

Joint Observations regarding Draft General Comment No. 5 (2020) on migrants’ right to liberty and freedom from arbitrary detention

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A. Introduction

1. The Association for the Prevention of Torture (APT), DIGNITY – Danish Institute Against Torture ('DIGNITY') and the Redress Trust (REDRESS) provide these comments to the Committee on the draft General Comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention (CMW/C/32/R.2), hereafter referred to as the 'draft General Comment'.
2. We welcome the Committee's decision to draft a General Comment on migrant workers and their families' rights to liberty and freedom from arbitrary detention, particularly considering the growing global practice whereby states criminalise migrants solely as a result of their immigration status, and detain them arbitrarily, typically in substandard facilities, inadequate conditions, and without access to judicial guarantees and procedural safeguards.
3. We note that in this joint submission we have proposed textual changes under the heading 'Recommended textual change/addition' in each section and sub-section. Proposed additional text is formatted in bold. Proposed deletions are identified with a 'strikethrough'.

B. Comments on specific sections and paragraphs of the draft General Comment

(i) Section II. Regulatory framework on protection of the right to liberty of migrant workers and members of their families

A. Right to liberty and security in the Convention (articles 16 and 17)

4. We recommend that **paragraph 10** is strengthened to reflect that the right to compensation is not only exercised in relation to unlawful or arbitrary detention but – in accordance with other international human rights instruments – should also be an available remedy where a detainee suffers other human rights violations, for example torture or other ill-treatment, the violation of procedural rights, etc. In addition, other forms of reparation should be available where human rights violations have been committed. In line with this recommendation, we also suggest strengthening **paragraph 82**.
5. We recommend that **paragraph 11** is strengthened to reflect that migrants who are detained, not having been charged with or convicted of a criminal offence, should not be subject to prison-like conditions and environments (such as prison uniforms, highly restricted movement, lack of outdoor recreation, and lack of contact visitation).¹

Recommended textual changes to paragraphs 10 and 11:

10. ...and the right to compensation **and reparation** in the event of unlawful arrest or detention **or other human rights violations that occurred during the detention**.

11. Article 17 of the Convention also recognizes the right of all migrant workers and members of their families who have been deprived of their liberty to be treated with humanity

¹ See e.g. UN Human Rights Committee, General comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, §18; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council 37th session (2018), A/HRC/37/50.

and with respect for the inherent dignity of the human person and for their cultural identity. States parties should therefore guarantee adequate conditions in detention centres, taking into consideration the individual circumstances and necessities of each detainee; **and the fact that migrants in administrative detention, not having been charged with or convicted of a criminal offence, should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movement, lack of outdoor recreation, and lack of contact visitation. ...**

E. Prohibition of arbitrary detention

6. We recommend that **paragraphs 20 and 21** are strengthened to reflect the standard in other international human rights treaties that any decision to detain must be based on specific reasons pertaining to the individual. The relevant factors should be considered on a case-by-case basis and not be based on a mandatory rule for a broad category of migrants.² In addition, it is recommended that the reference to ‘freedom’ in paragraph 20 be replaced with ‘liberty,’ as it reflects more appropriate terminology in line with the ‘right to personal liberty’. It is recommended that all references to ‘freedom’ in this context are changed to ‘**liberty**’ throughout the draft General Comment (**see paragraphs 20, 26, 44, 55 and 58**).
7. Further, **paragraph 29** should be amended to clarify the process expected of the authorities when assessing proportionality.

Recommended textual changes to paragraphs 20, 21 and 29:

20. The Committee considers immigration detention to be an undesirable measure. There should always be a presumption against detention and therefore in favour of ~~freedom~~**liberty**. Hence, deprivation of liberty in the immigration context should be an exceptional measure of last resort. The relevant authorities must carry out a context-specific **and individual** assessment of the situation, **basin** a decision to detain on reasons specific to the individual and ensuring that the period of detention is as short as possible.

21. In addition, the Committee considers that the prohibition of arbitrary detention also extends to the use of detention as a deterrent or as a general migration management tool to contain immigration. Where detention becomes a routine measure of law enforcement at the border it may be arbitrary per se, to the extent that it is not an exceptional measure of last resort and is not based on an ~~individualized and significant risk~~ assessment **of the individual circumstances of the case**.

29. If deprivation of liberty meets the requirements of legitimate objective, legality, **and necessity** ~~and proportionality~~, it is the duty of the authorities to carry out an **proportionality** assessment by contrasting the gravity of the measure implemented with the importance of satisfying the established legitimate purpose. According to the Working Group on Arbitrary Detention, such an assessment should take into account the possible effects of detention on the physical and mental health of the person, as well as the particular needs of migrant workers and members of their families. **According to the Special Rapporteur on the Human Rights of Migrants, the obligation to always consider alternatives to detention (non-custodial**

² See e.g. UN Human Rights Committee, General comment No. 35 on Article 9 (Liberty and security of person), CCPR/C/GC/35, §18.

measures) before resorting to detention should be established by law, and detailed guidelines and proper training should be developed for judges and other State officials, such as police, border and immigration officers, in order to ensure a systematic application of non-custodial measures instead of detention. (Suggested footnote: Report of the Special Rapporteur on the human rights of migrants, François Crépeau to the UN Human Rights Council (20th session), A/HRC/20/24, paragraph 53)

(ii) **Section III. General measures for the implementation of the provisions of the Convention concerning the protection of the right to liberty**

A. Places of detention

8. **Paragraphs 30 to 32** cover the issue of States' extraterritorial responsibilities for places of detention. We welcome this focus, bearing in mind the growing trend of States to use 'offshore processing centres' and other similar measures as a way to shift the responsibility for protecting the human rights of migrants to other states. It is suggested that these paragraphs are preceded by a sub-heading entitled '**Extraterritorial responsibility**'.
9. **Paragraph 32** lists some elements for States to take into account in order to fulfil their obligations under international refugee law. At (b) we suggest replacing the term 'individualized assessment' with the term '**individual** assessment'. The term 'individual' has a well-established use and meaning in refugee law, while the term 'individualized' could be interpreted in bad faith as setting a lower threshold.
10. In addition, we consider that this section of the draft General Comment could be strengthened further by adding a paragraph that addresses 'places of detention' that are not suitable for migrants. Firstly, it should be emphasized that this recommendation is made bearing in mind that detention solely on the basis of immigration status is an unacceptable measure and that long-term detention facilities for migrants should not be contemplated in the first place. Where the detention of a migrant is strictly essential to achieve the established legitimate end then migrants should not be placed in detention facilities that are carceral in nature. This infers that the material conditions and regime within places of detention used for migrants should not reflect those used for individuals convicted of a criminal offence, but should instead have as few restrictions, in particular to freedom of movement, as possible. Secondly, it is considered that this paragraph (or a separate paragraph) should refer to 'holding facilities' which are often used to detain migrants, for example at points of entry, airport transit zones and police stations. It should be emphasized that these facilities are inadequate for extended periods of detention and therefore should only be used for a minimum period, e.g. less than 24 hours. It is suggested that these additional paragraphs could be grouped under a sub-heading entitled 'Avoiding the use of unsuitable premises' or similar.

Recommended textual changes and additions

*(Insert subheading before paragraph 30 entitled '**Extraterritorial responsibility**'; insert new subheading and paragraph, after paragraph 32)*

'Avoiding the use of unsuitable premises'

32.bis The Committee reaffirms the importance that any necessary detention of migrant workers and their families for immigration-related reasons—for appropriately justified reasons, strictly limited in time, and when no other least intrusive and restrictive

measures can be applied in the individual case in question—must never be punitive in nature and should take place in appropriate, non-prison-like, sanitary, and otherwise adequate conditions. In particular, immigration detention facilities should restrict as little as possible migrants’ freedom of movement. The Committee further notes that non-custodial measures themselves may be so restrictive, either by themselves or in combination with other measures, that they amount to alternative forms of detention, instead of alternatives to detention. When considering whether the measures applied amount to detention, the cumulative impact of the restrictions as well as the degree and intensity of each of them should therefore also be assessed.

The Committee considers that ‘holding facilities’ such as at points of entry, airport transit zones and police stations, are inadequate for extended periods of detention. Therefore, where it is necessary for migrant workers and their families to be detained in ‘holding facilities’ this should be on a temporary basis and for no longer than 24 hours before an alternative to detention, or an adequate immigration detention facility is found.

B. Personnel carrying out detentions

11. We propose this section of the draft General Comment is titled ‘**Detention facility personnel**’ instead of the current title. We also consider it important that this section (**paragraphs 33 and 34**) emphasizes that personnel working in places of immigration detention should not be using ‘law enforcement equipment’ e.g. batons, handcuffs, pepper spray, etc. in the everyday administration and management of the detention facilities. The use of this equipment in places of immigration detention is more likely to lead to higher incidences of torture and other forms of ill-treatment, as well as a breakdown in trust between personnel and detainees.

(iii) **Section IV. Fundamental principles of the Convention regarding the right to liberty of migrant workers and members of their families**

E. Principle of non-detention of persons in vulnerable situations

12. We consider that the section relating to non-detention of persons in vulnerable situations (**paragraphs 52 and 53**) could be strengthened by including **ethnic minorities** who are not mentioned. In addition, **paragraph 53** which refers to the threshold for reaching torture or other ill-treatment in relation to migrants in vulnerable situations could be expanded. In addition, it is recommended that the Committee refers to the importance that mechanisms are in place to identify vulnerable persons in detention settings so that appropriate care can be afforded to them or where possible that alternative non-detention measures are considered. Finally, in light of the particular vulnerabilities that detainees face due to potential infectious disease outbreaks, such as Covid-19, it is recommended that this section refers to the need for States to also consider the public health situation in particular in relation to such outbreaks, for example Covid-19, when deciding whether to detain a vulnerable person. The proposed wording below reflects these suggested amendments.

Recommended textual changes to paragraphs 52 and 53

52. ...That includes pregnant and breastfeeding women, older persons, persons with disabilities, survivors of torture or trauma, persons who are victims of crimes such as trafficking, migrants with special physical or mental health needs, lesbian, gay, bisexual, transgender and intersex persons, **members of ethnic minorities**, refugees, asylum seekers and stateless persons.

53. The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has established that the threshold for ill-treatment **or even torture** can be reached ~~very quickly a very low one, if not immediately,~~ for migrants in vulnerable situations. **Therefore, the relevant threshold for torture or other ill-treatment may be met where factors such as unjustified detention, delayed access to procedural rights or physical discomfort occur cumulatively and/or for a prolonged or indeterminate length of time.**

Recommended textual addition after paragraph 53

53.bis Given the multiple and intersecting levels of vulnerability that can be experienced by migrants, the Committee considers that States should take measures to ensure that specific screening procedures are in place, aimed at identifying migrants in vulnerable situations, including survivors of torture, trauma, sexual and gender-based violence, trafficking, migrants with physical or psychosocial disabilities, or who are at risk of self-harm or suicide, so that appropriate care can be provided. In addition, where a person is assessed to be in a vulnerable situation, alternative non-custodial measures should always be applied – detention of those in situations of vulnerability should never be permitted. Especially in the context of public health and other humanitarian emergencies, circumstances that may lead to increased vulnerability due to overcrowded facilities, old age or underlying health conditions should be given due consideration in assessing the proportionality of such alternative non-custodial measures.

(iv) **Section V. Legal obligations of States parties to the Convention to protect the right to liberty of migrant workers and members of their families**

D. Judicial guarantees and access to justice (articles 16, 17 and 18 of the Convention)

13. We recommend that **paragraph 66** is strengthened to reflect international standards on the right to receive effective information on one's rights. Principle 13 of the 'UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment' (A/43/173, 1988) provides clear language on the obligation to inform someone of their right from the outset of the deprivation of liberty, and to ensure that the information is communicated effectively, and understood. We note that the Convention mentions this right to receive information on one's right in the context of the right to consular assistance in art. 16(7)(c).

Recommended textual addition to paragraph 66

66. The Committee recalls that migrants may face multiple obstacles to accessing justice, such as language barriers, lack of knowledge about applicable laws and lack of support networks. Therefore, in order to ensure that migrants enjoy the right of access to justice and due process on an equal footing with others, States should adopt procedural or compensatory measures that help reduce or eliminate obstacles and shortcomings that prevent or hinder the effective defence of migrants' interests. The Committee recommends that States parties take all necessary measures to ensure that migrant workers and members of their families who are deprived of their liberty have access to justice in transit and destination States, and to information on their rights as migrants before, during and after their entry and stay in transit and destination countries. **States should ensure that any migrant worker and member of their family who are deprived of liberty receive information and effective explanation of their rights and how to avail themselves of such rights at the moment of arrest and at the commencement of the deprivation of liberty, or promptly thereafter. Authorities responsible for arrest and**

detention should provide such information and explanation orally and in writing, in a format and language adapted to the migrant workers and their family members.

E. Judicial guarantees

Right to be informed of the reasons for detention (article 16(5) of the Convention)

14. In light of our comments above, we also recommend that **paragraph 71** is strengthened to reflect the importance that the reasons for detention are given in writing. In addition, a decision to detain must take into account the effects of detention on the physical and mental health of the individual, both at the outset of the detention and when detention is periodically reviewed.³ We propose some amendments to the wording of paragraph 71.

Recommended textual changes to paragraph 71

Right to be informed **in writing** of the reasons for detention (article 16 (5) of the Convention)

71. The right to information is essential for the exercise of other rights, such as access to justice. The authorities must inform the migrant worker about the reasons for **his/her** detention **in writing** ~~as soon as possible~~ **promptly at the outset of detention** and, ~~as far as possible,~~ in a language that the person understands, ~~and~~ taking into consideration factors such as age, disability and educational level to adopt understandable language. **The Committee considers that the initial decision to detain and any subsequent decision to extend detention should fully consider the effects of detention on the physical and mental health of the individual.**

Free legal representation and interpretation assistance

15. We consider that this section (**paragraphs 79 and 80**) should be restructured into two separate sections that address the ‘**right to access a lawyer**’ and ‘**the right to interpretation**’. In addition, we recommend referring to the specific articles in the Convention where these rights are mentioned (as other sections do), i.e. to articles 16(7), 16(8) and 18(3).
16. We note that **paragraph 79** underlines the importance that migrant workers and their families have the right to legal advice and legal representation, including free of charge where they are unable to afford it. In addition to this, we consider that the paragraph should reflect additional aspects of the right to access a lawyer. Firstly, a detainee should be able to exercise his/her right to access a lawyer from the outset of the detention. Secondly, access to a lawyer includes the ability to talk privately with a lawyer of the person’s choice.⁴ We recommend that this paragraph is amended to include these points.
17. In relation to interpretation, we recommend that the Committee confirms that migrants in detention have the right to interpretation so as to be informed of all their rights in a language that they understand, including with reference to consular assistance, legal aid, right to appeal, compensation. In addition, the Committee should recommend that the use of fellow detainees as interpreters (including family members) should be avoided. We propose some wording below.

Recommended textual changes to paragraph 79

³ See, e.g. UN Human Rights Committee, General Comment no. 35 (Article 9), §18.

⁴ See, e.g. UN Human Rights Committee, General Comment no. 35 (Article 9), §§15, 34.

Right to access a lawyer (articles 16(7) and 18(3) of the Convention)

79. In the context of immigration detention, migrant workers and members of their families have the right to legal advice and legal representation, provided by the State free of charge for persons who cannot afford it, making the rights to due process and access to justice truly operational. **The right to access a lawyer must be exercisable from the outset of the migrant's detention. The right includes the ability to choose a lawyer and to meet or talk privately with a lawyer.** ~~In the case of migrant workers who cannot understand or speak the language used during the proceedings, States should make qualified interpreters available to them. Even for migrant workers who understand the language of the country in which they currently reside, it is important to have an interpreter and that the information is provided in understandable terms free of technicalities.~~

Recommended textual addition after paragraph 79

Right to an interpreter (articles 16(8) and 18(3) of the Convention)

79.bis In the case of migrant workers who cannot understand or speak the language used ~~during the proceedings~~, States should make qualified interpreters available to them, **including during legal proceedings and whenever they are informed of their rights.** Even for migrant workers who understand the language of the country in which they currently reside, it is important to have an interpreter and that the information is provided in understandable terms free of technicalities. **The Committee considers that the use of fellow detainees as interpreters (including family members) should be avoided.**

18. We consider that Section E could be further strengthened by referring to the right to notify family or a third person of the migrant's detention. This is an important safeguard reflected in other international standards⁵ that ensures that detention is not incommunicado or arbitrary, safeguards against torture and other ill-treatment and allows the migrant to maintain contact with the outside world. We suggest inserting an **additional paragraph in Section V. E. (Judicial guarantees)** to emphasise the importance of this safeguard. We propose the wording below.

Recommended textual addition after paragraph 80

Right to contact family members or a third party (article 17 of the Convention)

80.bis The Committee recognizes the importance that migrant workers and members of their families who are detained are able to notify family members or a third party of their detention promptly at the outset of their detention. In addition, they should be able to maintain regular contact with family members or third parties throughout the period of detention, subject to reasonable conditions and restrictions specified by law. In relation to this, the Committee recommends that migrants are allowed to keep their mobile phones, or have regular access to a public telephone during their detention. In addition, detained migrants should be able to receive regular visits from family members, NGO representatives or third parties of their choice.

⁵ See, e.g. the UN Human Rights Committee, General Comment no. 35 on Article 9, §§58-59; the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of 9 December 1988, Principle 19.

19. In line with our comments at paragraph 4 of this submission, we recommend that the Committee reflects in **paragraph 82** that compensation and other forms of reparation should not solely be available to migrants who have been arbitrarily or unlawfully arrested or detained but should also be available for other human rights violations that they may have suffered whilst in detention. For example, where a detainee is subjected to torture or ill-treatment or where procedural rights have been violated, they should also have an opportunity to seek compensation or other forms of reparation. We suggest wording below.

Recommended textual change to paragraph 82:

82. The Committee recalls that under article 16(9) of the Convention, migrant workers and members of their families who are victims of unlawful or arbitrary detention have an enforceable right to compensation. The nature of the compensation must be decided by the competent national authority. That does not preclude States from taking appropriate measures to ensure that expelled migrant workers have access to compensation through consular and diplomatic mechanisms, and taking other measures of redress, such as facilitating the return of the migrant. **The Committee also reaffirms that migrants who have been detained have an enforceable right to reparation (including compensation and rehabilitation) for other human rights violations that they experience whilst in detention, for example torture or ill-treatment or a violation of their procedural rights, as recognised in other international human rights treaties. (Suggested footnote: UN Convention against Torture, Article 14 and the UN Committee against Torture’s General Comment No. 3 (2012) on Article 14.)**

F. Prohibition of torture and cruel, inhuman or degrading treatment or punishment (article 10)

20. We welcome the reference in the draft General Comment at **paragraphs 83 and 84** to the multiple circumstances in which migrants are subjected to abuse that amounts to torture or ill-treatment – either on their migratory journey or while in detention. As has previously been reported, the prevalence of torture and ill-treatment amongst migrants – perpetrated by State or non-State actors - is escalating. Depending on the context, the confirmed prevalence of torture victims among irregular migrants can be as high as 76 per cent, with the overall average considered to be around 27 per cent.⁶ This illustrates the enormity of the problem and underlines why the detention of migrants should always be a measure of last resort, given the particular vulnerability of migrants and the evidence that torture and ill-treatment often occurs in detention settings.
21. We strongly recommend that the draft General Comment addresses three safeguards that are critical to prevent the occurrence of torture and other forms of ill-treatment in detention: notifying a third person, access to a lawyer and access to a medical examination. We have referred to the first two safeguards in comments to Section V.- E (Judicial guarantees) of the draft General Comment. In addition, we recommend that the draft General Comment refers in this section to access to a medical examination as an important safeguard to prevent torture and ill-treatment and to ensure that survivors of torture and trauma (and other vulnerable persons) are not detained.⁷ We propose amendments to **paragraph 83 and the insertion of a new paragraph** to address the safeguard of access to a medical examination, with suggested wording below.

⁶ See, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Human Rights Council 37th session (2018), A/HRC/37/50, §8.

⁷ See, e.g. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 24 to 26.

Recommended textual changes to paragraph 83

83. **The Committee notes that migrants are at an increased risk of human rights violations – perpetrated by State and non-State actors - both during their migratory journey and while in detention.** The Committee has received information about various acts of violence, particularly sexual violence, forced labour and trafficking for the purpose of sexual exploitation, perpetrated against migrants who have been deprived of their liberty. Women, girls and members of the LGBTI+ community are highly vulnerable to abuse in immigration detention centres, ~~–In some cases, the abuse~~ **which may** amounts to torture. The Committee notes that ~~migrants are at an increased risk of human rights violations while in detention, and States have~~ an obligation to prevent, investigate, prosecute and punish any acts of torture, cruel, inhuman or degrading treatment or punishment or other human rights violations by detention facility personnel, detainees or any other person. **The obligation to prevent torture and other forms of ill-treatment includes ensuring key safeguards are in place notably access to a lawyer, access to a third party and access to a medical examination, for all detainees, including migrant workers and their families.**

Recommended textual addition after paragraph 85

Access to a medical examination

85.bis In the context of detention, migrant workers and members of their families have the right to access a medical examination promptly, from the outset of their detention and free of charge. The purpose of the medical examination is three-fold: (i) to identify healthcare needs, both physical and psychological (ii) to identify any torture or ill-treatment, thereby facilitating its prevention, investigation and documentation; and (iii) to identify detainees suspected of having contagious diseases. The medical examination should be carried out in confidence by an independent medical professional to identify vulnerabilities and record in a timely fashion any injuries. A written medical record of the examination should include as a minimum: (i) a full account of objective medical findings based on a thorough examination; and (ii) an account of statements made by the person concerned which are relevant to the medical examination, including any allegations of ill-treatment made by him/her. Where allegations of torture or ill-treatment have been raised, the detainee should be referred immediately for proper medical-legal documentation.⁸ The results of the examination should be made available to the detainee and his/her lawyer.

State parties must ensure that where a medical examination indicates that torture or ill-treatment may have occurred, the information is immediately brought to the attention of the relevant investigative authority. Care must be taken to ensure this is confidential and that measures are in place to mitigate any risk of reprisals. In addition, alternatives to detention should be considered immediately and the migrant should no longer be detained.

I. Right to health (article 28 of the Convention)

22. We recommend that this section (**paragraphs 90 and 91**) reaffirms the importance of all detainees having access to a medical examination promptly and at the outset of their detention, in line with

⁸ Medical-legal documentation should be in accordance with the internationally recognised minimum standards in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Istanbul Protocol), Submitted to the United Nations High Commissioner for Human Rights, 9 August 1999.

international standards (see our previous comments in relation to the section on prohibition of torture and ill-treatment).⁹ The section should refer to the multiple objectives of the medical examination, including to identify physical and/or psychological healthcare needs of migrants, and identify any contagious diseases which would require immediate action. It is particularly important that these needs are identified at the outset of detention to prevent the worsening of any physical or mental health problems for the individual and in the case of contagious diseases to prevent transmission to other detainees and potential deaths.

Recommended textual changes to paragraphs 90 and 91

90. The information received by the Committee indicates that migrants who are deprived of their liberty often face serious difficulties in accessing health services and medical care in detention centres. Reproductive health care for women held in detention, particularly pregnant women, is reportedly often inadequate. **The Committee therefore considers that States should ensure that detained migrants have access to health services, including sexual and reproductive health services, and psychological care. In the absence of adequate conditions in detention centres, detained migrants in need of medical care should be transferred to adequate facilities.**

91. ~~The Committee therefore considers that States should ensure that detained migrants have access to health services, including sexual and reproductive health services, and psychological care. In the absence of adequate conditions in detention centres, detained migrants in need of medical care should be transferred to adequate facilities.~~ **The Committee considers that in line with other human rights standards relevant to persons in detention it is of paramount importance that all migrants in detention are given access to a medical examination promptly and from the outset of the detention. As referred to previously in this General Comment, the medical examination is intended in part to identify physical and/or psychological healthcare needs, any contagious diseases which would require immediate action, as well as any ill-treatment that migrants may have been subjected to prior to or during the detention. Thereafter medical care and treatment must be provided whenever necessary and free of charge.** Moreover, taking into account the psychological and physical effects of detention on migrants, States should assess detained migrants' physical and mental health on a regular basis **throughout the detention period. States must ensure that a medical examination is carried out by an independent and competent health professional in confidential surroundings. In addition,** States should take all necessary measures to ensure that all migrant workers and members of their families who are deprived of their liberty, regardless of their immigration status, enjoy – both in law and in practice – access to emergency medical care and basic health services under the same conditions as nationals of the State party.

K. Conditions of detention

23. We recommend that **paragraphs 98 and 99** are restructured to clarify firstly that migrants should not be detained in prison-like facilities, thereby reflecting the administrative nature of immigration detention. It

⁹ See, e.g. UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 24 to 26.

should also be emphasised in this section that immigration detention conditions should be adjusted to reflect the non-punitive nature of immigration detention and so should be materially different from conditions in prison facilities. Secondly, where migrants are detained in prison facilities, the relevant international standards for treatment in prisons (referred to in paragraph 99) must be upheld. It should be noted that there are no internationally recognised standards on immigration-related detention although regional organisations, such as the European Committee for the Prevention of Torture have agreed on regional standards specific to immigration detention.¹⁰ We propose that the Committee refers to certain elements of these standards in its General Comment. We suggest some wording for the Committee to consider below.

Recommended textual changes to paragraphs 98 and 99

98. **The Committee stresses that detention in the immigration context should never be governed by criminal law and migrants who are detained for an immigration-related reason and therefore neither accused nor convicted of a criminal offence should not be detained in carceral settings.** Immigration detention facilities must therefore meet the highest standards to ensure the dignity and well-being of detainees **and reflecting the non-punitive nature of their deprivation of liberty. Therefore, freedom of movement should be restricted as little as possible, there should be only limited restrictions in place and a varied regime of activities, including daily outdoor exercise. Immigration detention centres should provide accommodation, which is adequately furnished, clean and in a good state of repair, and which offers sufficient living space for the numbers involved. Immigration detention centres should have adequate lighting (including daylight), ventilation and heating. Detainees should be provided with a bed, ready access to toilet and washing facilities and sanitary supplies free of charge. They should be able to wear their own clothes and be provided with products and facilities to keep their clothing and accommodation clean. Access to food and drinking water must be provided and meals should take into account any religious requirements and dietary habits.**~~at least at a level required for detention facilities used in criminal contexts. However, the Committee stresses that detention in the immigration context should never be governed by criminal law.~~

99. **The Committee reiterates that migrants who have not been convicted of a criminal offence should not be detained in prison settings. However, where this happens, States must ensure that the treatment of migrants in prison facilities meets the international standards outlined *inter alia* in:** The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) **which** provide the standards to be met by **prisons** ~~detention centres~~, regardless of the budget available to States. It must be ensured that: (a) migrant workers are not detained with persons prosecuted for or convicted of crimes; (b) men and women remain separated unless in a family setting; (c) specific areas are designated for families with children; (d) sufficient space is provided and overcrowding is avoided at all costs; (e) facilities have open spaces for coexistence and recreation; (f) adequate cleaning and lighting is provided; and (g) other measures are taken that enable detainees to have an adequate standard of living. In addition to physical

¹⁰ See, e.g. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Factsheet on Immigration Detention, March 2017 (CPT/Inf(2017)3). Available at: <https://rm.coe.int/16806fbf12>

conditions, States should ensure that there are sufficient staff, both men and women, who must be adequately trained in human rights and gender issues and qualified to work with groups of persons who are in vulnerable situations.

L. Monitoring human rights in places of detention

24. We welcome the inclusion of monitoring and the recognition of its importance. We recommend that **paragraphs 102 and 103** are strengthened by including more information on the obligations of State Parties to the Optional Protocol to the Convention Against Torture and other cruel, inhuman or degrading treatment (OPCAT). More specifically, we recommend that the obligation to set up an independent national preventive mechanism (NPM) is added to **paragraph 102**. Moreover, we suggest a reformulation of **paragraph 103** to address the obligation of State Parties to the OPCAT not to deny access to NPMs, despite restrictive measures that may be implemented in detention. We propose the following wording for the Committee to consider.

Recommended textual changes to paragraphs 102 and 103

102. The Committee recalls that the objective of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as provided for in its preamble and article 1, is to establish a system of regular visits undertaken by independent international and national bodies to places where persons are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment, which is a non-derogable obligation under international law. State Parties to that Optional Protocol should ensure that ~~detention facilities are monitored by such bodies, particularly by their national mechanisms for the prevention of torture~~ **they set up, designate or maintain at the domestic level an independent national preventive mechanism (NPM) with adequate resources to regularly visit places of detention (OPCAT Art.3, 18).**

103. In a context such as the Covid-19 pandemic, **national preventive mechanisms cannot be completely denied access to places of detention, including immigration detention (SPT Advice to State Parties and NPMs relating to the Covid-19 pandemic – 7 April 2020).** States should take steps to ~~ensure that monitoring is carried out in a way that allows international and national bodies to carry out their mandate in detention facilities in line with the principle of “do no harm”, minimizing the need for physical contact, but offering opportunities for preventive involvement.~~ **facilitate the access of NPMs to detention facilities and to ensure, in collaboration with NPMs, that the monitoring activities are carried out in line with the principle of ‘do no harm’.**

Information about the organisations in this submission

APT – Association for the Prevention of Torture

The Association for the Prevention of Torture (APT) is an international non-governmental organisation, based in Geneva, Switzerland. For more than 40 years we have worked for societies without torture. We have contributed to the adoption and implementation of international treaties and established an innovative torture prevention ‘architecture’ that has been adopted in countries around the world. Over four decades, we have successfully advocated for the preventive approach at the global, regional and national levels; built strong partnerships to support prevention efforts; gathered evidence to demonstrate that prevention works to reduce torture and ill-treatment; and become widely recognised for our leadership and expertise.

www.apr.ch.

DIGNITY – Danish Institute Against Torture

DIGNITY - Danish Institute Against Torture is a Copenhagen-based NGO working in the areas of prevention of torture and ill-treatment, supporting survivors of torture and ill-treatment through rehabilitation, and generating new knowledge about the causes and consequences of torture, ill-treatment and organised violence. DIGNITY’s vision is a world without torture and other forms of organised violence. Our work builds on the respect for human rights and on the respect for the dignity and integrity of each individual human being. We have offices in Tunisia and Jordan and are represented in 20 countries where we cooperate with partner organisations to support survivors and combat torture. www.dignityinstitute.dk.

The Redress Trust (REDRESS)

REDRESS is an international human rights organisation based in the United Kingdom and The Netherlands with a mandate to assist survivors of torture and related international crimes to seek justice and other forms of reparation, hold accountable the governments and individuals who perpetrate torture, and develop the means of ensuring compliance with international standards and securing remedies for victims. REDRESS was established in 1992 and has been in consultative status with the Economic and Social Council since 2011.

www.redress.org