care in line with the requirements set out in subsection 5.2.5 above.¹⁷² As a vulnerable group, children

¹⁶³ PACE, *recommendation 1985 (2011)*, § 9.4.4; Committee of Ministers, *Recommendation Rec(2003)5*, cited above, §§ 14 and 21; CPT, *19th General Report*, cited above, § 87 and CPT, *Factsheet*, cited above, § 10.

¹⁶⁴ PACE, *recommendation 1985 (2011)*, § 9.4.4; Committee of Ministers, *Twenty Guidelines*, cited above, § 11.2; and CPT, *Factsheet*, cited above, § 10.

¹⁶⁵ *S.F. and Others v. Bulgaria*, cited above, §§ 84–92; *Popov*, cited above, §§ 91 and 103 and *Muskhadzhiyeva*, cited above.

¹⁶⁶ F.6.

¹⁶⁷ General Comment No. 2, § 44.

¹⁶⁸ *Mubilanzila*, cited above, § 50. See also, Committee of Ministers, *Twenty Guidelines*, cited above, § 11.4 and CPT, *Factsheet*, cited above, § 10.

¹⁶⁹ CPT, *19th General Report*, cited above, § 99 and CPT, *Factsheet*, cited above, § 6.

¹⁷⁰ J.9.

¹⁷¹ Cf. General Comment No. 2, §§ 36 and 44.

¹⁷² See also, PACE, *resolution 1810 (2011)*, § 5.1.3 and PACE, *resolution 2020 (2014)*, § 5.

in immigration detention should also have regular contact with a social worker and a psychologist.¹⁷³ Access to child-specific health care services is provided for in the Draft Codifying Instrument.¹⁷⁴

In the context of EU-law, the FRA has identified several recurring obstacles to the provision of adequate child health care: consent for treatment of unaccompanied children, lack of trust and a lack of specialised doctors. Where consent is required, the child's own capacity to give consent may differ according to age and maturity. As a rule, though, the FRA considers that consent should be given by the child's legal guardian. Problems can arise however if the guardian is not present or if the guardian is the director of the detention facility. Some EU member states even permit police or medical staff to consent to treatment.¹⁷⁵ According to the FRA, lack of trust for medical staff amongst child detainees can be related to a close affiliation between such staff and detention facility authorities, compromised medical confidentiality and the absence of interpreters. Particularly problematic practices pointed out by the FRA include the presence of police officers at consultations and police handcuffing and escorting accompanying parents.¹⁷⁶ Finally, the FRA observes that medical services at detention facilities rarely include staff specialised in working with children or visiting paediatricians.¹⁷⁷

Neither the UNCMW nor the Committee's existing guidelines address the issue of child specific health care. The commentary of the FRA highlights several important issues in this regard that may be of interests to the Committee when drafting General Comment No. 5.

5.3.5 Play and constructive leisure activities, including education

Children in immigration detention should be offered the opportunity to engage in play and constructive leisure activities appropriate to their age.¹⁷⁸ In this respect, the ECtHR has named the inadequacy of play areas and absence of activities for children as a contributing factor in the unsuitability of a detention facility for the specific needs of children.¹⁷⁹ Children should also have access to education,

¹⁷³ Committee of Ministers, *Recommendation Rec(2003)5*, cited above, § 13 and CPT, *19th General Report*, cited above, § 99.

¹⁷⁴ H.12.

¹⁷⁵ FRA *European legal and policy framework*, cited above, p. 83.

¹⁷⁶ *Ibid.*, p. 83–84.

¹⁷⁷ *Ibid.*, p. 83.

¹⁷⁸ Committee of Ministers, *Twenty Guidelines*, cited above, § 11.3; CPT, *19th General Report*, cited above, § 99 and CPT, *Factsheet*, cited above, § 10.

¹⁷⁹ *Popov*, cited above, §§ 95–97.

subject to the length of their detention.¹⁸⁰ The Draft Codifying Instrument regulates access to both age appropriate recreational activities and education.¹⁸¹

More extensive guidance on access to education for child detainees is provided by the FRA in the context of the requirements of EU-law. Specific areas of concern identified by the FRA in this regard include the location and quality of education and access to education in temporary holding facilities. The FRA recommends that education should wherever possible be provided outside of detention facilities, preferably in community schools. In all circumstances, the quality of education should be ensured by the use of qualified teachers, the provision of adequate teaching materials and language support, the range of subjects offered and adequate school hours.¹⁸² On access, the FRA notes that many EU member states do not provide education at first reception or pre-removal facilities, on the basis that periods of detention are intended to be short.¹⁸³ Problems can arise however where detention in such facilities is prolonged. The FRA considers that education must be provided “[w]here detention lasts longer than a very short period”.¹⁸⁴

Once again, the Committee draws on Article 37 of the CRC in stipulating that children should be provided with adequate access to education, play and leisure facilities.¹⁸⁵ Article 17 § 7 of the UNCMW further obliges States parties to extend the same rights in this regard to migrant children in detention as provided to nationals.¹⁸⁶ The recommendations of the FRA could serve as inspiration to the Committee in developing more detailed guidelines on access to education.

¹⁸⁰ *Mubilanzila*, cited above, § 50. See also, PACE, *resolution 1810 (2011)*, § 5.1.3; PACE, *resolution 2020 (2014)*, § 5; Committee of Ministers, *Twenty Guidelines*, cited above, § 11.3; CPT, *19th General Report*, cited above, § 99 and CPT, *Factsheet*, cited above, § 10.

¹⁸¹ G.2–G.4.

¹⁸² FRA, *European legal and policy framework*, cited above, Opinion 7, p. 81.

¹⁸³ *Ibid*, p. 85. In this respect, Article 17.3 of the Returns Directive provides that access to education depends on the length of detention.

¹⁸⁴ FRA *European legal and policy framework*, cited above, Opinion 7.

¹⁸⁵ General Comment No. 2, § 44.

¹⁸⁶ *Ibid*, § 43.

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¹ Annex 2 supervised by Prof. Maria Grahn-Farley, written by Kristin Ferm; law student of Uppsala University, and Elin Malmsköld; LL.M, Uppsala University, Law Clerk at Gävle Tingsrätt.

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1 Introduction

In this annex, you will find summaries of our findings in the internal documents of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (the CMW Committee) for the United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their families on the subject of, Liberty and Protection from Arbitrary Detention. The focus of our research has been:

- If Member States consider an irregular migration status as a criminal offense.
- If Member States use of immigration detention as a measure of deterrence or as a general tool of migration management.
- If Member States criminalize irregular entry/stay.
- If Member States detain any children and families due to their migration status.
- If Member States specifically provide any protection for siblings of migrants.
- If Member States criminalize or provide any protection for trafficking victims entering the state through organized crime.
-

All material used in our research can be found in separate documents, with the parts cited in this document marked in yellow.

2 Concluding Observations

2.1 Introduction

The following chapter contains the summary of findings in the Concluding Observations 1-62 by the CMW Committee. All the Concluding Observations are found in a separate folder, and research material containing summaries of the relevant parts of all the Concluding Observations are found in two separate documents named ‘‘Summary of Concluding Observations 1-31’’ and ‘‘Summary of Concluding Observations 32-62’’.

It can be noted that there is no mention of the Member States’ protection of siblings to migrants in any of the Concluding Observations.

2.2 Member states' use of detention on migrants

2.2.1 Statistics

In quite a few Concluding Observations, the CMW Committee encourages State parties to create databases and/or to conduct studies to assess the extent of migration and trafficking in, through and from the State party's territory as well as the number of immigrants in detention.² In general, the Committee notices with concern the relatively low rate of convictions in the cases of trafficking that were brought before the courts, and the uncertain statistical data overall.

To give a few examples:

- 31. *Mali, CMW/C/MLI/CO/2, 30 Apr 2014, page 4*: "While noting the delegation's statements that imprisonment of migrant workers for violating migration legislation is virtually non-existent, the Committee remains concerned by the lack of statistics on this subject".
- 50. *Niger, CMW/C/NER/CO/1, 11 October 2016, para 32 c*: "The lack of statistics on persons placed in holding centres or detention facilities due to their irregular migration status and on the measures taken to ensure access to consular assistance for migrant workers and members of their families in such circumstances."
- 60. *Mozambique (CMW/C/MOZ/CO/1), para 19*: "It is concerned, however, by the lack of statistical data [...] such as migrant workers in detention in the State party, migrant workers who are nationals of the State party and who are in detention in their country of employment, and the number of unaccompanied migrant children or children who are in the State party and have become separated from their parents."

2.2.2 Conditions in detention and migrant holding centres

In about a third of the Concluding Observations, the CMW Committee comments on the conditions in detention and migrant holding centres. Generally speaking, it welcomes efforts by State parties to improve the physical conditions in the

² For instance, see: 7 El Salvador, CMW/C/SLV/CO/1, 04 Feb 2009, page 7. 11 Bosnia and Herzegovina, CMW/C/BIH/CO/1, 03 Jun 2009, page 5. 31 Mali, CMW/C/MLI/CO/2, 30 Apr 2014, page 4.

facilities, expresses concern on difficult detention conditions, and invites state parties to provide more information on this topic.³ To give a few examples:

- *17. Mexico, CMW/C/MEX/CO/2, 03 May 2011, page 6-7: “The Committee remains concerned by the poor conditions in some of the places where migrants are held or detained, where there are still cases of cruel, inhuman and degrading treatment being carried out with impunity, and by the lack of medical care and restrictions on contact with the outside world. It is particularly concerned by situations in which undocumented migrant workers who claim to have been tortured and ill-treated in some cases have to live alongside the perpetrators of these violations.”*
- *19. Chile, CMW/C/CHL/CO/1, 19 Oct 2011, page 4: “While noting that migrant workers detained for infringement of migration laws are placed in administrative custody, the Committee is concerned about the lack of information received on the length and conditions of their detention.”*
- *26. Colombia, CMW/C/COL/CO/2, 27 May 2013 page 3-4: “It is also concerned by the lack of information on the types of facilities in which migrant workers and members of their families are held and the conditions in those facilities, particularly in temporary holding centres.” (...) “The Committee also recommends that the State party ensure that the procedures used when detaining migrant workers and members of their families who are in an irregular situation, including those who are in transit, are in accordance with articles 16 and 17 of the Convention. The Committee invites the State party to make sure that conditions in temporary migrant holding centres meet international standards.”*
- *60. Algeria, CMW/C/DZA/CO/2, 25 May 2018, para 39: “[The Committee is] concerned by: [...] (d) The inadequate conditions of detention in holding centres for the temporary accommodation of irregular migrants pending their deportation;”*

³ For instance, 2 Mexico, CMW/C/MEX/CO/1, 20 Dec 2006, page 6. 7 El Salvador, CMW/C/SLV/CO/1, 04 Feb 2009 page 2. 7 El Salvador, CMW/C/SLV/CO/1, 04 Feb 2009, page 2. 10 Colombia, CMW/C/COL/CO/1, 22 May 2009, page 5. 11 Bosnia and Herzegovina, CMW/C/BIH/CO/1, 03 Jun 2009, page 5. 16 Ecuador, CMW/C/ECU/CO/2, 15 Dec 2010 page 5. 17 Mexico, CMW/C/MEX/CO/2, 03 May 2011, page 2 and 6-7. 19 Chile, CMW/C/CHL/CO/1, 19 Oct 2011, page 4. 22 Tajikistan, CMW/C/TJK/CO/1, 16 May 2012, page 6. 26 Colombia, CMW/C/COL/CO/2, 27 May 2013 page 3-4. 29 Burkina Faso, CMW/C/BFA/CO/1, 07 Oct 2013, page 5.

The CMW further expresses concern regarding the maximum period of time for detention.⁴ To give a few examples:

- *11. Bosnia and Herzegovina, CMW/C/BIH/CO/1, 03 Jun 2009, page 5:* The Committee is, moreover, concerned that no information was provided in relation to the maximum period for which migrants may be detained.
- *13. Algeria, CMW/C/DZA/CO/1, 19 May 2010, page 4:* The Committee is concerned that irregular migrant workers awaiting deportation may be deprived of their liberty for prolonged periods and that detention orders may, in principle, be extended indefinitely.
- *60. Algeria, CMW/C/DZA/CO/2, 25 May 2018, para 39:* “[The Committee is] concerned by: [...] (e) Reports that the administrative detention of foreign nationals awaiting deportation can be prolonged indefinitely.”

2.2.3 Children in detention

In a few Concluding Observations, the CMW Committee touch upon the subject of children in detention and give State Parties recommendations on concrete actions as well as policy measures in order to better protect children’s rights. For example:

- *2. Mexico, CMW/C/MEX/CO/1, 20 Dec 2006, page 4:* “Ensure that detention of migrant children and adolescents, accompanied or otherwise, is carried out in accordance with the law and used only as a last resort and for the shortest possible time.”
- *13. Algeria, CMW/C/DZA/CO/1, 19 May 2010, Page 5:* “The Committee has received information that several former Moroccan migrant workers continues to be separated from their families following their collective expulsion in the past.”
- *14. Senegal, CMW/C/SEN/CO/1, 10 Dec 2010, page 3:* “The Committee is concerned that migrant workers in an irregular situation are placed in detention with persons either accused or convicted of crimes and that young people are not separated from adults.”
- *23. Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 Sep 2012, page 5:* “The Committee is concerned that children of migrant workers are being placed in the Lukavica Immigration Centre (Researches comment: an administrative immigration detention centre) and that this facility is not adapted to their needs. The Committee recommends that the State party give

⁴ For instance, 18 Guatemala, CMW/C/GTM/CO/1, 18 Oct 2011, page 4.

priority to alternatives to the placement of children of detained migrant workers in immigration centres and ensure that custodial measures are only taken as a last resort, when non-custodial measures are unavailable to uphold the right to family life.’’

- 32. *El Salvador, CMW/C/SLV/CO/2, 1 May 2014, para 49*: “[...] the State party should: [...] (c) Strengthen cooperation with transit and destination countries in order to ensure that unaccompanied migrant children are not detained for having entered transit or destination countries in an irregular fashion, that minors who are accompanied by family members are not separated from them and that families are housed in protection centres;”
- 46. *Turkey, CMW/C/TUR/CO/1, 31 May 2016, para 47*: “[The Committee is] concerned about: [...] (c) Children and families with children not always being separated from adults in detention facilities, as family rooms are, as yet, often not available; (d) Unaccompanied children in detention often reportedly not receiving treatment appropriate to their age and legal status and having no access to child protection services;”
- 48. *Honduras, CMW/C/HND/CO/1, 3 Oct 2016, para 55*: “In particular, it recommends that the State party: (i) End the detention of children on grounds of their migration status or that of their parents; (ii) Devise alternatives — in law and in practice — to the detention of families and unaccompanied or separated minors, and ensure their implementation under the coordination of national and/or local organizations responsible for the comprehensive protection of children”

2.2.4 *Detention or imprisonment as a consequence of irregular migrant status*

The CMW Committee is concerned that a considerable number of State parties criminalizes a number of immigration-related offences, which may lead to detention and sometimes punishment by imprisonment and/or fines. In general, the Committee recommends that the State parties decriminalize immigration offences and treat such violations as administrative offences and establish appropriate penalties for offences of this kind. To give a few examples:

- 4. *Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 5*: “The Committee is concerned at the information that the provisions of the Convention are not always respected in expulsion/deportation procedures, including due to the fact that: (...) (c) article 131 of the Migration Law provides that when a deportation/expulsion order cannot be executed because it has been issued against a stateless person or a person lacking identity papers, or for any other justifiable reason, the Police Commissioner refers the concerned person to

a penal judge and this person may end up in prison for up to three years, pending execution of the expulsion/deportation order.’’

- *12. Sri Lanka, CMW/C/LKA/CO/1, 14 Dec 2009, Page 9:* ‘‘The Committee also notes with concern that those who irregularly leave or enter Sri Lankan territory are penalized for the crime of ‘‘illegal migration’’. (...) The Committee recommends that the State party: (...) (c) Take steps to ensure that those responsible for trafficking or smuggling of human beings are brought to justice and appropriately sanctioned, while at the same time ensuring that migrants are not penalized for having irregularly migrated.’’
- *13. Algeria, CMW/C/DZA/CO/1, 19 May 2010, page 3:* ‘‘The Committee is concerned that a considerable number of migrant workers in the State party are non-documented and that their irregular migration status is considered a criminal offence punishable by imprisonment and/or fines under Law No. 08-11 of 25 June 2008. (...) In particular, the Committee urges the State party to bring its legislation – which criminalizes irregular migration – into conformity with the Convention.’’
- *13. Algeria, CMW/C/DZA/CO/1, 19 May 2010, Page 6:* ‘‘The Committee is concerned that a new law on amendments to the Criminal Code criminalizes attempts of to emigrating in an irregular manner. The Committee recommends that the State party reconsider the proposal that criminalizes the attempt of prospective migrants to leave the national territory in an irregular manner.’’
- *16. Ecuador, CMW/C/ECU/CO/2, 15 Dec 2010 page 8.* ‘‘With regard to the smuggling of migrants, the Committee reiterates its recommendation to the State party to continue, and to step up, its efforts in this area, in particular: (a) To ensure that migrant workers in an irregular situation are not criminalized.’’
- *23. Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 Sep 2012 page 4-5:* ‘‘The Committee is concerned about the lack of procedural safeguards concerning decisions on detention (‘‘placement under supervision’’) under the Law on Movement and Stay of Aliens and Asylum, in particular: (a) The fact that the Law on Movement and Stay of Aliens and Asylum provides for an extension of the length of detention beyond 180 days in exceptional cases, and the absence of a time limit in the Law for administrative detention of migrant workers; (b) The possibility of issuing detention orders placing migrant workers under supervision during appellate proceedings against decisions rejecting an application for a residence permit; (...) and (e) Reports that, in practice, migrant workers apprehended without a valid permission

to enter, to stay and to engage in a remunerated activity in the State party are often detained, contrary to information provided by the delegation during the dialogue.”

- 24. *Rwanda, CMW/C/RWA/CO/1, 10 Oct 2012, page 3-4*: “The Committee notes with concern that Law No. 04/2011 of 21 March 2011 on immigration to and emigration from Rwanda (arts. 37 to 49) criminalizes a number of immigration-related offences by migrant workers. The Committee recommends that the State party (...) decriminalize immigration offences committed by migrant workers or members of their families, treating such violations as administrative offences and establishing appropriate penalties for offences of this kind.”
- 28. *Morocco, CMW/C/MAR/CO/1, 07 Oct 2013, page 5*: “The Committee regrets that Act No. 02-03 (chapters VII and VIII) criminalizes irregular migration and provides penalties of imprisonment and fines for Moroccan and foreign migrants in an irregular situation. The Committee regrets that the State party has not provided information either on the implementation of these legal provisions in practice or on the number of migrant workers placed in administrative custody or judicial detention. Taking into consideration its general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, the Committee considers that the undocumented entry or exit of migrant workers and residence exceeding the duration of their residence permits cannot be considered to be crimes. Consequently, the Committee recommends that the State party decriminalize irregular migration and make provision for appropriate administrative penalties for such offences.”

2.2.5 Using penalties designated for pre-trial detention and/or for deprivation of liberty of persons for the purpose of securing migrants

In a few Concluding Observations, the CMW Committee express concern about the fact that premises designated for pretrial detention or prison are used as migrant holding centres for the purpose of securing migrants.⁵ The Committee also recommends that State parties ensure that migrants or members of their families detained for violation of provisions relating to migration are deprived of their liberty for as short a time as possible and continue to take steps to guarantee that they be held, in so far as practicable, separately from convicted persons or persons

⁵ For instance, 2. Mexico, CMW/C/MEX/CO/1, 20 Dec 2006, page 6.

detained pending trial, in accordance with article 17 (3) of the Convention.⁶ For example:

- 4. *Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 5*: “The Committee notes that the State party seeks to ensure that migrant workers and members of their families detained for violation of provisions relating to migration are held separately from convicted persons or persons detained pending trial. However, it is concerned that, due to the limited number of separated places of detention available, this right is not always guaranteed in practice, especially in isolated or sparsely populated areas of the country.”
- 14. *Senegal, CMW/C/SEN/CO/1, 10 Dec 2010, page 3*: “The Committee is concerned that migrant workers in an irregular situation are placed in detention with persons either accused or convicted of crimes and that young people are not separated from adults.”
- 17. *Mexico, CMW/C/MEX/CO/2, 03 May 2011, page 6-7*: “The Committee is concerned by the information provided by the State party that migrant workers held in migrant holding centres who lodge appeals relating to their migration status or who make use of the procedure to determine refugee status are kept in those centres for prolonged periods.”

2.2.6 *Irregular migrants in detention or imprisonment*

The CMW Committee expresses that domestic policy should, inter alia, annul the classification of illegal entry into the state as an offence punishable by deprivation of liberty.⁷ Thereby, violations of provisions relating to migration should not be treated in the criminal justice system.⁸ To give a few examples:

- 3. *Egypt, CMW/C/EGY/CO/1, 25 May 2007, page 5*: “While noting the State party’s assertion that there are no migrant workers in administrative detention, the Committee remains concerned about information according to which some migrant workers are arrested without warrant and if they are unable to show valid identity documents, are detained by law enforcement officials and allegedly sometimes subjected to torture or ill-treatment.”

⁶ For instance, 4. *Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 5*. 6 *Bolivia, CMW/C/BOL/CO/1, 02 May 2008, page 5*. 17 *Mexico, CMW/C/MEX/CO/2, 03 May 2011, page 6-7, 42*. Timor-Leste, *CMW/C/TLS/CO/1, 8 Oct 2015 para. 31, 44*. Senegal, *CMW/C/SEN/CO/2-3*), May 2015, para 26 c.

⁷ 2. *Mexico, CMW/C/MEX/CO/1, 20 Dec 2006, page 4*.

⁸ 4 *Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 6*.

- 4. *Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 6*: “The Committee also recommends that the State party consider abolishing or amending article 131 of the Migration Law with a view to avoiding that violations of provisions relating to migration are treated in the criminal justice system.”
- 5. *Syrian Arab Republic, CMW/C/SYR/CO/1, 02 May 2008, page 5*: “The Committee is concerned about reports of instances in which migrant workers and members of their families found to be in violation of immigration regulations are detained and deported without due process. The Committee recommends that the State party consider policies under which the detention of migrant workers in an irregular situation would generally be envisaged only as a measure of last resort and that, in all circumstances, necessary law enforcement measures, including deportation, are carried out with respect for due process.”
- 16. *Ecuador, CMW/C/ECU/CO/2, 15 Dec 2010 page 5*: The Committee regrets that the deprivation of liberty of persons in an irregular situation takes place in prisons for ordinary offences or in pretrial detention centres that are overcrowded and in poor condition, without access to basic social services. The Committee recommends that the State party should adopt measures to improve conditions in temporary detention centres so that they are not the same as prisons, and that men and women should be duly separated.”
- 22. *Tajikistan, CMW/C/TJK/CO/1, 16 May 2012, page 6*: “Those who are in an irregular situation are often held in detention centres in prison like conditions for several months or, in the absence of identity documents, for up to one year.”
- 23. *Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 Sep 2012, page 5*: “In accordance with article 16 of the Convention, the Committee recommends that the State party: (...) (c) Ensure that detention orders against migrant workers, including those in an irregular situation, are only taken as a last resort, on a case-by-case basis, and strictly in compliance with applicable international standards.”
- 24. *Rwanda, CMW/C/RWA/CO/1, 10 Oct 2012, page 4*: “The Committee is concerned at the fact that migrants arrested for immigration offences are detained with persons who have committed offences under common law. The Committee recommends that the State party: (a) Ensure that detention of migrants for violations of immigration law is used only as a measure of last resort and in special facilities; and that, insofar as practicable, migrants

detained for immigration offences are held separately from ordinary prisoners.’’

- 29. *Burkina Faso, CMW/C/BFA/CO/1, 07 Oct 2013, page 5*: ‘‘The Committee takes note that the State party has stated that no migrant worker has been detained since 2010. The Committee nevertheless remains concerned that migrant workers arrested for violations of Order 84-49 (1984) may be held in a detention facility for foreign nationals, guarded by the security forces or imprisoned for a period of 1 to 6 months, and is concerned about the contradiction between articles 10, 11 and 12 of the Order. The Committee has indeed taken account of the challenges faced by the State party, but is extremely disturbed by the fact that migrant workers are not held separately from persons accused or found guilty of crimes, and is also concerned about the conditions in prisons.’’
- 31. *Mali, CMW/C/MLI/CO/2, 30 Apr 2014, page 4*: ‘‘The Committee is (...) concerned by the legislative provisions that impose prison sentences of between 3 months and 3 years on foreign nationals who stay or live in Mali without the required permit or after a permit has expired. The Committee recommends that the State party: (...) (b) Consider decriminalizing irregular migration and envisaging appropriate administrative penalties for migrants who have violated the legislation on immigration; as stated in its general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, the Committee considers that staying in a country without authorization or proper documentation or overstaying a permit of stay does not constitute a crime; (c) Detain migrant workers for immigration offences only in exceptional circumstances, as a last resort, and ensure in all cases that they are held separately from ordinary prisoners and that women are held separately from men and minors from adults.’’

2.2.7 *The situation of migrants in administrative detention*

The CMW touches upon administrative detention in a few of the Concluding Observations, and reiterates that administrative detention should only be used as a last resort, and recommends State parties to consider alternatives to administrative detention. To give a few examples:

- 10. *Colombia, CMW/C/COL/CO/1, 22 May 2009, page 5*: ‘‘The Committee noted that the centres run by the Administrative Department of Security (DAS) are used to detain migrants in an irregular situation. However, the Committee is concerned at gaps in the information provided by the State

party with regard to the procedures for the detention of migrants by the Administrative Department of Security.”

- 33. *Uruguay, CMW/C/URY/CO/1, 2 May 2014, para 5.* [The Committee welcomes the Migration Act, Act No. 18250 (2008), which adheres to the provisions of the Convention and could serve as a model for other States parties to follow. The Committee notes with particular interest that the Act recognizes: [...] (c) That no case involving a migrant in an irregular situation for administrative reasons warrants detention;
- 35. *Belize, CMW/C/BLZ/CO/1, 26 September 2014 para 27.* “The Committee recalls that children should never be detained on the basis of their or their parents’ immigration status, and urges the State party to: [...] (b) Take all appropriate measures to ensure that administrative detention of migrant workers and members of their families on the basis of their migration status is an exceptional measure only for the shortest time possible, and adopted in the framework of a process that includes all due process guarantees”
- 39. *Uganda, CMW/C/UGA/CO/1, para 33* “In the light of the Committee’s general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, the Committee recalls that administrative detention should only be used as a measure of last resort, and recommends that the State party consider alternatives to administrative detention.”

2.3 Member States’ Criminalization or Protection of Trafficking Victims Entering the State as Victims of Organized Crime

The CMW Committee touch upon the subject of trafficking in nearly every concluding observation. It notices instruments ratified or changes in domestic policy, notes with appreciation the different initiatives taken to combat trafficking in persons, and encourages or urges state parties to intensify their efforts to combat trafficking in persons and migrant smuggling.⁹ In a few Concluding Observations the Committee touches upon regional aspects, for instance:

⁹ For instance, 1. Mali, CMW/C/MLI/CO/1, 31 May 2006, page 5, 2 Mexico, CMW/C/MEX/CO/1, 20 Dec 2006, page 8, 3 Egypt, CMW/C/EGY/CO/1, 25 May 2007, page 7-8. 4 Ecuador, CMW/C/ECU/CO/1, 05 Dec 2007, Page 6-8. 5 Syrian Arab Republic, CMW/C/SYR/CO/1, 02 May 2008, page 6-7. 7 El Salvador, CMW/C/SLV/CO/1, 04 Feb 2009, page 2 and 7. 8 Azerbaijan, CMW/C/AZE/CO/1, 19 May 2009, page 8. 9 Philippines, CMW/C/PHL/CO/1, 22 May 2009, Page 10-11. 10 Colombia, CMW/C/COL/CO/1, 22 May 2009, page 7. 11 Bosnia and Herzegovina, CMW/C/BIH/CO/1, 03 Jun 2009, page 7. 12 Sri Lanka, CMW/C/LKA/CO/1, 14 Dec 2009, Page 9.

- *14. Senegal, CMW/C/SEN/CO/1, 10 Dec 2010, page 4: “The State party has not taken any practical steps to end regional trafficking in children for the purpose of begging.”*

For most parts the Committee mentions trafficking migrants within State parties, thereby not focusing on the migrant status of victims of trafficking or organized crime entering and leaving a State Party. Although there are exceptions, such as:

- *9. Philippines, CMW/C/PHL/CO/1, 22 May 2009, Page 10-11: “El Comité, aunque toma nota de los considerables esfuerzos del Estado parte, como las recientes condenas de traficantes y la campaña "No estamos en venta", observa con inquietud el gran número de trabajadores filipinos que son víctimas de la trata en el extranjero. El Comité lamenta además el escasísimo número de causas penales incoadas y de fallos condenatorios dictados contra los autores de la trata y el hecho de que muchas de esas causas se desestimen en las etapas preliminares. (Researchers summarized translation: The committee notes that a great number of Filipino workers are victims of human trafficking abroad and the low numbers of conviction for these crimes, despite the state’s campaign ‘we are not for sale’)*
- *10. Colombia, CMW/C/COL/CO/1, 22 May 2009, page 7: “The State party continues to be a major country of origin of victims of trafficking, especially women and girls trafficked for commercial, sexual and labour exploitation.”*
- *12. Sri Lanka, CMW/C/LKA/CO/1, 14 Dec 2009, page 5: “The Committee remains concerned at reports of physical and sexual abuse of female migrant workers, particularly by employers in the host countries, but also by airport personnel prior to departure. The Committee urges the State party to focus efforts on promoting the enhancement and empowerment of migrant women facing situations of vulnerability by inter alia: (...) (c) Taking measures to ensure the safety of migrant workers in the international airport prior to departure, including gender and sensitization training for airport personnel*

15 Albania, CMW/C/ALB/CO/1, 10 Dec 2010 page 6. 16 Ecuador, CMW/C/ECU/CO/2, 15 Dec 2010 page 5. 18 Guatemala, CMW/C/GTM/CO/1, 18 Oct 2011, page 7. 19 Chile, CMW/C/CHL/CO/1, 19 Oct 2011, page 6. 20 Argentina, CMW/C/ARG/CO/1, 01 Nov 2011, page 6-7. 21 Paraguay, CMW/C/PRY/CO/1, 16 May 2012, page 6-7. 23 Bosnia and Herzegovina, CMW/C/BIH/CO/2, 26 Sep 2012, page 8. 24 Rwanda, CMW/C/RWA/CO/1, 10 Oct 2012, page 6-7. 27 Azerbaijan, CMW/C/AZE/CO/2, 27 May 2013, page 6. 28 Morocco, CMW/C/MAR/CO/1, 07 Oct 2013, page 8. 29 Burkina Faso, CMW/C/BFA/CO/1, 07 Oct 2013, page 7. 31 Mali, CMW/C/MLI/CO/2, 30 Apr 2014, page 7-8.

and monitoring and investigation of all complaints of abuse or violence against migrant workers.”

- *16. Ecuador, CMW/C/ECU/CO/2, 15 Dec 2010 page 7.* “The Committee (...) is concerned about cases of deportation involving foreign victims of trafficking.”
- *17. Mexico, CMW/C/MEX/CO/2, 03 May 2011, page 2 and 6-8.* “The Committee notes the efforts made by the State party to inform undocumented migrant workers who are in migrant holding centres about their rights, how to obtain a humanitarian visa if they are victims or witnesses of trafficking in persons or migrant-smuggling, (...) However, the Committee is concerned about allegations that such information is not provided to migrant workers in some migrant holding centres, or not provided systematically, especially in the case of persons in such centres who opt for voluntary repatriation. The Committee is concerned that only a small proportion of the victims of trafficking who have been identified as such have received temporary visas and that many victims have been repatriated.”
- *20. Argentina, CMW/C/ARG/CO/1, 01 Nov 2011, page 7.* “The Committee (...) recommends that the State party: (...) (e) Provide victims of trafficking, including victims from non-MERCOSUR countries, with an opportunity to regularize their situation.”
- *42. Timor-Leste, CMW/C/TLS/CO/1, 8 Oct 2015, para 59:* “The Committee is, however, concerned that: [...] (f) Reports indicate that police officials accept bribes from establishments involved in trafficking or from traffickers attempting to cross the border illegally and that police officials have been identified as clients of commercial sex venues investigated for suspected trafficking.”

3 Replies to the List of Issues

3.1 Introduction

The following chapter contains the summary of findings in the Replies to the List of Issues to the CMW Committee. All the existing Replies to the List of Issues have

been studied in English or Spanish, with the exception of four reports which were not available in the aforementioned languages, that have not been included.¹⁰

3.2 General notes

First and foremost, the Replies to the List of Issues vary greatly. While some Replies to the List of Issues are relatively short and scarcely or not at all touch upon the issue of detention of migrants, others are extensive in length and details.

Five of the Replies to the List of Issues do not contain anything that is relevant in research.¹¹ A few Replies to the List of Issues clarifies that migrants have the same rights as citizens in the domestic criminal processes and do not get any sort of special treatment.¹²

3.3 When the states' citizens are detained in other states

Quite a few Replies to the List of Issues brought up the State's consular support to its citizens abroad when these face detentions.¹³ A Mexican Reply to the List of Issues also provides statistics on the phenomenon of detained Central American migrants in the United States, and a Reply to the List of Issues by Bangladesh mentions how migrant Bangladeshi workers are found to be detained in countries of employment:

- 3. *Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, Page 4: 'It is estimated that over 400,000 undocumented Central Americans crossed the southern border of Mexico in 2004, including 204,113 who were held by the Mexican migration authorities and 54,626 detained by the United States border patrol. The remaining crossings were defined as crossings by undocumented locals on the basis of the survey of migration on the Mexican-Guatemalan border and other sources provided by the National Institute for Migration (INM).'*'

¹⁰ 31. Tajikistan, CMW/C/TJK/Q/2/Add.1, 05 Dec 2018, 26. Morocco, CMW/C/MAR/Q/1/Add.1, 20 Aug 2013, 25 Burkina Faso, CMW/C/BFA/Q/1/Add.1, 20 Aug 2013, and 13. Algeria, CMW/C/DZA/Q/1/Add.1, 15 Jan 2010.

¹¹ These five Replies to the List of Issues are: 24 Colombia, CMW/C/COL/Q/2/Add.1, 02 Jul 2013, 21 Bosnia and Herzegovina, CMW/C/BIH/Q/2/ADD.1, 30 Jul 2012, 19 Tajikistan, CMW/C/TJK/Q/1/ADD.1, 14 Feb 2012, 15 Albania, CMW/C/ALB/Q/1/ADD.1, 04 Nov 2010, and 11 Bosnia and Herzegovina, CMW/C/BIH/Q/1/Add.1, 24 Mar 2009.

¹² 30 Algeria, CMW/C/DZA/Q/2/Add.1, 11 Jan 2018, page 5, and 27 Uruguay, CMW/C/URY/Q/1/Add.1, 05 Feb 2014, page 18.

¹³ 28 Peru, CMW/C/PER/Q/1/ADD.1, 13 Apr 2015 Page 16, 23 Bolivia, CMW/C/BOL/Q/2/Add/1, 12 Apr 2013, page 5. 23 Bolivia, CMW/C/BOL/Q/2/Add/1, 12 Apr 2013 Page 21. 20 Paraguay, CMW/C/PRY/Q/1/ADD.1, 22 Feb 2012 page 9. 18 Guatemala, CMW/C/GTM/Q/1/ADD.1, 23 Aug 2011, page 15-16. 17 Chile, CMW/C/CHL/Q/1/ADD.1, 23 Aug 2011, page 23, and 14 Ecuador, CMW/C/ECU/Q/2/ADD.1, 21 Oct 2010, Page 21.

- 29. *Bangladesh, CMW/C/BGD/Q/1/Add.1, 21 Mar 2017 Page 8:* “Bangladesh being a source-country of international labour migration, there is indeed no instance of migrant workers being detained in Bangladesh. By contrast, many Bangladeshi migrant workers are found to be detained in countries of employment. In 2014, a total 23367 migrant workers from Bangladesh were detained in 7 countries of destination (...) it is presumed that most detainees are held for the breach of immigration rules in the destination countries. Many of them, however, are detained on the charge of criminal activities.”

3.4 Statistics of detained migrants in the state

A few Replies to the List of Issues provide statistics or mention the number of foreigners detained in the State. For instance:

- 17. *Chile, CMW/C/CHL/Q/1/ADD.1, 23 Aug 2011, page 14:* “El cuadro que sigue da un panorama de los extranjeros detenidos en Chile a la fecha.” (Translation: The following table gives an overview of foreigners detained in Chile to date.)
- 10. *Philippines, CMW/C/PHL/Q/1/Add.1, 06 Mar 2009, page 19:* “Information from the Bureau of Immigration revealed that as of 26 January 2009, there are sixty-two (62) foreigners detained at the Bureau of Immigration Detention Center, Camp Bagong Diwa, Bicutan, Taguig City. There are 125 foreign inmates detained in city and municipal jails all over the Philippines as of 31 December 2008. 56. As a standard operating procedure, all detained foreigners are notified of their right for consular visitation by accredited consular officers of their respective embassies/consulates in line with the Vienna Convention on Consular Relations.”
- 9. *Colombia, CMW/C/COL/Q/1/Add.1, 27 Feb 2009, page 4:* “Colombia has no migrant centre; hence at present it has no foreigners in detention.”

3.5 Detention before deportation of migrants

Two Replies to the List of Issues touch upon the issue of detention of migrants while these await deportation:

- 22. *Rwanda, CMW/C/RWA/Q/1/Add.1, 23 Aug 2012, page 6:* “Before deporting a foreigner, he/she may be provisionally detained as provided by the law. Where the decision to deport a foreigner has been made, a copy of the decision shall be given to the person to be deported.”

- 8. *El Salvador, CMW/C/SLV/Q/1/Add.1, 10 Nov 2008, page 4*: “La utilización de alternativas a la detención como mecanismo para garantizar la comparecía del extranjero en un procedimiento de expulsión, repatriación o deportación.” (Translation: The use of alternatives to detention as a mechanism to guarantee the appearance of the foreigner in a procedure of expulsion, repatriation or deportation.)

3.6 Arbitrary detention of migrants

An Algerian Reply to the List of Issues touch upon the issue of arbitrary detention of migrants:

- 30 *Algeria, CMW/C/DZA/Q/2/Add.1, 11 Jan 2018, page 6*: “The State party is not aware of any intimidatory measures against, or arbitrary arrests or detention of, citizens involved in the defence of migrants’ rights.”

3.7 State parties rejecting the use of detention of migrants due to the migrants’ breach of international law

This issue is mentioned in many of Replies to the List of Issues, for instance:

- 29. *Bangladesh, CMW/C/BGD/Q/1/Add.1, 21 Mar 2017, page 15*: “Unless arrested for involvement in any criminal and unlawful activity, undocumented Myanmar nationals are not detained for violation of immigration laws.” Page 9: “No Rohingya asylum seeker has been detained for having entered Bangladesh in irregular manner.”
- 28. *Peru, CMW/C/PER/Q/1/ADD.1, 13 Apr 2015, page 14*: “Migrants in Peru are never placed in detention because they are in an irregular situation.”
- 23. *Bolivia, CMW/C/BOL/Q/2/Add/1, 12 Apr 2013, page 16*: “ (...) el proyecto de ley migratoria no contempla la figura del internamiento de ciudadanos extranjeros o internamiento por motivos de inmigración.” (Translation: the migratory bill does not include the placement of foreign citizens or internment for immigration reasons)
- 23. *Bolivia, CMW/C/BOL/Q/2/Add/1, 12 Apr 2013, page 16*: “La DIGEMIG establece en su informe que no tiene registros de detención, ya que no existen centros de reclusión del sistema de inmigración y en ningún caso se procede con la privación de libertad de trabajadores u otras personas extranjeras, por vulneración a la normativa que regula la temática migratoria, sin embargo, todo extranjero que cometa alguna acción tipificada en el ordenamiento penal, es susceptible a ser procesado por las vías judiciales correspondientes.” (Translation: The DIGEMIG establishes

in its report that it does not have detention records, since there are no detention centers of the immigration system and in no case do they proceed with the deprivation of freedom of workers or other foreigners, for violation of the regulations governing migration issues, however, any foreigner who commits any action classified in the criminal code is liable to be prosecuted by the corresponding judicial channels)

- 17. *Chile, CMW/C/CHL/Q/1/ADD.1, 23 Aug 2011, page 21*: La regla general es que la legislación migratoria en Chile no contempla la detención de personas por incumplimiento de su normativa
- 14. *Ecuador, CMW/C/ECU/Q/2/ADD.1, 21 Oct 2010, page 42*: “Con el propósito de contrarrestar las medidas de la Directiva Europea de Retorno, se determina que los ecuatorianos en condición irregular no podrán ser detenidos, salvo casos excepcionales, y únicamente en centros especializados, mientras se organiza su retorno. Además, por ningún motivo los menores de edad no acompañados serán sujetos de detención y se garantizará la asistencia jurídica gratuita.” (Translation: In order to counteract the measures of the European Return Directive, it is determined that Ecuadorians in irregular condition cannot be detained, except in exceptional cases, and only in specialized centers, while their return is organized. In addition, for any reason unaccompanied minors will be subject to detention and free legal assistance will be guaranteed.)
- 9. *Colombia, CMW/C/COL/Q/1/Add.1, 27 Feb 2009, page 5*: The breach or infraction of the provisions relating to migration is not a criminal offence.
- 6. *Syrian Arab Republic, CMW/C/SYR/Q/1/Add.1, 02 Apr 2008, page 10*: “The law applies to everyone and does not differentiate between Syrian citizens detained by the police and migrant workers.” Page 12: “If a person is in conflict with the law, the same rules apply to him or her as to Syrians; there are no provisions based on nationality, rather they are based on the facts.”
- 5. *Ecuador, CMW/C/ECU/Q/1/Add.1, 17 Aug 2007, page 11*: “The Ecuadorian delegation that participated in the Global Forum on Migration and Development urged the international community to ensure that contraventions of migration regulations are considered in every country as administrative, not criminal, matters, in keeping with the principle that migrants should not be treated as criminals.”
- 4. *Egypt, CMW/C/EGY/Q/1/Add.1, 06 Feb 2007, page 15-16*: “There are no migrants in [administrative] detention in Egypt. All the rules and guarantees which the Egyptian legal system has established for persons

subject to criminal proceedings apply to everyone without any discrimination between Egyptians and foreigners and whatever the reason for their presence in the country. As far as migrants in judicial detention since 2000 are concerned, they are there because they have committed a legally designated offence. We shall prepare a statement on this subject and submit it to the Committee as soon as it is ready. With regard to places of detention, these are defined in detail in, and regulated by, the Prisons Act No. 396 of 1956, which classifies accused persons and places of confinement depending on the nature of the penalty. These places are inspected regularly by members of the Department of Public Prosecutions and the judiciary. It is an offence under Egyptian law to detain a person in a place other than one of these facilities. In light of the recommendations which the National Council for Human Rights had made in its regular annual reports, the Code of Criminal Procedures was amended in 2005 to place legal and judicial restrictions on the use of preventive detention and establish absolute time limits for the measure.’’

- 2. *Mali, CMW/C/MLI/Q/1/Add.1, 22 Mar 2006, page 7*: ‘‘Migrant workers and members of their families who are accused of a crime or arrested in Mali can appeal for assistance from the consular or diplomatic authorities of their State of origin, which are notified immediately of their situation. In the case of criminal offences, migrants are subject to the same procedure as nationals. In the case of violations of the provisions relating to migration, they are subject to administrative measures, and are either escorted to the border where they arrived or repatriated. ‘‘

3.8 Member states’ use of detention or imprisonment of migrants as a consequence of breaches of migratory legislation

A few member states admit to the use of detention of migrants as a direct consequence of the migrants’ breach of domestic migratory legislation, for instance:

- 22. *Rwanda, CMW/C/RWA/Q/1/Add.1, 23 Aug 2012, the charts of page 5-6 contains the following information*. Rwanda criminalizes immigration related crimes from 15 days up to 7 years imprisonment and with fines up to two million Rwandan francs, for immigration-related crimes such as forging or altering documents, illegal change of names, non-compliance with immigration or emigration laws, refusal by an expelled foreigner to leave the State, illegal re-entry, employing a foreigner who is not legally authorized to work, or by not paying fines. In the Rwandan Reply to List of

Issues, it is stated that no case of violation of the immigration law by migrant workers has been recorded so far in Rwanda.

- 7. *Bolivia, CMW/C/BOL/Q/1/Add.1, 10 Apr 2008, page 8*: “According to the regulations of the National Migration Service (SENAMIG), foreigners who infringe administrative provisions may not be detained for more than 24 hours - a rule that always applies.”
- 6. *Syrian Arab Republic, CMW/C/SYR/Q/1/Add.1, 02 Apr 2008, page 12*: “Persons detained for violations of immigration regulations are held in a holding centre for Arabs and foreigners awaiting deportation and are by no means treated as prisoners.”
- 5. *Ecuador, CMW/C/ECU/Q/1/Add.1, 17 Aug 2007, page 11*: “When a deportation order cannot be executed because it has been issued against a stateless person or a person lacking identity papers, or for any other substantiated reason, the police commissioner in charge of the case is required to bring the individual before the appropriate criminal court in order to replace pretrial detention with one of the alternative measures prescribed in article 171 of the Code of Criminal Procedure, pending execution of the order. If the deportation order is not implemented within three years, the person’s stay in the country becomes legal.”
- 5. *Ecuador, CMW/C/ECU/Q/1/Add.1, 17 Aug 2007, page 18*: “The Office of the Ombudsman reports that it has received complaints from persons seeking refuge who have had problems with police officers: not having their documents on them, their status was not respected and they were detained in order to be deported. In these cases, the Office of the Ombudsman has intervened and obtained their release from the police commissioner, once the status of the detainees was confirmed by the Ministry of Foreign Affairs.”

3.9 Detained migrants in penal institutions

A few States keep detained migrants in prison facilities, penal institutions or mix criminals and detained migrants in their detention facilities:

- 6. *Syrian Arab Republic, CMW/C/SYR/Q/1/Add.1, 02 Apr 2008, page 12*: “Concerning detention of untried persons separate from convicted persons, this is the state of affairs in the Syrian Arab Republic. In this regard, we would point out the following: (a) Article 32 of the Prisons Code, enacted by Decision No. 1222 of 20 June 1929, as amended, provides that all prisons must have completely separate cells for men and women, and must be arranged so as to prevent any communication between one ward and

another. The following categories of detainees must be held in separate wards: (i) Suspects and accused persons detained for debt, insolvency or indecent acts; (ii) Persons sentenced for a major offence to less than one year's imprisonment; (iii) Young detainees; (b) Persons detained for violations of immigration regulations are held in a holding centre for Arabs and foreigners awaiting deportation and are by no means treated as prisoners; (c) For the execution of sentences of detention of 15 days or less, Legislative Decree No. 140 of 1940 allows holding cells to be set aside in some gendarme stations located at least eight hours' walking distance from the nearest prison. Women sentenced to under eight days' detention may serve their sentence in a mayor's house near the gendarme station on condition that the mayor is married and living with his wife."

- *5. Ecuador, CMW/C/ECU/Q/1/Add.1, 17 Aug 2007, page 20-21: "The Department of Social Rehabilitation reports that a total of nine persons were being held in detention in May 2007 for migration violations in the social rehabilitation centres of Ibarra, Tulcán, Macas, provisional detention centre No. 1 of Quito and Loja. 72. The Department of Social Rehabilitation points out that when persons arrested for violation of provisions relating to migration are held in penal institutions, an effort is made to hold them in cells separately from convicted persons considered to be dangerous. However, there are no separate detention facilities, except for the provisional detention centres in Quito, Manabí and Guayas."*
- *3. Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, page 24: "Article 94 of the regulations of the General Population Act empowers the Ministry of the Interior, in specific cases and on an exceptional basis, to use pretrial detention facilities as migrant holding centres, only for the time that is strictly required: Article 94. The Ministry may establish or equip, at premises that it considers appropriate, migrant holding centres for the temporary stay of foreigners not meeting immigration requirements upon verification of their documentation, or to house, as a security measure, foreigners awaiting expulsion. In places where the Ministry has no established migrant holding centres, pretrial detention facilities shall be considered as equipped to secure foreigners awaiting expulsion. In no case shall penitentiaries for convicted prisoners be equipped for this purpose."*

3.10 The conditions of migrants in detention

A few Replies to the List of Issues mention the conditions for migrants in detention:

- *28. Peru, CMW/C/PER/Q/1/ADD.1, 13 Apr 2015, page 15: "The Ministry of Justice has drafted a protocol for the public defence service on access to*

justice for foreign youth and women deprived of their liberty, which aims to define the quality standards of the public defence service at the national level for foreign women in detention. The protocol identifies a series of steps, from arrest, enforcement of the sentence and transfer on completion of the sentence.”

- 8. *El Salvador, CMW/C/SLV/Q/1/Add.1, 10 Nov 2008, page 10*: “Desde el 7 de julio 2008 se cuenta con el Centro de atención integral para migrantes extrarregionales. La División de Fronteras de la Policía Nacional Civil con la DGME han elaborado un Manual Administrativo y de Procedimientos del Centro, en el que se establece que el tiempo máximo de estadía de los migrantes localizados debe ser cinco días. Con este procedimiento ya no pasan por las instalaciones de la División de Fronteras, de la PNC, se van directamente al Centro; posteriormente de revisar sus documentos, se realizan los chequeos médicos. En el Centro se cuenta con alimentación adecuada, atención médica y tiene capacidad para 80 personas.” (Translation: Since July 7, 2008, there is a Comprehensive Care Center for extraregional migrants. The Division of Borders of the National Civil Police with the DGME have prepared an Administrative and Procedures Manual of the Center, which establishes that the maximum length of stay of the migrants located should be five days. With this procedure they no longer go through the facilities of the Border Division, of the PNC, they go directly to the Center; After reviewing your documents, medical check-ups are carried out. The center has adequate food, medical attention and has capacity for 80 people.)
- 3. *Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, page 12*: “Establishing safe areas for women, indigenous peoples and communities, disabled persons, people with unconventional sexual preferences, and older adults, among others, where they can be protected from discrimination and violence at the hands of other detainees, whether this be at branch offices of the public prosecutor, at civil or conciliation tribunals, or in detention centres.”
- 3. *Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, page 25*: “As for ensuring that migrants are not secured for indefinite periods, the General Population Act and its regulations have always limited the duration of the various procedures for which they provide, including the administrative migration procedure, thus limiting the time during which migrants may be held. 79. The maximum period that a migrant may be held at a migrant holding centre with a view to regularizing his status must not exceed 90 days. Efforts are made to expedite the administrative immigration

procedures so as to speed up the regularization or repatriation, as the case may be, provided the migrants in question cooperate and the identification papers and travel documents required to finalize the procedure are available. This reduces the time during which they are held. 80. Thanks to safe and orderly repatriation agreements between Mexico and the countries of Central America, the stays of Central American migrants at migrant holding centres are generally 24 to 48 hours long, except when there is some legal or administrative impediment to their leaving the holding centres. 81. Such actions are intended to reduce arbitrariness in the length of time migrants in an irregular situation can be held. (...) 83. As for the conditions of stay, action has been taken under the programme for upgrading migrant detention centres to improve the physical conditions and services at migrant holding centres. The aim is to provide better care for the foreigners during their entry, stay and departure at such centres, with strict respect for their dignity and human rights.’’

- 3. *Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, page 30*: ‘‘Secured foreigners are housed in National Institute for Migration accommodation, whereas those awaiting criminal trial or serving a custodial sentence are held in the social rehabilitation centres or penitentiaries designated by the Federal or State Government for that purpose, security in such centres being the responsibility of the federal or state ministries of public security, as appropriate. 109. Every migrant holding centre provides secured migrants with three meals a day. In addition, the National Institute for Migration and the Ministry of Health are finalizing the details of an agreement guaranteeing permanent medical services in all Mexico’s migrant holding centres. 110. In order to avoid overcrowding in the migrant health centres and to properly manage repatriation flows, the Migrant Holding Centre Securing and Transfer System was launched on 17 January 2006; this makes it possible to establish, in real time via the Internet, the number of foreigners secured in each centre, which means precautions can be taken to minimize any risk of emergencies arising as a result of overcrowding in any of the centres. 111. The programme for upgrading migrant holding centres aims to enhance physical conditions and services with a view to improving the treatment of secured migrants as they enter and leave the centre and during their stay, while fully respecting their dignity and human rights, in accordance with the General Population Act and its regulations and the Agreement on Operating Standards for INM Holding Centres.’’

3.11 The placement of migrants in administrative detention

A Mexican Reply to the List of Issues mentions the placement of migrants in administrative detention:

- *3. Mexico, CMW/C/MEX/Q/1/Add.1, 05 Oct 2006, page 29: “In Mexican migration law, the term aseguramiento (“securing”) refers to an administrative measure applied by the migration authorities, as they are empowered to do, in migrant holding centres or establishments adapted for that purpose, until such time as a foreigner’s migration status has been determined. As mentioned in paragraph 28 of Mexico’s report, this approach avoids undocumented migration being treated as a crime. 105. With regard to the conditions in the migrant holding centres, under article 73 of the General Population Act, “The Ministry of the Interior shall establish migrant holding centres wherever it deems necessary, in order to accommodate, by securing as appropriate, foreigners who have been granted provisional entry or are due to be deported.” Under article 209 of the General Population Act regulations, “When a foreigner is secured in a migrant holding centre pending expulsion for a violation of the Act, these regulations or other applicable provisions, the following procedure must be followed: ... (f) he or she shall be provided during his or her stay with proper accommodation, food, basic toiletries, and medical care if needed.” 106. In migration matters, the term “securing” applies in the following circumstances under the General Population Act: Article 71. The Ministry of the Interior shall establish migrant holding centres wherever it deems necessary, in order to accommodate, by securing as appropriate, foreigners who have been granted provisional entry or are due to be deported. Article 128. For all legal purposes the expulsion of foreigners, and the measures ordered by the Ministry of the Interior for securing foreigners in migrant holding centres or places adapted for that purpose when the intention is their expulsion from the country, are matters of public order. Article 152. If the verification process brings to light any violation of the Act, these regulations or other applicable provisions such as to warrant a foreigner’s deportation, the foreigner may be secured by the authorized officials. 107. The terms “detention” or “detainee”, by contrast, apply in criminal matters, as, for example, in article 16, paragraphs 4 and 6, and article 19, paragraph 1, of the Constitution.”*

3.12 Trafficking victims in detention

A few Replies to the List of Issues mentions detention of victims of trafficking, for instance:

- *14. Ecuador, CMW/C/ECU/Q/2/ADD.1, 21 Oct 2010, page 13: “(c) CASO: DOLL HOUSE, 5 personas de nacionalidad cubana (se mantiene en reserva sus nombres por ser potenciales víctimas de trata)- junio de 2010- detención arbitraria dispuesta en el operativo Identidad. Acción de Habeas Corpus interpuesto por la Dirección Nacional de Protección de la Defensoría del Pueblo y sorteado en el Juzgado Segundo de Garantías Penales de Pichincha, signado con el No. 0671-2010. dicho juzgado emitió resolución favorable el 23 de junio y notificada el 24 de junio de 2010, disponiendo la libertad de 5 personas de nacionalidad cubana.”* (Translation: CASE: DOLL HOUSE, 5 people of Cuban nationality (their names are kept in reserve for being potential victims of trafficking) - June 2010 - Arbitrary detention ordered in the Identity operation. Habeas Corpus action filed by the National Protection Directorate of the Ombudsman's Office and raffled in the Second Court of Criminal Guarantees of Pichincha, signed with No. 0671-2010. said court issued a favorable ruling on June 23 and notified on June 24, 2010, providing for the release of 5 persons of Cuban nationality.)
- *8. El Salvador, CMW/C/SLV/Q/1/Add.1, 10 Nov 2008, page 37: “De acuerdo al o informado para este período por el Departamento de Investigación contra la Trata de Personas de la Policía Nacional Civil, se han atendido desde el año 2004 hasta el segundo trimestre del presente año, 208 víctimas de trata de personas, y se han detenido a 140 personas.”* (Translation: According to or reported for this period by the Department of Investigation against Trafficking in Persons of the National Civil Police, 208 victims of trafficking in persons have been served from 2004 to the second quarter of this year, and 140 people have been arrested.) Page 37: “Gráfico de personas detenidas y víctimas de trata de personas, 2004-2007.” (Translation: Chart of people detained and victims of trafficking in human beings, 2004-2007.)

4 General Comments

4.1 Introduction

All four existing General Comments¹⁴ have been studied and mentions in them of the topics studied for the General Comment no 5 have been compiled. As this part

¹⁴ *General comment No. 1 on migrant domestic workers, General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of*

of the report aims at looking at the language used by the CMW Committee, the text has been copied in, as is, from the General Comments.

4.2 Member states' use of detention on migrants

4.2.1 General comment no. 1:

27. A number of factors make it difficult for migrant domestic workers to claim their rights and seek redress in case of violations, including the fact that: [...] (c) Migrant domestic workers who depend on their employers for their immigration status may not report abuse for fear of arrest, detention or deportation.

[...]

64. In the case of detention of a migrant domestic worker or a member of his or her family, the person shall be contacted by the embassies or consulates concerned with a view to arranging visits by the relevant consular officials in consultation with the State of employment. (articles 16, paragraph 7, and 23).

4.2.2 General comment no. 2:

2. As a deterrent for migrant workers and members of their families in an irregular situation to enter or stay on their territory, States increasingly resort to repressive measures, such as criminalization of irregular migration, administrative detention and expulsion. Criminalization of irregular migration fosters and promotes public perceptions that migrant workers and members of their families in an irregular situation are “illegal”, second-class individuals, or unfair competitors for jobs and social benefits, thereby fueling anti-immigration public discourses, discrimination and xenophobia.

Protection against arbitrary arrest and detention

23. Article 16 protects the right of migrant workers and members of their families to liberty and security of person (para. 1), and provides that identity controls of migrant workers must comply with the procedure established by law (para. 3). Article 16, paragraph 4, complements article 9, paragraph 1, of the International Covenant on Civil and Political Rights, adding that migrant workers and members of their families shall not be subjected “individually or collectively” to arbitrary arrest or detention. In order not to be arbitrary, arrest and detention of migrant

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, and 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.

workers and members of their families, including those in an irregular situation, must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances and proportionate to the legitimate aim pursued.

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. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.

25. Although article 16, paragraph 4, does not define the permissible grounds for detention, it states that migrant workers and members of their families shall not be deprived of their liberty, except on such grounds and in accordance with such procedures as are established by law. Furthermore, detention must be prescribed by law, pursue a legitimate aim under the Convention, be necessary in the specific circumstances, and proportionate to the legitimate aim pursued.

26. In the Committee's view, any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. Such assessment should consider the necessity and appropriateness of any restriction of liberty, including whether it is proportional to the objective to be achieved. The principle of proportionality requires States parties to detain migrant workers only as a last resort, and to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the least intrusive and restrictive measure possible in each individual case should be applied.

27. Administrative detention of migrants that is initially lawful and non-arbitrary may become arbitrary if it continues beyond the period for which a State party can provide proper justification. To prevent such a situation from occurring, a maximum period of administrative detention shall be established by law, upon expiry of which a detainee must be automatically released in the absence of such justification. Administrative detention must never be unlimited or of excessive length. The justification for keeping a migrant worker detained shall be reviewed periodically to prevent prolonged and unjustified detention, which would be considered arbitrary. Preventive detention of migrant workers often leads to prolonged detention based on vague criteria. Therefore, such detention should be imposed only following an individual assessment in each case and for the shortest time possible, in compliance with all procedural safeguards provided for in article 16 of the Convention. In cases where an expulsion order cannot be executed for

reasons beyond the detained migrant worker's control, he or she shall be released in order to avoid potentially indefinite detention.

28. Article 16, paragraph 5, requires States parties to inform migrant workers and members of their families who are arrested of the reasons for their arrest at the time of arrest and, as far as possible, in a language they understand. Moreover, they must be promptly informed of the charges against them in a language they understand. In order to comply with this obligation, States parties should consider preparing standard notification forms, containing, *inter alia*, information on available remedies, in the languages that are most frequently used or understood by migrant workers in an irregular situation in the State party concerned. Such standard notification forms, however, should be complementary to the issuance of a detention order containing factual information and the legal grounds pertaining to the arrest.

29. Under article 16, paragraph 6, the guarantees of certain rights of migrant workers and members of their families in custody and pretrial detention are applicable to anyone suspected of committing or having committed a crime.

30. Article 16, paragraph 7, provides for the right of migrant workers who are deprived of their liberty to communicate with the consular or diplomatic authorities of their State of origin or those of a State representing the interests thereof. It also requires State parties to:

- (a) Inform the said authorities without delay of the arrest or detention of the migrant worker concerned, if he or she so requests;
- (b) Facilitate any communication between the person concerned and the said authorities;
- (c) Inform the person concerned without delay of this right as well as of rights under other applicable treaties; and
- (d) Correspond and meet with representatives of the said authorities and make arrangements with them for his or her legal representation.

31. In order to enable detained migrant workers to avail themselves effectively of the rights under (c) above, States parties shall provide the relevant information without delay, that is, upon or shortly after admission to the facility where they are deprived of their liberty and preferably in a language they understand. In relation to (a) above, the Committee emphasizes that the detaining State shall only contact the said authorities if this is explicitly requested by the detained migrant worker. In particular, migrant workers with potential protection needs shall not be brought to the attention of the said authorities without their knowledge and consent.

32. Article 16, paragraph 8, provides for the right of all migrant workers and members of their families who are deprived of their liberty by arrest or detention to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention. If the court finds that the detention is unlawful, it must order the release of the detained migrant worker. The Committee considers that mandatory detention of migrant workers and members of their families in an irregular situation is incompatible with article 16, paragraph 8, if the possibility of judicial review is confined to a formal assessment of whether the migrant worker concerned entered the State party without a valid entry permit, without the possibility of release if the detention is incompatible with article 16, paragraph 4.

33. The Committee considers that anyone arrested and detained solely for immigration purposes should be brought promptly before a judge or other officer authorized by law to exercise judicial power to review the lawfulness of the arrest and/or detention and the continued necessity of such arrest or detention; and to order unconditional release and/or less coercive measures, if warranted. Further reviews of the continued necessity and lawfulness of the detention should be carried out at regular intervals by a judge or other officer authorized by law to exercise judicial power. The burden of proof must rest on the detaining authorities to demonstrate that the presumption in favour of liberty should be displaced. The migrant worker must have access to legal representation and advice, if necessary free of charge, to challenge the lawfulness of detention. Children, and in particular unaccompanied or separated children, should never be detained solely for immigration purposes.

34. Article 16, paragraph 8, of the Convention provides for the right of migrant workers attending such proceedings to an interpreter, if necessary, without cost to them, if they cannot understand or speak the language used. In the Committee's view, States parties should take effective measures to ensure that all migrant workers held in migration detention centres, including those who opt for voluntary repatriation, are properly informed of their rights in a language they understand, especially with regard to their rights to consular assistance, to challenge the lawfulness of their detention and/or to release, to request asylum and to receive information about protection measures available to victims or witnesses of trafficking in persons.

35. Article 16, paragraph 9, provides for an enforceable right to compensation for migrant workers and members of their families who have been victims of unlawful arrest or detention. This right does not depend on a violation of article 16. It is sufficient that the arrest or detention be found unlawful under national or international law. States parties shall ensure that the right to compensation can be effectively enforced before the competent domestic authority. States parties must

also ensure that migrant workers and members of their families are not expelled while their claim is being considered.

[...]

Protection against inhumane treatment

38. Article 17, paragraph 3, underlines the non-punitive nature of administrative detention. It provides for migrant workers or members of their families who are detained for violation of provisions relating to migration to be held, insofar as is practicable, separately from convicted persons or pretrial detainees. Given that such detention can last for an extended period, migrant detainees should be kept in special facilities that are specifically designed for that purpose. Moreover, migrant workers and members of their families should not be subjected to any greater restriction or severity than is necessary to ensure safe custody and good order. The Committee is of the view that States parties should look for alternatives to administrative detention and that administrative detention should only be used as a last resort.

39. The Committee considers that administrative detention of migrant workers should, as a rule, take place in public establishments. Privately run migrant detention centres pose particular difficulties in terms of monitoring. States parties cannot absolve themselves of their human rights obligations by contracting out the detention of persons to private commercial enterprises. If States parties delegate such functions to private companies, they must ensure respect for the rights of detained migrant workers, as provided for under article 17 of the Convention. States parties must ensure that detention centre personnel are trained in human rights, cultural sensitivity, and age and gender considerations.

[...]

42. Article 17, paragraph 6, requires States parties to pay attention to the problems that deprivation of liberty may pose for family members, in particular spouses and minor children. In such cases, the Committee is of the view that States parties should seek alternatives to administrative detention, as administrative detention often has dire consequences, both economically and psychologically, for spouses and children.

[...]

44. This provision [*Article 17, paragraph 7*] also raises the issue of family detention. As a general rule, children and families with children should not be detained and States parties should always give priority to alternatives to detention where children and families are concerned. When family detention is unavoidable, detention of children shall be used “only as a measure of last resort and for the

shortest appropriate period of time”, in accordance with article 37, paragraph (b), of the Convention on the Rights of the Child. Moreover, the primary consideration in all actions concerning children shall be the best interest of the child standard, as laid down in article 3, paragraph 1, of the Convention on the Rights of the Child. States parties shall ensure that children in detention are treated with humanity and respect for the inherent dignity of the human person and in an age-appropriate manner and are provided with all legal safeguards (Convention on the Rights of the Child, art. 37). States parties shall therefore provide living quarters that are suitable for children and provide adequate access to education, play and leisure facilities, and, in the case of children detained with their parents, in special family units. Children should not be separated from their parents against their will except when such separation is necessary for the best interests of the child (Convention on the Rights of the Child, art. 9, para. 1). Unaccompanied children should be appointed a legal guardian who should be entrusted with the duty to care for the child outside of detention facilities.

45. States parties must also take into consideration the special situation of women migrant workers in detention. States parties must ensure separate facilities for men and women, ensure the provision of gender-specific health care services, and also provide for the specific needs of pregnant women, breastfeeding mothers and mothers with young children. States should avoid detaining women migrant workers in the final months of pregnancy or if they are nursing. The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) provide useful guidelines for States in these situations.

46. Detention can be particularly damaging to vulnerable categories of migrant workers, impacting negatively on their physical and mental health. These migrant workers and members of their families may include victims of torture, unaccompanied older persons, persons with disabilities and persons living with HIV/AIDS. Special measures should be taken to protect vulnerable people deprived of their liberty, including access to adequate health services, medication and counselling. Moreover, migrant workers with disabilities and members of their families with disabilities should be provided with “reasonable accommodation”¹⁵ to ensure their right to enjoy their human rights and fundamental freedoms on an equal basis with others.

47. With regard to article 17, paragraph 8, the Committee considers that detention “for the purpose of verifying any infraction of provisions related to migration” covers the entire duration of administrative detention, and that, consequently, migrant workers and members of their families subjected to administrative detention shall not bear any costs arising therefrom.

4.2.3 Joint General comment No. 3

30. In particular, the best interests of the child should be ensured explicitly through individual procedures as an integral part of any administrative or judicial decision concerning the entry, residence or return of a child, placement or care of a child, or the detention or expulsion of a parent associated with his or her own migration status.

[...]

32. The Committees stress that States parties should: [...] (e) Assess and determine the best interests of the child at the different stages of migration and asylum procedures that could result in the detention or deportation of the parents due to their migration status.

[...]

40. [...] While migration can provide opportunities to improve living conditions and escape from abuses, migration processes can pose risks, including [...] detention.

41. The Committees acknowledge that the lack of regular and safe channels for children and families to migrate contribute to children taking life-threatening and extremely dangerous migration journeys. The same is true for border control and surveillance measures that focus on repression rather than facilitating, regulating and governing mobility, including detention and deportation practices.

4.2.4 Joint general comment no. 4:

5. Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted 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. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children. Any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.

6. Immigration detention is understood by the Committees as any setting in which a child 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 child of his or her liberty, or the name of the facility or location where the child is deprived of liberty. "Reasons related to migration status" is understood by the Committees to be a person's migratory or residence status, or the lack

thereof, whether relating to irregular entry or stay or not, consistent with the Committees' previous guidance.

7. In addition, both the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have emphasized that children should not be criminalized or subject to punitive measures, such as detention, because of their or their parents' migration status. Irregular entry and stay do not constitute crimes per se against persons, property or national security. Criminalizing irregular entry and stay exceeds the legitimate interest of States parties to control and regulate migration, and leads to arbitrary detention.

8. The Committee on the Rights of the Child, in relation to unaccompanied and separated children, stated in 2005 that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.

9. The Committees emphasize the harm inherent in any deprivation of liberty and the negative impact that immigration detention can have on children's physical and mental health and on their development, even when they are detained for a short period of time or with their families. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that "within the context of administrative immigration enforcement ... the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children".

10. Article 37 (b) of the Convention of the Rights of the Child establishes the general principle that a child may be deprived of liberty only as a last resort and for the shortest appropriate period of time. However, offences concerning irregular entry or stay cannot under any circumstances have consequences similar to those derived from the commission of a crime. Therefore, the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development.

11. Instead, States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to 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, as well as before return. 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 is not a valid reason to 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.

12. Consequently, child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family. The measures offered to the child and the family should not imply any kind of child or family deprivation of liberty and should be based on an ethic of care and protection, not enforcement. They should focus on case resolution in the best interests of the child and provide all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child, allowing for children's holistic development. Independent public bodies, as well as civil society organizations, should be able to regularly monitor these facilities or measures. Children and families should have access to effective remedies in case any kind of immigration detention is enforced.

13. In the view of the Committees, child protection and welfare actors should take primary responsibility for children in the context of international migration. When a migrant child is first detected by immigration authorities, child protection or welfare officials should immediately be informed and be in charge of screening the child for protection, shelter and other needs. Unaccompanied and separated children should be placed in the national/local alternative care system, preferably in family-type care with their own family when available, or otherwise in community care when family is not available. These decisions have to be taken within a child-sensitive due process framework, including the child's rights to be heard, to have access to justice and to challenge before a judge any decision that could deprive him or her of liberty, and should take into account the vulnerabilities and needs of the child, including those based on their gender, disability, age, mental health, pregnancy or other conditions.

[...]

34. In the case of unaccompanied or separated children, including children separated from their parents due to the enforcement of immigration laws, such as the parents' detention, efforts to find sustainable, rights-based solutions for them

should be initiated and implemented without delay, including the possibility of family reunification.

4.3 Member states' criminalization or protection of trafficking victims entering the state as victims of organized crimes

4.3.1 General comment no. 1:

10. While transiting through foreign countries, women and girls are particularly at risk of being subjected to physical and sexual abuse by agents and intermediaries.

[...]

51. With a view to preventing irregular migration as well as smuggling and human trafficking, States parties should ensure that migrant domestic workers have access to regular channels for migration based on actual demand (article 68).

4.3.2 Joint general comment no. 3:

40. [...] Unaccompanied and separated children may face further vulnerabilities and can be more exposed to risks, such as gender-based, sexual and other forms of violence and trafficking for sexual or labour exploitation.

[...]

42. [...] States, especially those of transit and destination, should devote special attention to the protection of [...] child victims of transnational organized crime, including trafficking

4.3.3 Joint general comment no. 4:

39. Children in the context of international migration, in particular those who are undocumented, stateless, unaccompanied or separated from their families, are particularly vulnerable, throughout the migratory process, to different forms of violence, including [...] trafficking [...] in countries of origin, transit, destination and return.

[...]

41. [...] The Committees recognize that children face gender-specific risks and vulnerabilities which should be identified and specifically addressed. In many contexts, girls may be even more vulnerable to trafficking, especially for purposes of sexual exploitation.

[...]

43. For migrant children for whom there are indications of trafficking, sale or other forms of sexual exploitation [...] States should adopt the following measures:

- Establish early identification measures to detect victims of sale, trafficking and abuse, as well as referral mechanisms, and in this regard carry out mandatory training for social workers, border police, lawyers, medical professionals and all other staff who come into contact with children
- Where different migration statuses are available, the most protective status (i.e., asylum or residence on humanitarian grounds) should be applied and granting such status should be determined on a case-by-case basis in accordance with the best interests of the child
- Ensure that the granting of residence status or assistance to migrant child victims of sale, trafficking or other forms of sexual exploitation is not made conditional on the initiation of criminal proceedings or their cooperation with law enforcement authorities.

44. Furthermore, States should take the following actions to ensure the full and effective protection of migrant children from all forms of violence and abuse:

- Take effective measures to ensure that they are protected from any form of slavery and commercial sexual exploitation [...]

Recognize and address the gender-specific vulnerable situations of girls and boys and children with disabilities as potential victims of trafficking for sexual, labour and all other forms of exploitation.

4.4 Member states' protection of siblings to migrants

4.4.1 Joint general comment no. 4:

37. Children that remain in their countries of origin may end up migrating irregularly and unsafely, seeking to be reunited with their parents and/or older siblings in destination countries.

38. The Committees are aware that insufficient financial resources often hinder the exercise of the right to family reunification and that the lack of proof of adequate family income can constitute a barrier to reunion procedures. States are encouraged to provide adequate financial support and other social services to those children and their parent(s), siblings and, where applicable, other relatives.

5 Statements by the Committee

5.1 Introduction

The statements relating to the topic of General Comment No. 5 have been compiled below. It can be noted that no statement mentions protection of siblings to migrants.

5.2 Member states' use of detention on migrants

Public Statement 1 December 2017 – “Calls on Libyan immigration authorities to, in all instances, ensure that procedures concerning undocumented migrants fully respect the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, and to further that a migrant is only placed in detention for an immigration related infraction as a measure of last resort, and completely cease the immigration-related detention of migrant children consistent with the best interest of the child principle.”

Public Statement 3 April 2017 – “ On 19 September 2016, the General Assembly at its High Level Meeting on Addressing Large Movements of Refugees and Migrants, adopted the New York Declaration. [...] Critically, the Declaration commits States, inter alia, to [...] consider reviewing policies that criminalize cross-border movements; pursue alternatives to detention;”

Public Statement 9 September 2015 – regarding the global migration crisis – “States should also refrain from reacting to this multidimensional and complex issue through criminalization of irregular migration, building of fences and strengthening other border controls measures, including detention, push-back and deportation practices.”

Public Statement 1 July 2015 – “In July 2014, the Chair of the Committee issued a statement focusing on immigration detention of children. The Committee noted that 35 million children migrate every year for a variety of reasons, including deteriorating security and economic conditions, lack of educational and work opportunities, as well seeking out parents who are working abroad, and called upon States to cease immigration detention of children and adopt alternatives to detention that fulfil the best interests of the child.”

Public Statement 3 July 2014 – “Every day, all around the world, millions of children are affected by immigration detention. Whether detained themselves or impacted by the detention of their guardians, children are particularly vulnerable to human rights violations. The immigration detention of children has been shown to have long-lasting mental and physical health implications for children, even when used for very short periods of time.

In all actions concerning children, the best interests of the child should be a primary consideration. States should not detain children based on their migration status or that of their parents or guardians. In the unfortunate situation where detention is used in respect of children of migrant workers for immigration matters, Article 17 of the UN Convention on Migrant Workers makes it clear that the children must be treated with humanity and with respect for the inherent dignity of the human person and for their cultural identity.

Accordingly, the Chairperson of the CMW calls upon States to cease the immigration detention of children, and to adopt alternatives to detention that fulfil the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved. The Chairperson of the CMW also calls upon States to respect their obligations under those core United Nations human rights treaties that they have ratified, and to ratify those treaties to which they are not yet party.”

5.3 Member states’ criminalization or protection of trafficking victims entering the state as victims of organized crime

Public Statement 1 December 2017 – “Calls upon all States of origin and destination of these migrants to undertake immediate action to end the trafficking and sale of human beings ensuring the strict application of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families adopted by the United Nations General Assembly by its resolution 45/158 of 18 December 1990, and to provide severe sanctions to the perpetrators of human rights violations against migrants, within and outside Libya’s borders.”

Public Statement 25 October 2015 - “We are deeply concerned by the recent adoption by the United Nations Security Council of a resolution which allows the European Union to inspect, possibly seize and use “... all measures commensurate to the specific circumstances in confronting migrant smugglers and human traffickers in full compliance with international human rights law” against boats off the coast of Libya in cases where reasonable grounds exist to suspect that such boats are being used for the smuggling of migrants from that country. [...] It is extremely difficult to imagine how EU member States will take action against smugglers’ vessels without putting at risk the lives of the refugees and migrants on board. It is also not clear how such actions will not amount to ‘push-backs’ or collective expulsions, and how using such force will be compatible with the EU member States’ international human rights and humanitarian law obligations which require that they respect the principle of non-refoulement and allow for proper individual assessments.”

Public Statement 7 April 2014 – “In addition to the documented discrimination, exclusion, exploitation faced by migrants in an irregular situation, the GMG also noted that these individuals are also more likely to be targeted by xenophobes and racists, unscrupulous employers, criminal traffickers and smugglers. Women in an irregular situation are doubly vulnerable owing to the high risk of sexual exploitation.”

6 Inter-Agency Working Group to End Child Detention

6.1 About the Inter-Agency Working Group

The Inter-Agency Working Group (IAWG) to End Child Immigration Detention is an international alliance to support States to end child immigration detention consistent with existing international human rights obligations to protect the best interests of the child. The IAWG is comprised of twenty-nine prominent UN groups, inter-governmental organizations, and civil society representatives who collectively represent stakeholders in every country of the world. Together, they have committed to engaging and supporting States to “completely and expeditiously” end the practice of child immigration detention, consistent with the UN Convention on the Rights of the Child.

6.2 History of the Inter-Agency Working Group

In September 2012, at the annual Day of General Discussion of the UN Committee on the Rights of the Child, UN, intergovernmental and civil society experts discussed growing concerns around the detention of migrant children and their families on the basis of irregular immigration status.

In March 2014, at the UN Human Rights Council, a broad stakeholder group of child rights organizations, migrant groups and long-time supporters of the Global Campaign to End the Immigration Detention of Children hosted a side-event Where They explored “A Global Strategy to End Child Immigration Detention. “Immediately Following this side-event, groups met and Agreed to form an Inter-Agency Working Group to End Child Immigration Detention. Terms of reference were developed in the following months and the first official meeting of the IAWG which held in June 2014 on the margins of the UN Human Rights Council.

6.3 The Inter-Agency Working Group’s position

It is the position of all IAWG members that all refugee, asylum-seeker and migrant children should be:

1. *Treated as children* – Children are, first and foremost, children and should always be treated in full accordance with international law regarding child rights, regardless of their legal or migration status.
2. *Free* – Children have a fundamental right to liberty. Children should never be deprived of liberty for reasons related to their or their parents’ immigration status. Migration is not a crime and children should never be criminalised or otherwise punished because of their or their parents’ migration status.

3. *Looked after* – The best interests of the child must be a primary consideration in all actions concerning children. Immigration detention is never in the best interests of the child and will always constitute a child rights violation. When children are unaccompanied or separated, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State.
4. *With their parents* – Children have a right to family, which extends to their parents, guardians and/or primary care-givers. When the child’s best interests require keeping the family together, authorities must choose alternatives to detention for the entire family which allow children to remain with their families in non-custodial, community-based settings.
5. *In the community* – Overall, an ethic of care—not enforcement—should guide all placement decisions regarding children and their families. States are required to favour measures that promote the care and well-being of the child rather than migration enforcement or control. Facilities that grant accommodation for migrant children and families should have all the material conditions necessary to ensure the child’s comprehensive care, protection and development.

6.4 Members of the Inter-Agency Working Group

6.4.1 UN and International Members

- *UN Committee on Migrant Workers* - The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of independent experts that monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families by its State parties. It held its first session in March 2004.
- *UN High Commissioner for Human Rights (OHCHR)*. The Office of the United Nations High Commissioner for Human Rights (OHCHR) represents the world’s commitment to universal ideals of human dignity.
- *UN High Commissioner for Refugees (UNHCR)*. For over 65 years, the United Nations High Commissioner for Refugees (UNHCR) has been protecting the rights and well-being of refugees all over the world. They work to ensure that everybody has the right to seek asylum and find safe refuge, having fled violence, persecution, war or disaster at home.

- *United Nations Children's Fund (UNICEF)*. UNICEF works for a world in which every child has a fair chance in life.
- *International Committee of the Red Cross (ICRC)*. The work of the ICRC is based on the Geneva Conventions of 1949, their Additional Protocols, its Statutes – and those of the International Red Cross and Red Crescent Movement – and the resolutions of the International Conferences of the Red Cross and Red Crescent.
- *International Organization for Migration (IOM)*. Established in 1951, IOM is the leading inter-governmental organization in the field of migration and works closely with governmental, intergovernmental and non-governmental partners. With 165 member states, a further 8 states holding observer status and offices in over 100 countries, IOM is dedicated to promoting humane and orderly migration for the benefit of all. It does so by providing services and advice to governments and migrants.
- *Global Alliance of NHRIs (GANHRI)*. Established in 1993, GANHRI, previously known as the ICC (International Coordinating Committee of NHRIs), is the Global Alliance of National Human Rights Institutions. GANHRI promotes the role of NHRIs worldwide, providing a forum for its members to interact and exchange, as well as facilitating their engagement with international organisations. Currently, 100 national human rights institutions exist worldwide, 74 of which are accredited in full compliance with the Paris Principles.
- *UN Special Rapporteur on the Human Rights of Migrants*. The mandate of the Special Rapporteur on the Human Rights of Migrants was created in 1999 by the Commission on Human Rights, pursuant to resolution 1999/44. Since then, the mandate of the Special Rapporteur has been extended by Commission on Human Rights resolutions 2002/62 and 2005/47 and Human Rights Council resolutions 8/10, 17/12 and 26/19, each for a period of three years. With 165 member states, a further 8 states holding observer status and offices in over 100 countries, IOM is dedicated to promoting humane and orderly migration for the benefit of all. It does so by providing services and advice to governments and migrants.
- *UN Special Rapporteur on Trafficking*. At its sixtieth session, the Commission on Human Rights adopted decision 2004/110, by which it decided to appoint, for a three- year period, a Special Rapporteur on trafficking in persons, especially women and children to focus on the human rights aspects of the victims of trafficking in persons. In the same decision, the Commission invited the Special Rapporteur to submit annual reports to

the Commission together with recommendations on measures required to uphold and protect the human rights of the victims.

- *UN SRSG on Violence Against Children.* The UN Secretary-General's Study on Violence against Children addressed violence against children in five settings: the family, schools, alternative care institutions and detention facilities, places where children work and communities. The Study called for urgent action to prevent and respond to all forms of violence and presented a set of recommendations to guide the process of follow up. To promote dissemination of the Study and ensure an effective follow up to its recommendations, the Study called for the appointment of a Special Representative of the Secretary General on Violence against Children (SRSG).
- *UN Working Group on Arbitrary Detention (WGAD).* The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's resolution 1997/50. The mandate was extended for a further three-year period by resolution 24/7 of 26 September 2013.

6.4.2 Regional Members

- *African Committee of Experts on the Rights and Welfare of the Child (ACERWC).* The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) is established by article 32 of the African Charter on the Rights and Welfare of the Child (ACRWC). It is mandated under article 42 of the ACRWC to promote and ensure the protection of the rights of the child enshrined in the ACRWC.
- *Inter-American Commission on Human Rights (IAHCR) Rapporteurship on the Rights of Migrants.* Throughout the years, the Commission has monitored the situation of people in the context of human mobility by conducting visits to countries, elaborating thematic studies and country reports, requesting information and conducting hearings and meetings.
- *Council of Europe, Commissioner on Human Rights.* The Commissioner conducts visits to help raise the standards of human rights protection in all Council of Europe member states, in accordance with his mandate. Visits aim at pursuing a direct dialogue with the authorities and looking into one or several specific issues. The Commissioner is currently carrying out more targeted country visits focused on specific topics. A report may be published, containing conclusions and relevant recommendations to help redress shortcomings. Some of these reports may also relate to crisis situations and human rights in conflict areas.

- *Council of Europe, General Rapporteur on Ending Immigration Detention of Children.* The General rapporteur will contribute to raising awareness in Council of Europe member states on the need to end immigration detention of children and to adopt alternatives to detention that fulfil the best interests of the child and allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved.

6.4.3 Civil Society Members

- *Caritas Internationalis.* Caritas shares the mission of the Catholic Church to serve the poor and to promote charity and justice throughout the world.
- *Child Rights International Network (CRIN).* Its foundation is the United Nations Convention on the Rights of the Child (CRC), which they use to bring children's rights to the top of the international agenda and to put pressure on national governments to promote and protect children's rights.
- *Defence for Children International (DCI).* DCI national sections, particularly – although not exclusively – in the European region, work closely with migrants and asylum seeking children to ensure that their rights are respected and protected.
- *Global Campaign to End Child Immigration Detention.* The Global Campaign to End Immigration Detention of Children was launched during the 19th Session of the UN Human Rights Council in 2012, to draw attention to the many detrimental effects that immigration detention has on children, and to encourage states to cease the immigration detention of children consistent with their CRC obligations.
- *Human Rights Watch (HRW).* Human Rights Watch is a nonprofit, nongovernmental human rights organization made up of roughly 400 staff members around the globe. Its staff consists of human rights professionals including country experts, lawyers, journalists, and academics of diverse backgrounds and nationalities. Established in 1978, Human Rights Watch is known for its accurate fact-finding, impartial reporting, effective use of media, and targeted advocacy, often in partnership with local human rights groups.
- *Platform for International Cooperation on Undocumented Migrants (PICUM)* PICUM is a network of individuals and organisations working to ensure social justice and human rights for undocumented migrants. PICUM works to ensure that all migrants are entitled to a dignified standard of living and respect.

- *International Detention Coalition (IDC)*. The International Detention Coalition (IDC) is a unique global network, of over 300 civil society organisations and individuals in more than 70 countries, that advocate for, research and provide direct services to refugees, asylum-seekers and migrants affected by immigration detention.
- *Save the Children*. Save the Children uses a holistic approach to help us achieve more for children, and to use our resources in an efficient and sustainable way. In every programme we aim to: innovate – develop and prove evidence-based, replicable solutions to the problems children face; achieve results at scale – by expanding effective and sustainable approaches; be the voice – campaign for better practices and policies to fulfil children’s rights and ensure that children’s voices are heard; build partnerships – with children, communities, governments, civil society and private sector organisations – to influence others and increase our impact.
- *Terre des Hommes International Federation (TDH)*. The Terre des Hommes International Federation is a network of ten national organisations working for the rights of children and to promote equitable development without racial, religious, political, cultural or gender-based discrimination.
- *Destination Unknown Campaign*. The Destination Unknown campaign, an international campaign to protect children on the move, implemented by more than 100 campaign members, TDH organisations together with NGO partners. The campaign in figures: Half a million children (not including emergency operations), 159 projects, in 65 countries within 10 sub-regions of the world.
- *Amnesty International*. Amnesty International is a global movement of more than 7 million people in over 150 countries and territories who campaign to end abuses of human rights.
- *Asia-Pacific Refugee Rights Network (APRRN)*. The Asia Pacific Refugee Rights Network is an open and growing network consisting of more than 300 civil society organisations and individuals from 28 countries committed to advancing the rights of refugees in the Asia Pacific region.
- *SOS Children’s Villages*. SOS Children’s Villages International comprises 117 national SOS Children’s Villages associations. As members of the federation, each national SOS Children’s Villages association is committed to applying the federation’s statutes, standards for quality child care, and stringent financial and administrative practices.

Annex 3: Relevant Articles in External Conventions, Protocols and Recommendations related to Article 16 and Article 17¹

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1 Introduction

The content of this annex is based on relevant external conventions, protocols and recommendations mainly in relation to article 16 - read in the light of article 17 - originated in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly resolution 45/158 of 18 December 1990.

Part I, contains a comparison to all the international instruments mentioned in the preamble of the CMW. In Part II will a comparison to other international instruments be presented.

Part I

International instruments mentioned in the preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Universal Declaration of Human Rights

General Assembly resolution: 217 A (III)
Adopted: 10 December 1948

(Articles: 1, 2, 7, 9, 10, 11, 16)

Non-Discrimination Principle

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Deprivation of Freedom

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

The Legal Status of the Family

Article 16.3

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

International Covenant on Economic, Social and Cultural Rights

General Assembly resolution:	2200A (XXI)
Adopted:	16 December 1966
Entry into force:	3 January 1976, in accordance with article 27

(Article: 2)

Non-Discrimination Principle

Article 2

2. 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.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

International Covenant on Civil and Political Rights

General Assembly resolution:	2200A (XXI)
Adopted:	16 December 1966

Entry into force:
Article 49

23 March 1976, in accordance with

(Article: 2, 4, 8, 9, 10, 11, 12, 14, 23, 24, 26)

Non-Discrimination Principle

Article 2

1. 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.

Article 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
Right to Freedom

Article 2

3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.

Prohibition Against Forced Labour

Article 8

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.

3. (a) No one shall be required to perform forced or compulsory labour;
- (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:
- (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.
- Deprivation of Freedom

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 11

No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Article 12

2. Everyone shall be free to leave any country, including his own.

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) To be tried without undue delay;
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
- (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated

according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

The Legal Status of the Family

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 24

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

International Convention on the Elimination of All Forms of Racial Discrimination

General Assembly resolution:	2106 (XX)
Adopted:	21 December 1965
Entry into force:	4 January 1969, in accordance with Article 19
<i>(Article: 1, 3, 5, 6)</i>	

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.

4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;
- (c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
 - (i) The right to freedom of movement and residence within the border of the State;
 - (ii) The right to leave any country, including one's own, and to return to one's country;
 - (iii) The right to nationality;
 - (iv) The right to marriage and choice of spouse;
 - (v) The right to own property alone as well as in association with others;
 - (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Convention on the Elimination of All Forms of Discrimination against Women

General Assembly resolution: 34/180
Adopted: 18 December 1979
Entry into force: 3 September 1981, in accordance with
Article 27(1)
(Article 1, 2, 3, 6)

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Convention on the Rights of the Child

General Assembly resolution: 44/25
Adopted: 20 November 1989
Entry into force: 2 September 1990, in accordance with Article 49
(Article 1, 2, 9, 11, 12, 19, 20, 25, 34, 35, 36, 37, 40)

Definition

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Non-Discrimination Principle

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Family

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-

being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Deprivation of Freedom

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with

his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such

as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Exploitation

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

ILO, Migration for Employment Convention (Revised), No. 97

International Labour Organization: C97
Adopted: 1 July 1949
Entry into force: 22 January 1952
Convention may be denounced: 22 January 2022 - 22 January 2023
(Article: 6)

Non-Discrimination Principle

Article 6

1. Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:

(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities--

(i) remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment, apprenticeship and training, women's work and the work of young persons;

(ii) membership of trade unions and enjoyment of the benefits of collective bargaining;

(iii) accommodation;

(b) social security (that is to say, legal provision in respect of employment injury, maternity, sickness, invalidity, old age, death, unemployment and family responsibilities, and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) there may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension;

(c) employment taxes, dues or contributions payable in respect of the person employed; and

(d) legal proceedings relating to the matters referred to in this Convention.

ILO, Recommendation concerning Migration for Employment (Revised), No. 86

International Labour Organization: R86
Publication date: 1 July 1949
No relevant articles.

ILO, Migrant Workers (Supplementary provisions) Convention, No. 143

International Labour Organization: C143
Adopted: 24 June 1975
Entry into force: 9 December 1978

Convention is currently open for denunciation: 9 December 2018 - 9 December 2019
(Article: 1, 3, 4, 5, 10, 13)

Equality

Article 1

Each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.

Article 10

Each Member for which the Convention is in force undertakes to declare and pursue a national policy designed to promote and to guarantee, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Exploitation

Article 3

Each Member shall adopt all necessary and appropriate measures, both within its jurisdiction and in collaboration with other Members--

(a) to suppress clandestine movements of migrants for employment and illegal employment of migrants, and

(b) against the organisers of illicit or clandestine movements of migrants for employment departing from, passing through or arriving in its territory, and against those who employ workers who have immigrated in illegal conditions,

in order to prevent and to eliminate the abuses referred to in Article 2 of this Convention.

Article 4

In particular, Members shall take such measures as are necessary, at the national and the international level, for systematic contact and exchange of information on the subject with other States, in consultation with representative organisations of employers and workers.

Article 5

One of the purposes of the measures taken under Articles 3 and 4 of this Convention shall be that the authors of manpower trafficking can be prosecuted whatever the country from which they exercise their activities.

Family

Article 13

1. A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

2. The members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother.

ILO, Migrant Workers Recommendation, No. 151

International Labour Organization: R151
Publication date: 24 June 1975
No relevant articles.

ILO, Forced Labour Convention, No. 29

International Labour Organization: C29
Adopted: 28 June 1930
Entry into force: 1 May 1932

Convention may be denounced: 1 May 2022 - 1 May 2023
No relevant articles.

ILO, Abolition of Forced Labour Convention, No. 105

International Labour Organization: C105
Adopted: 25 June 1957
Entry into force: 17 January 1959

Convention may be denounced: 17 January 2019 - 17 January 2020
No relevant articles.

UNESCO, Convention against Discrimination in Education

Registration at the UN: 29 May 1962, No. 6193
Adopted: 14 December 1960
Entry into force: 22 May 1962, in accordance with article
14

No relevant articles.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

General Assembly resolution: 39/46
Adopted: 10 December 1984
Entry into force: 26 June 1987, in accordance with Article
27 (1)

No relevant articles.

The Declaration of the Eight United Nations Congress on the Prevention on Crime and the Treatment of Offenders

General Assembly resolution: 144/28
Adopted: May 1991

Note: This is the updated version no. 8, instead of declaration no. 4 that was mentioned in the preamble of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

I V. SOCIALIZATION PROCESSES

(Point: 11, 12)

Family

11. Every society should place a high priority on the needs and well-being of the family and of all its members.

12. Since the family is the central unit responsible for the primary socialization of children, governmental and social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well-being of children. Adequate arrangements including day-care should be provided.

ANNEX - United Nations Rules for the Protection

(Point: 1, 2, 3, 4, 12, 17, 18)

Non-Discrimination Principle

4. The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth of family status, ethnic or social origin, and disability. The religious and cultural belief, practices and moral concepts of the juvenile should be respected.

Right to Freedom

3. The Rules are intended to establish minimum standards accepted by the United Nations for the protection of juveniles deprived of their liberty in all forms, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society.

12. The deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles. Juveniles detained in facilities should be guaranteed the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as members of society.

Deprivation of Freedom

1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.

2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

Rights of the Deprived

17. Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures. When preventive detention is nevertheless used, juvenile courts and investigative bodies

shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention. Untried detainees should be separated from convicted juveniles.

18. The conditions under which an untried juvenile is detained should be consistent with the rules set out below, with additional specific provisions as are necessary and appropriate, given the requirement of the presumption of innocence, the duration of the detention and the legal status and circumstances of the juvenile. These provisions would include, but not necessarily be restricted to, the following:

(a) Juveniles should have the right of legal counsel and be enabled to apply for free legal aid, where such aid is available, and to communicate regularly with their legal advisers. Privacy and confidentiality shall be ensured for such communications;

(b) Juveniles should be provided, where possible, with opportunities to pursue work, with remuneration, and continue education or training, but should not be required to do so. Work, education or training should not cause the continuation of the detention;

(c) Juveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice.

Code of Conduct for Law Enforcement Officials

General Assembly resolution: 34/169
Adopted: 17 December 1979
(Article: 2)

Article 2

In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons. Slavery Convention (*Convention to Suppress the Slave Trade and Slavery*)

League of Nations: 60 LNTS 253, Registered No. 1414
Adopted: 25 September 1926
Entry into force: 9 March 1927, in accordance with article 12

No relevant articles.

Part II

Other international instruments

United Nations Convention against Transnational Organized Crime and the Protocols Thereto

General Assembly resolution: 55/25
Adopted: 15 November 2000
Entry into force: 29 September 2003, in accordance with

article 38

ANNEX II - Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime
(Article 9, 11)

Prohibition Against Trafficking

Article 9

1. States Parties shall establish comprehensive policies, programmes and other measures:

- (a) To prevent and combat trafficking in persons; and
- (b) To protect victims of trafficking in persons, especially women and children, from revictimization.

2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.

3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.

4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.

5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 11

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by

commercial carriers from being used in the commission of offences established in accordance with article 5 of this Protocol.

3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which they Live

General Assembly resolution: 40/144
Adopted: 13 December 1985
(Article 5, 7, 10)

Deprivation of Freedom

Article 5

1. Aliens shall enjoy, in accordance with domestic law and subject to the relevant international obligations of the State in which they are present, in particular the following rights:

(a) The right to life and security of person; no alien shall be subjected to arbitrary arrest or detention; no alien shall be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established by law;

(b) The right to protection against arbitrary or unlawful interference with privacy, family, home or correspondence;

(c) The right to be equal before the courts, tribunals and all other organs and authorities administering justice and, when necessary, to free assistance of an interpreter in criminal proceedings and, when prescribed by law, other proceedings;

(d) The right to choose a spouse, to marry, to found a family;

(e) The right to freedom of thought, opinion, conscience and religion; the right to manifest their religion or beliefs, subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others;

(f) The right to retain their own language, culture and tradition;

(g) The right to transfer abroad earnings, savings or other personal monetary assets, subject to domestic currency regulations.

2. Subject to such restrictions as are prescribed by law and which are necessary in a democratic society to protect national security, public safety, public order, public health or morals or the rights and freedoms of others, and which are consistent with the other rights recognized in the relevant international instruments and those set forth in this Declaration, aliens shall enjoy the following rights:

(a) The right to leave the country;

(b) The right to freedom of expression;

(c) The right to peaceful assembly;

(d) The right to own property alone as well as in association with others, subject to domestic law.

3. Subject to the provisions referred to in paragraph 2, aliens lawfully in the territory of a State shall enjoy the right to liberty of movement and freedom to choose their residence within the borders of the State.

4. Subject to national legislation and due authorization, the spouse and minor or dependent children of an alien lawfully residing in the territory of a State shall be admitted to accompany, join and stay with the alien.

Article 7

An alien lawfully in the territory of a State may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons why he or she should not be expelled and to have the case reviewed by, and be represented for the purpose before, the competent authority or a person or persons specially designated by the competent authority. Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is Prohibited.

Article 10

Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in their absence, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides.

Durban Declaration and Programme of Action - Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/12)

General Assembly resolution: 56/266
Endorsed: 15 May 2002
(Article: 2, 7, 10, 30, 65, 69, 72, 104)

Non-Discrimination Principle

2. We recognize that racism, racial discrimination, xenophobia and related intolerance occur on the grounds of race, colour, descent or national or ethnic origin and that victims can suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status;

10. We reaffirm that everyone is entitled to a social and international order in which all human rights can be fully realized for all, without any discrimination;

Right to Freedom

7. We declare that all human beings are born free, equal in dignity and rights and have the potential to contribute constructively to the development and well-being of their societies. Any doctrine of racial superiority is scientifically false, morally condemnable, socially unjust and dangerous, and must be rejected along with theories which attempt to determine the existence of separate human races;

65. We recognize the right of refugees to return voluntarily to their homes and properties in dignity and safety, and urge all States to facilitate such return;

Deprivation of Freedom

104. We also strongly reaffirm as a pressing requirement of justice that victims of human rights violations resulting from racism, racial discrimination, xenophobia and related intolerance, especially in the light of their vulnerable situation socially, culturally and economically, should be assured of having access to justice, including legal assistance where appropriate, and effective and appropriate protection and remedies, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, as enshrined in numerous international and regional human rights instruments, in particular the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination;

Prohibition Against Forced Labour

30. We affirm the urgent need to prevent, combat and eliminate all forms of trafficking in persons, in particular women and children, and recognize that victims of trafficking are particularly exposed to racism, racial discrimination, xenophobia and related intolerance;

Women and Children

69. We are convinced that racism, racial discrimination, xenophobia and related intolerance reveal themselves in a differentiated manner for women and girls, and can be among the factors leading to a deterioration in their living conditions, poverty, violence, multiple forms of discrimination, and the limitation or denial of their human rights. We recognize the need to integrate a gender perspective into relevant policies, strategies and programmes of action against racism, racial discrimination, xenophobia and related intolerance in order to address multiple forms of discrimination;

72. We note with concern the large number of children and young people, particularly girls, among the victims of racism, racial discrimination, xenophobia and related intolerance and stress the need to incorporate special measures, in accordance with the principle of the best interests of the child and respect for his or her views, in programmes to combat racism, racial discrimination, xenophobia and related intolerance, in order to give priority attention to the rights and the situation of children and young people who are victims of these practices;

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

General Assembly resolution: 54/263
Adopted: 25 May 2000
Entry into force: 18 January 2002
(*Article 1, 8*)

Article 1

States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.

Article 8

1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

- (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;
- (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;
- (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;
- (d) Providing appropriate support services to child victims throughout the legal process;
- (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;
- (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;
- (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.

2. States Parties shall ensure that uncertainty as to the actual age of the victim shall not prevent the initiation of criminal investigations, including investigations aimed at establishing the age of the victim.

3. States Parties shall ensure that, in the treatment by the criminal justice system of children who are victims of the offences described in the present Protocol, the best interest of the child shall be a primary consideration.

4. States Parties shall take measures to ensure appropriate training, in particular legal and psychological training, for the persons who work with victims of the offences prohibited under the present Protocol.

5. States Parties shall, in appropriate cases, adopt measures in order to protect the safety and integrity of those persons and/or organizations involved in the prevention and/or protection and rehabilitation of victims of such offences.

6. Nothing in the present article shall be construed to be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

General Assembly resolution: 54/263
Adopted: 25 May 2000
Entry into force: 12 February 2002
No relevant articles.

Recommended Principles and Guidelines on Human Rights and Human Trafficking - Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council

UN Economic and Social Council: E/2002/68/Add.1
Adopted: 20 May 2002

Recommended Principles on Human Rights and Human Trafficking (1, 3, 7, 10)

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers

7. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

10. Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.

Guideline 1: Promotion and protection of human rights (1, 5, 6)

1. Taking steps to ensure that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including those who have been trafficked.

5. Protecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right.

6. Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.

Guideline 2: Identification of trafficked persons and traffickers (6, 7)

6. Ensuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.

7. Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers and that the principle of non-refoulement is respected and upheld at all times

Guideline 8: Special measures for the protection and support of child victims of trafficking

(1, 3, 4, 5, 6)

1. Ensuring that definitions of trafficking in children in both law and policy reflect their need for special safeguards and care, including appropriate legal protection. In particular, and in accordance with the Palermo Protocol, evidence of deception, force, coercion, etc. should not form part of the definition of trafficking where the person involved is a child.

3. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

4. In cases where children are not accompanied by relatives or guardians, taking steps to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of trafficked children with their families where this is deemed to be in their best interest.

5. In situations where the safe return of the child to his or her family is not possible, or where such return would not be in the child's best interests, establishing adequate care arrangements that respect the rights and dignity of the trafficked child.

6. In both the situations referred to in the two paragraphs above, ensuring that a child who is capable of forming his or her own views enjoys the right to express those views freely in all matters affecting him or her, in particular concerning decisions about his or her possible return to the family, the views of the child being given due weight in accordance with his or her age and maturity.

Resolution of the General Assembly on the Protection of Migrants

General Assembly resolution: 67/172
Adopted: 20 December 2012
(Article 1, 3, 4, 5, 6, 7, 8)

Non-Discrimination Principle

Reaffirming the Universal Declaration of Human Rights,² which proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin,

Right to Freedom

Reaffirming also that everyone has the right to freedom of movement and residence within the borders of each State and the right to leave any country, including his or her own, and to return to his or her country,

1. Calls upon States to promote and protect effectively the human rights and fundamental freedoms of all migrants, regardless of their migration status, especially those of women and children, and to address international migration through international, regional or bilateral cooperation and dialogue and a comprehensive and balanced approach, recognizing the roles and responsibilities of countries of origin, transit and destination in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability;

3. Reaffirms the rights set forth in the Universal Declaration of Human Rights and the obligations of States under the International Covenants on Human Rights, and in this regard:

(a) Strongly condemns the acts, manifestations and expressions of racism, racial discrimination, xenophobia and related intolerance against migrants and the stereotypes often applied to them, including on the basis of religion or belief, and urges States to apply and, where needed, reinforce the existing laws when xenophobic or intolerant acts, manifestations or expressions against migrants occur, in order to eradicate impunity for those who commit those acts;

(b) Expresses concern about legislation adopted by some States that results in measures and practices that may restrict the human rights and fundamental freedoms of migrants, and reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law,

including international human rights law, in order to ensure full respect for the human rights of migrants;

(c) Calls upon States to ensure that their laws and policies, including in the areas of counter-terrorism and combating transnational organized crime, such as trafficking in persons and smuggling of migrants, fully respect the human rights of migrants;

(d) Calls upon States that have not done so to consider signing and ratifying or acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a matter of priority, and requests the Secretary-General to continue his efforts to promote and raise awareness of the Convention;

(e) Takes note of the report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on its fifteenth and sixteenth sessions;

4. Also reaffirms the duty of States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their migration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party, and therefore:

(a) Calls upon all States to respect the human rights and the inherent dignity of migrants and to put an end to arbitrary arrest and detention and, where necessary, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt, where applicable, alternative measures to detention;

(b) Urges all States to adopt effective measures to prevent and punish any form of illegal deprivation of liberty of migrants by individuals or groups;

(c) Notes with appreciation the measures adopted by some States to reduce detention periods in cases of undocumented migration in the application of national regulations and laws regarding irregular migration;

(d) Also notes with appreciation the successful implementation by some States of alternative measures to detention in cases of undocumented migration as a practice that deserves consideration by all States;

(e) Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, to train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants, inter alia, arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa, including their transit through national borders;

(f) Underlines the right of migrants to return to their country of citizenship, and recalls that States must ensure that their returning nationals are duly received;

(g) Reaffirms emphatically the duty of States parties to ensure full respect for and observance of the Vienna Convention on Consular Relations, in particular with regard to the right of all foreign nationals, regardless of their migration status, to communicate with a consular official of the sending State in

case of arrest, imprisonment, custody or detention, and the obligation of the receiving State to inform the foreign national without delay of his or her rights under the Convention;

(h) Requests all States, in conformity with national legislation and applicable international legal instruments to which they are party, to enforce labour law effectively, including by addressing violations of such law, with regard to migrant workers' labour relations and working conditions, inter alia, those related to their remuneration and conditions of health, safety at work and the right to freedom of association;

(i) Encourages all States to remove unlawful obstacles, where they exist, that may prevent the safe, transparent, unrestricted and expeditious transfer of remittances, earnings, assets and pensions of migrants to their country of origin or to any other countries, in conformity with applicable legislation and agreements, and to consider, as appropriate, measures to solve other problems that may impede such transfers;

(j) Recalls that the Universal Declaration of Human Rights recognizes that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her.

Exploitation

5. Emphasizes the importance of protecting persons in vulnerable situations, and in this regard:

(a) Expresses its concern about the increase in the activities of transnational and national organized crime entities and others who profit from crimes against migrants, especially women and children, without regard for dangerous and inhumane conditions and in flagrant violation of national laws and international law and contrary to international standards;

(b) Also expresses its concern about the high level of impunity enjoyed by traffickers and their accomplices as well as other members of organized crime entities and, in this context, the denial of rights and justice to migrants who have suffered from abuse;

(c) Welcomes immigration programmes, adopted by some countries, that allow migrants to integrate fully into the host countries, facilitate family reunification and promote a harmonious, tolerant and respectful environment, and encourages States to consider the possibility of adopting these types of programmes;

(d) Calls upon States that have not already done so to provide for the protection of the human rights of women migrant workers, to promote fair labour conditions and to ensure that all women, including care workers, are legally protected against violence and exploitation;

(e) Encourages States to implement gender-sensitive policies and programmes for women migrant workers, to provide safe and legal channels that recognize the skills and education of women migrant workers and to facilitate their productive employment, decent work and integration into the labour force, including in the fields of education and science and technology;

(f) Encourages all States to develop international migration policies and programmes that include a gender perspective, in order to adopt the measures necessary to better protect women and girls against dangers and abuse during migration;

(g) Calls upon States to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, ensuring that the best interests of the child are a primary consideration in their policies of integration, return and family reunification;

(h) Encourages all States to prevent and eliminate discriminatory policies and legislation, at all levels of government, that deny migrant children access to education;

(i) Encourages States, while taking into account the best interests of the child as a primary consideration, to foster the successful integration of migrant children into the education system and the removal of barriers to their education in host countries and countries of origin;

(j) Urges States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations, including persons with disabilities, and take into account, in conformity with their international obligations and commitments, the principle of the best interests of the child and family reunification;

(k) Urges States parties to the United Nations Convention against Transnational Organized Crime and supplementing protocols thereto, namely, the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, to implement them fully, and calls upon States that have not done so to consider ratifying or acceding to them as a matter of priority;

7. Encourages States to protect victims of national and transnational organized crime, including kidnapping, trafficking and, in some instances, smuggling, through, where applicable, the implementation of programmes and policies that guarantee protection and access to medical, psychosocial and legal assistance;

8. Encourages Member States that have not already done so to enact national legislation and to take further effective measures to combat trafficking in persons and smuggling of migrants, recognizing that these crimes may endanger the lives of migrants or subject them to harm, servitude or exploitation, which may also include debt bondage, slavery, sexual exploitation or forced labour, and also encourages Member States to strengthen international cooperation to combat such trafficking and smuggling;

Children

6. Takes note with appreciation of the study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration and invites States to take into account the conclusions and recommendations of the study when designing and implementing their migration policies;

Resolution of the Human Rights Council on the Protection of Migrants

General Assembly resolution: 23/20
Adopted: 26 June 2013
(Article: 3, 4)

Non-Discrimination Principle

Reaffirming the Universal Declaration of Human Rights, which proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Right to Freedom

Recalling also previous resolutions of the General Assembly, the Commission on Human Rights and the Human Rights Council on the protection of the human rights of migrants, and the work of various special mechanisms of the Council that have reported on the situation of human rights and fundamental freedoms of migrants,

3. Expresses its concern at legislation and measures adopted by some States that may restrict the human rights and fundamental freedoms of migrants, and reaffirms that, when exercising their sovereign right to enact and implement migration and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of all migrants;

4. Calls upon States and regional and international organizations with competence in the field of regulating migration and implementing migration policies:

(a) To effectively promote and protect the human rights and fundamental freedoms of all migrants, including, in particular, the right to life, liberty and security of person, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international human rights instruments to which they are party;

Deprivation of Freedom

4. Calls upon States and regional and international organizations with competence in the field of regulating migration and implementing migration policies:

(c) To prosecute, in conformity with applicable law, acts of violation of the human rights of migrants and their families, such as arbitrary detention, torture and violations of the right to life, including extrajudicial executions, during their transit from their country of origin to the country of destination and vice versa, including their transit through national borders;

(h) To respect the human rights and inherent dignity of migrants, to put an end to arbitrary arrest and detention and, in order to avoid excessive

detention of irregular migrants, to review, where necessary, detention periods and to use alternatives to detention, where appropriate;

New York Declaration for Refugees and Migrants

General Assembly resolution: 71/1
Adopted: 19 September 2016

(Article: 5, 13, 14, 22, 23, 26, 29, 31, 32, 33, 35, 41, 42, 51, 56, 59, 60)

Non-Discrimination Principle

5. We reaffirm the purposes and principles of the Charter of the United Nations. We reaffirm also the Universal Declaration of Human Rights² and recall the core international human rights treaties. We reaffirm and will fully protect the human rights of all refugees and migrants, regardless of status; all are rights holders. Our response will demonstrate full respect for international law and international human rights law and, where applicable, international refugee law and international humanitarian law.

13. All human beings are born free and equal in dignity and rights. Everyone has the right to recognition everywhere as a person before the law. We recall that our obligations under international law prohibit discrimination of any kind on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Yet in many parts of the world we are witnessing, with great concern, increasingly xenophobic and racist responses to refugees and migrants.

14. We strongly condemn acts and manifestations of racism, racial discrimination, xenophobia and related intolerance against refugees and migrants, and the stereotypes often applied to them, including on the basis of religion or belief. Diversity enriches every society and contributes to social cohesion. Demonizing refugees or migrants offends profoundly against the values of dignity and equality for every human being, to which we have committed ourselves. Gathered today at the United Nations, the birthplace and custodian of these universal values, we deplore all manifestations of xenophobia, racial discrimination and intolerance. We will take a range of steps to counter such attitudes and behaviour, in particular with regard to hate crimes, hate speech and racial violence. We welcome the global campaign proposed by the Secretary-General to counter xenophobia and we will implement it in cooperation with the United Nations and all relevant stakeholders, in accordance with international law. The campaign will emphasize, inter alia, direct personal contact between host communities and refugees and migrants and will highlight the positive contributions made by the latter, as well as our common humanity.

Commitments for migrants

41. We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times. We will cooperate closely to facilitate and ensure safe, orderly and regular

migration, including return and readmission, taking into account national legislation

Right of Freedom

22. Underlining the importance of a comprehensive approach to the issues involved, we will ensure a people-centred, sensitive, humane, dignified, gender responsive and prompt reception for all persons arriving in our countries, and particularly those in large movements, whether refugees or migrants. We will also ensure full respect and protection for their human rights and fundamental freedoms.

23. We recognize and will address, in accordance with our obligations under international law, the special needs of all people in vulnerable situations who are travelling within large movements of refugees and migrants, including women at risk, children, especially those who are unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, victims of human trafficking, and victims of exploitation and abuse in the context of the smuggling of migrants.

26. We will continue to protect the human rights and fundamental freedoms of all persons, in transit and after arrival. We stress the importance of addressing the immediate needs of persons who have been exposed to physical or psychological abuse while in transit upon their arrival, without discrimination and without regard to legal or migratory status or means of transportation. For this purpose, we will consider appropriate support to strengthen, at their request, capacity-building for countries that receive large movements of refugees and migrants.

Commitments for migrants

42. We commit to safeguarding the rights of, protecting the interests of and assisting our migrant communities abroad, including through consular protection, assistance and cooperation, in accordance with relevant international law. We reaffirm that everyone has the right to leave any country, including his or her own, and to return to his or her country. We recall at the same time that each State has a sovereign right to determine whom to admit to its territory, subject to that State's international obligations. We recall also that States must readmit their returning nationals and ensure that they are duly received without undue delay, following confirmation of their nationalities in accordance with national legislation. We will take measures to inform migrants about the various processes relating to their arrival and stay in countries of transit, destination and return.

51. We take note of the work done by the Global Migration Group to develop principles and practical guidance on the protection of the human rights of migrants in vulnerable situations.

Exploitation

29. We recognize and will take steps to address the particular vulnerabilities of women and children during the journey from country of origin to country of arrival. This includes their potential exposure to discrimination and exploitation, as well as to sexual, physical and psychological abuse, violence, human trafficking and contemporary forms of slavery.

31. We will ensure that our responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls and fully respect and protect the human rights of women and girls. We will combat sexual and gender-based violence to the greatest extent possible. We will provide access to sexual and reproductive health-care services. We will tackle the multiple and intersecting forms of discrimination against refugee and migrant women and girls. At the same time, recognizing the significant contribution and leadership of women in refugee and migrant communities, we will work to ensure their full, equal and meaningful participation in the development of local solutions and opportunities. We will take into consideration the different needs, vulnerabilities and capacities of women, girls, boys and men.

35. We recognize that refugees and migrants in large movements are at greater risk of being trafficked and of being subjected to forced labour. We will, with full respect for our obligations under international law, vigorously combat human trafficking and migrant smuggling with a view to their elimination, including through targeted measures to identify victims of human trafficking or those at risk of trafficking. We will provide support for the victims of human trafficking. We will work to prevent human trafficking among those affected by displacement.

Commitments for migrants

60. We recognize the need to address the special situation and vulnerability of migrant women and girls by, inter alia, incorporating a gender perspective into migration policies and strengthening national laws, institutions and programmes to combat gender-based violence, including trafficking in persons and discrimination against women and girls.

Children

32. We will protect the human rights and fundamental freedoms of all refugee and migrant children, regardless of their status, and giving primary consideration at all times to the best interests of the child. This will apply particularly to unaccompanied children and those separated from their families; we will refer their care to the relevant national child protection authorities and other relevant authorities. We will comply with our obligations under the Convention on the Rights of the Child. We will work to provide for basic health, education and psychosocial development and for the registration of all births on our territories. We are determined to ensure that all children are receiving education within a few months of arrival, and we will prioritize budgetary provision to facilitate this, including support for host countries as required. We will strive to provide refugee

and migrant children with a nurturing environment for the full realization of their rights and capabilities.

33. Reaffirming 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, we will consider reviewing policies that criminalize cross border movements. We will also pursue alternatives to detention while these assessments are under way. Furthermore, recognizing that detention for the purposes of determining migration status is seldom, if ever, in the best interest of the child, we will use it only as a measure of last resort, in the least restrictive setting, for the shortest possible period of time, under conditions that respect their human rights and in a manner that takes into account, as a primary consideration, the best interest of the child, and we will work towards the ending of this practice.

Commitments for migrants

56. We affirm that children should not be criminalized or subject to punitive measures because of their migration status or that of their parents.

59. We reaffirm our commitment to protect the human rights of migrant children, given their vulnerability, particularly unaccompanied migrant children, and to provide access to basic health, education and psychosocial services, ensuring that the best interests of the child is a primary consideration in all relevant policies.

ANNEX 1 - Comprehensive refugee response framework

(Article 5)

5. At the outset of a large movement of refugees, receiving States, bearing in mind their national capacities and international legal obligations, in cooperation, as appropriate, with the Office of the United Nations High Commissioner for Refugees, international organizations and other partners and with the support of other States as requested, in conformity with international obligations, would:

(a) Ensure, to the extent possible, that measures are in place to identify persons in need of international protection as refugees, provide for adequate, safe and dignified reception conditions, with a particular emphasis on persons with specific needs, victims of human trafficking, child protection, family unity, and prevention of and response to sexual and gender-based violence, and support the critical contribution of receiving communities and societies in this regard;

(b) Take account of the rights, specific needs, contributions and voices of women and girl refugees;

(c) Assess and meet the essential needs of refugees, including by providing access to adequate safe drinking water, sanitation, food, nutrition, shelter, psychosocial support and health care, including sexual and reproductive health, and providing assistance to host countries and communities in this regard, as required;

(d) Register individually and document those seeking protection as refugees, including in the first country where they seek asylum, as quickly as possible upon their arrival. To achieve this, assistance may be needed, in areas

such as biometric technology and other technical and financial support, to be coordinated by the Office of the United Nations High Commissioner for Refugees with relevant actors and partners, where necessary;

(e) Use the registration process to identify specific assistance needs and protection arrangements, where possible, including but not exclusively for refugees with special protection concerns, such as women at risk, children, especially unaccompanied children and children separated from their families, child-headed and single-parent households, victims of trafficking, victims of trauma and survivors of sexual violence, as well as refugees with disabilities and older persons;

(f) Work to ensure the immediate birth registration for all refugee children born on their territory and provide adequate assistance at the earliest opportunity with obtaining other necessary documents, as appropriate, relating to civil status, such as marriage, divorce and death certificates;

(g) Put in place measures, with appropriate legal safeguards, which uphold refugees' human rights, with a view to ensuring the security of refugees, as well as measures to respond to host countries' legitimate security concerns;

(h) Take measures to maintain the civilian and humanitarian nature of refugee camps and settlements;

(i) Take steps to ensure the credibility of asylum systems, including through collaboration among the countries of origin, transit and destination and to facilitate the return and readmission of those who do not qualify for refugee status.

Report of the Nations High Commissioner for Refugees *Part II - Global Compact on Refugees*

General Assembly resolution: 73/12
Adopted: 2 August 2018
(Article: 57, 74, 75, 76)

Prohibition against Forced Labour

74. Women and girls may experience particular gender-related barriers that call for an adaptation of responses in the context of large refugee situations. In line with relevant international instruments and national arrangements, States and relevant stakeholders will seek to adopt and implement policies and programmes to empower women and girls in refugee and host communities, and to promote full enjoyment of their human rights, as well as equality of access to services and opportunities — while also taking into account the particular needs and situation of men and boys.

75. This will include contributions to promote the meaningful participation and leadership of women and girls, and to support the institutional capacity and participation of national and community-based women's organizations, as well as all relevant government ministries. Resources and expertise to strengthen access to justice and the security and safety of women and girls, including to prevent and respond to all forms of violence, including sexual exploitation and abuse, sexual- and gender-based violence and harmful practices, are called for; as is support to

facilitate access to age-, disability- and gender responsive social and health care services, including through recruitment and deployment of female health workers. Measures to strengthen the agency of women and girls, to promote women's economic empowerment and to support access by women and girls to education (including secondary and tertiary education) will be fostered.

Children

76. Children make up over half of the world's refugees. In support of host countries, States and relevant stakeholders will contribute resources and expertise towards policies and programmes that take into account the specific vulnerabilities and protection needs of girls and boys, children with disabilities, adolescents, unaccompanied and separated children, survivors of sexual and gender-based violence, sexual exploitation and abuse, and harmful practices, and other children at risk. Depending on the context, this will include resources and expertise to support integrated and age-sensitive services for refugee and host community girls and boys, including to address mental health and psychosocial needs, as well as investment in national child protection systems and cross-border cooperation and regional partnerships to provide a continuum of protection, care and services for at risk children. Capacity development for relevant authorities to undertake best interests determination and assessment to inform decisions that concern refugee children, as well as other child-sensitive procedures and family tracing, will be supported. UNHCR will work with States to enhance access by refugee boys and girls to resettlement and complementary pathways for admission

Global Compact for Safe, Orderly and Regular Migration

Adopted / Endorsed: 19 December 2018
(Article: 4, 15, 23, 25, 26, 31)

Non-Discrimination Principle

15. We agree that this Global Compact is based on a set of cross-cutting and interdependent guiding principles:

Human rights: The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle. We also reaffirm the commitment to eliminate all forms of discrimination, including racism, xenophobia and intolerance against migrants and their families.

Right to Freedom

4. Refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times. However, migrants and refugees are distinct groups governed by separate legal frameworks. Only refugees are entitled to the specific international protection as defined by international refugee law. This Global Compact refers to

migrants and presents a cooperative framework addressing migration in all its dimensions.

31. We commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services. We further commit to strengthen migrant inclusive service delivery systems, notwithstanding that nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law. To realize this commitment, we will draw from the following actions:

a) Enact laws and take measures to ensure that service delivery does not amount to discrimination against migrants on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other grounds irrespective of cases where differential provision of services based on migration status might apply

b) Ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery

Prohibition Against Forced Labour

25. We commit to intensify joint efforts to prevent and counter smuggling of migrants by strengthening capacities and international cooperation to prevent, investigate, prosecute and penalize the smuggling of migrants in order to end the impunity of smuggling networks. We further commit to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling, notwithstanding potential prosecution for other violations of national law. We also commit to identify smuggled migrants to protect their human rights, taking into consideration the special needs of women and children, and assisting in particular those migrants subject to smuggling under aggravating circumstances, in accordance with international law.

26. We commit to take legislative or other measures to prevent, combat and eradicate trafficking in persons in the context of international migration by strengthening capacities and international cooperation to investigate, prosecute and penalize trafficking in persons, discouraging demand that fosters exploitation leading to trafficking, and ending impunity of trafficking networks. We further commit to enhance the identification and protection of, and assistance to migrants who have become victims of trafficking, paying particular attention to women and children. To realize this commitment, we will draw from the following actions:

a) Promote, ratification, accession and implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (UNTOC)

b) Promote the implementation of the Global Plan of Action to Combat Trafficking in Persons and take into consideration relevant recommendations of the UNODC Toolkit to Combat Trafficking in Persons and

other relevant UNODC documents when developing and implementing national and regional policies and measures relating to trafficking in persons

c) Monitor irregular migration routes which may be exploited by human trafficking networks to recruit and victimize smuggled or irregular migrants, in order to strengthen cooperation at bilateral, regional and cross-regional levels on prevention, investigation, and prosecution of perpetrators, as well as on identification of, and protection and assistance to victims of trafficking in persons

Children

15. We agree that this Global Compact is based on a set of cross-cutting and interdependent guiding principles:

Child-sensitive: The Global Compact promotes existing international legal obligations in relation to the rights of the child, and upholds the principle of the best interests of the child at all times, as a primary consideration in all situations concerning children in the context of international migration, including unaccompanied and separated children.

23. We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements. To realize this commitment, we will draw from the following actions:

e) Account for migrant children in national child protection systems by establishing robust procedures for the protection of migrant children in relevant legislative, administrative and judicial proceedings and decisions, as well as in all migration policies and programmes that impact children, including consular protection policies and services, as well as cross-border 15 cooperation frameworks, in order to ensure the best interests of the child are appropriately integrated, consistently interpreted and applied in coordination and cooperation with child protection authorities

f) Protect unaccompanied and separated children at all stages of migration through the establishment of specialized procedures for their identification, referral, care and family reunification, and provide access to health care services, including mental health, education, legal assistance and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian, as essential means to address their particular vulnerabilities and discrimination, protect them from all forms of violence, and provide access to sustainable solutions that are in their best interests