Submission of Prof. Gerald L. Neuman for the CMW-CRC Joint Comment on the Human Rights of Children in the Context of International Migration

This submission is respectfully offered to the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and the Committee on the Rights of the Child by Gerald L. Neuman, a former member of the Human Rights Committee (2011-2014), and currently the J. Sinclair Armstrong Professor of International, Foreign, and Comparative Law at Harvard Law School, and Co-Director of its Human Rights Program. I served as Rapporteur on the Human Rights Committee’s General Comment No. 35 on article 9 of the International Covenant on Civil and Political Rights (ICCPR), and I submit the following observations in order to shed light on the positions taken by the Human Rights Committee in that General Comment with respect to the detention of children, in general and in the migration context. These observations are my personal interpretations and, of course, do not speak on behalf of the Human Rights Committee. I hope that these descriptions of the structure of General Comment No. 35 and some of the reasons that justify its content may be of use to the two Committees in their important joint project in relation to the two Conventions.

I begin by expressing agreement that the arbitrary detention of children in migration contexts is a severe and highly troubling phenomenon worldwide (including in my own country, the United States of America). Detention of children should be reduced to the minimum absolutely necessary, and to as short a duration as possible. However, whether it is possible to eliminate detention of children altogether in migration contexts may depend on the meaning attributed to the term “detention.” That is one of the main aspects of General Comment No. 35 that I plan to address here.

ICCPR article 9 guarantees the right to liberty and security of person, and forbids arbitrary arrest or detention. General Comment No. 35 explains that liberty of person concerns freedom from confinement of the body (para. 3), and that deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement within the meaning of article 12 of the ICCPR (para. 5). General Comment No. 35 defines “arrest” as any apprehension of a person that commences a deprivation of liberty, and defines “detention” as the deprivation of liberty that begins with the arrest (and continues in time from apprehension until release) (para. 13). Thus, every deprivation of liberty of person begins with an arrest and leads to a detention. These broad definitions ensure that any person who is deprived of liberty of person is protected by several safeguards contained in other provisions of article 9, such as notice of reasons for the arrest (article 9(2)), the right to take proceedings before a “court” (article 9(4)), and the right to compensation for unlawful or arbitrary detention (article 9(5)). (However, the right to notice of “charges” under article 9(2), and the rights under article 9(3), apply only in the context of criminal proceedings.)

It is against the background of these definitions that General Comment No. 35 addresses specific issues about detention, including detention in the context of migration, and detention of children. This General Comment was written with close attention to the Convention on the Rights of the Child and the General Comments of the Committee on the Rights of the Child. For example, paragraph 28 calls attention to the need to give notice of the reasons for any arrests both to the arrested children themselves and also directly to their parents, guardians or legal representatives; paragraph 38 emphasizes that in criminal proceedings, pretrial detention of juveniles should be avoided to the fullest extent possible. These are merely some examples of the discussion of children’s rights in General Comment No. 35.

*Detention of Children, in General*

Paragraph 62 of General Comment No. 35 discusses the interaction between article 9 and the requirement in ICCPR article 24(1) of measures of protection for children, also in light of the Convention on the Rights of the Child. It emphasizes that a child may be deprived of liberty of person -- i.e., detained -- only as a last resort and for the shortest appropriate period of time. It recognizes, however, that placement in institutional care can amount to deprivation of liberty, and that under some circumstances such deprivations of liberty are in the best interests of the child concerned. In other words, the definition of “detention” includes some forms of deprivation of liberty that may actually serve as protection for the child in the particular situation; they should nonetheless be recognized as detention, and must be accompanied by the safeguards provided by article 9, some of which are stricter in the case of children. Moreover, a judicial remedy that relieves a young child from unlawful detention cannot operate simply by release into the child’s own custody, as it normally does for an adult. The government cannot merely open the door of the detention facility and send a young child onto the street.

The Human Rights Committee has understood, however, that the best interests of the child are not the exclusive consideration in all governmental decisions regarding children. Sometimes the dangerous conduct of a person below the age of 18 requires a governmental response justified by the protection of the rights of others, and that response may include a temporary detention or in some cases even a longer detention. Scrupulous attention to the vulnerability of juveniles is required in proceedings leading to detention and in the conditions of detention, and General Comment No. 35, as well as other General Comments of the Human Rights Committee, addresses such issues. But deprivation of the liberty of a juvenile for protection of others may be necessary as a last resort, and is not absolutely prohibited by article 9 ICCPR.

*Detention in Migration Contexts, in Particular*

Paragraph 18 of General Comment No. 35 focuses on certain issues regarding detention in the context of migration, and other aspects are dealt with specifically in other paragraphs (such as paragraphs 3, 5, 14, 40, 58, and 60), or are subsumed in more generalized propositions about detention and its consequences in other paragraphs. I will describe the overall substance of Paragraph 18 before turning to its relevance to the situation of migrant children. Paragraph 18 notes that detention in the course of migration control proceedings is not *per se* arbitrary, but that any instance of such detention must be justified as reasonable, necessary and proportionate, and must be reassessed under that standard subsequently if it continues. These requirements represent an application to migration contexts of the understanding of arbitrary detention expressed in paragraph 12 of the General Comment.

Paragraph 18 observes, however, as the Human Rights Committee’s past Views confirm, that when state officials encounter an asylum seeker who has unlawfully entered the state’s territory, a *brief* initial detention is justified in order to document the person’s entry, to record the person’s claims, and to determine the person’s identity. General Comment No. 35 recognizes that brief deprivation of liberty as a form of detention, subject to the guarantees of the ICCPR that apply during periods of detention.

Paragraph 18 goes on to say that detention beyond that brief initial period would be arbitrary in the absence of an individualized showing of additional reasons sufficient to justify continued detention, such as a likelihood of that person’s absconding or committing crimes against other others or performing acts against national security, taking into account means of achieving the same ends that would be less invasive of personal liberty. Where such an individualized showing can be made about the particular person, not based on a mandatory policy of detaining some broad category of migrants, continued detention during the migration control proceedings can be justified, subject to periodic re-evaluation and the availability of review in court of lawfulness under article 9(4). The decision must also take into account the effect of detention on the physical and mental health of the individual. If the proceedings subsequently lead to an expulsion decision but the state is unable to carry out the decision for reasons such as statelessness, the individual cannot be kept indefinitely in migration detention.

Any detention in the context of migration must satisfy other requirements, such as those contained in article 10 of the ICCPR, and General Comment No. 35 points out that the conditions of detention for persons whose detention is justified by migration control proceedings must be appropriate to the justification of the detention, and must in particular be non-punitive.

The final sentence of paragraph 18 specifically addresses the detention of migrant children. It says, “Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.” Thus, paragraph 18 does not rule out detention of children in migration contexts altogether. This interpretation of the ICCPR may be explained by several factors. First, a brief initial detention may be as necessary in the case of unaccompanied minors as in the case of adults, and the General Comment recognizes and regulates it as a form of detention. Second, because young children cannot simply be released to look after themselves, the initial deprivation of liberty also serves the purpose of protecting unaccompanied children during the short period needed to make less restrictive arrangements for their supervision and protection. Third, at the conclusion of migration control proceedings it may be necessary for the child to be physically returned to the child’s home country in the custody of officials of the returning state, and the General Comment recognizes and regulates such custody as a form of detention (see paras. 5, 60).

Fourth, not all migrant children are young children, and some children on the verge of adulthood may pose dangers to others, just as adults may. The kinds of reasons that may justify as necessary and proportionate the continuation of detention for an adult migrant on an individualized basis may sometimes apply in the case of an unaccompanied minor, as a last resort and fully taking into account the minor’s best interests. The conditions of any deprivation of liberty necessitated by the circumstances should be tailored to the needs of minors, even if some form detention is unavoidable. The threat posed by a juvenile should not be exaggerated because the juvenile is a migrant, but states should not be precluded from protecting their residents – including other children – from objective dangers that arise in exceptional individual cases. Finally, there may be circumstances in which a particular minor successfully refuses to cooperate with less restrictive efforts to arrange accommodation and supervision, and placement for a limited time in a closed setting may become necessary.[[1]](#footnote-1)

To sum up, there are reasons why an absolute rule against ever detaining children in the context of migration would not be a defensible interpretation of the ICCPR, particularly if “detention” is defined broadly, as it should be. The Human Rights Committee declined to adopt such an absolute rule in its recent General Comment No. 35. The Committees may wish to take the reasons above into consideration in the drafting of their joint General Comment on the Human Rights of Children in the Context of International Migration.

Respectfully submitted,

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17 February 2016

1. Compare the Human Rights Committee’s decision in communication No. 794/1998, *Jalloh v. Netherlands*, Views adopted 23 March 2002, para. 8.2. [↑](#footnote-ref-1)