



SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS

DRAFT GENERAL COMMENT NO.5 ON MIGRANTS' RIGHT
TO LIBERTY AND FREEDOM FROM ARBITRARY
DETENTION

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THE GLOBAL DETENTION PROJECT MISSION

The Global Detention Project (GDP) is a non-profit organisation based in Geneva that promotes the human rights of people who have been detained for reasons related to their non-citizen status. Our mission is:

- To promote the human rights of detained migrants, refugees, and asylum seekers;
- To ensure transparency in the treatment of immigration detainees;
- To reinforce advocacy aimed at reforming detention systems;
- To nurture policy-relevant scholarship on the causes and consequences of migration control policies.

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GLOBAL DETENTION PROJECT SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS

DRAFT GENERAL COMMENT NO.5 ON MIGRANTS' RIGHT TO LIBERTY AND FREEDOM FROM ARBITRARY DETENTION

The Global Detention Project (GDP) welcomes the opportunity to provide this submission concerning the Committee On Migrant Workers' (CMW) Draft General Comment No.5 on Migrants' Right to Liberty and Freedom from Arbitrary Detention. The GDP is an independent research centre based in Geneva that investigates immigration-related detention including national laws, policies, practices, places, and conditions of detention for migration-related reasons in all regions of the world.

I. INTRODUCTION

The GDP congratulates the CMW for its success in producing a comprehensive, thoughtful, and rigorous draft guidance for States Parties on implementing their obligations concerning migrants' right to liberty and security under the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).

The guidance arrives at a critical time in the effort to promote the human rights of migrant workers and their families, as states face multiple pressures from a surging global pandemic, economic and environmental hardships, and growing political polarisation. These pressures have spurred further marginalisation and scapegoating of migrants, leading to their increasing vulnerability to discrimination, illness, destitution, physical abuse and torture, and emotional and psychological harm. Immigration detention can—and frequently does—exhibit all of these vulnerabilities and harms and thus is an extremely important focus of our attention today.

At the same time, however, there are numerous on-going initiatives occurring at local, regional, and international levels that can lead to the development of policies and practices that take into account the needs of migrants, acknowledge the benefits that migrant workers bring to their host communities, and clarify states' responsibilities to these vulnerable members of their societies. Chief among these today is the UN Network on Migration, which is tasked with assisting states in implementing the Global Compact for Safe, Orderly and Regular Migration. We hope that the CMW's Draft General Comment No. 5 can help guide those of us involved in these initiatives in better understanding the complex and multifaceted challenges that immigration detention presents, as well as provide a clear path for states seeking to adhere to their human rights obligations.

The focus of this GDP submission is on the General Comment's treatment of the role of necessity and proportionality in immigration detention decision-making, and in particular the function of non-custodial measures or "alternatives to detention" (ATDs) in establishing whether detention is both necessary and proportionate in all cases.

The draft General Comment covers an enormous range of critical subject areas regarding detention and states' obligations therein. Its treatment of issues ranging from criminalisation and discrimination to conditions of detention and monitoring mechanisms have provided the GDP team with considerable food for thought as we seek to improve how we collect data on detention systems.

However, today we are at a crossroads in how we move forward in developing an effective and harm-reducing set of strategies to reform states' detention systems. The fulcrum of this crossroads is the important role that less coercive measures must play to avoid arbitrary, harmful detention situations—namely by ensuring that detention is both necessary and proportionate in all cases. This narrow, well-defined role for ATDs is carefully spelled out in a recent study by the European Parliament regarding implementation of the EU Return Directive¹:

“In line with consistent case-law of the UN Human Rights Committee (HRC), immigration detention ‘could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding.’ Detention should be a last resort, where non-custodial measures (so-called alternatives to detention ATD) are not sufficient for ensuring an effective return. The principle of proportionality and the corresponding duty for considering ATD in the first place implies the obligation to individually assess the necessity of detaining a person.”

This submission endeavours to provide the CMW with a careful analysis of how ATDs should properly be understood within the framework of detention decision-making, highlighting pitfalls of certain ATD formulations, and urging a more careful use of these concepts in various parts of the Draft General Comment. In so doing, the submission seeks to assist the CMW in bringing the General Comment's treatment of ATDs in line with that of important partners, including the European Union, the UN High Commissioner for Refugees and other human rights monitors operating at the UN level, and regionally, as well as in civil society. Developing a synergy and harmony in our concepts of this issue will be an invaluable service and provide a substantive contribution to ensuring that the human rights of migrants are effectively promoted and protected.

II. FRAMING THE ROLE OF ATDs & NON-CUSTODIAL MEASURES

Today it has become commonplace to describe “alternatives to detention” and other non-custodial “alternative measures to detention” as any policies or practices that help “avoid the use of detention for reasons related to migration,” as stated in the Network on Migration's recent guidance “COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?”² Similarly, many non-governmental groups that promote ATDs define these measures as “Any law, policy or practice by which persons are not detained for reasons relating to their migration status.”³

While these formulations correctly identify limiting the use of detention as a goal of ATDs, they stop short of fully conceptualising the proper role of ATDs in law and policy. This way of defining ATDs makes them vulnerable to misuse and to being instrumentalised by states in ways that could result in violations of the human rights of migrants.

In contrast, the European Parliament is careful to distinguish between types of measures and how they are applied in order to ensure that “ATD are measures applied as alternatives to depriving liberty and not as alternatives to liberty.” Thus, for instance, it states, “When detention has no legal basis, when for instance, a person poses no risk of absconding, ATD are not applicable.”⁴

¹ European Parliament, “The Return Directive 2008/115/EC: European Implementation Assessment,” June 2020, pp. 90-92.

² United Nations Network on Migration, “COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?” <https://www.refworld.org/docid/5eac26514.html>

³ International Detention Coalition, “There Are Alternatives, (Revised Edition),” 2015, <https://idcoalition.org/wp-content/uploads/2016/01/There-Are-Alternatives-2015.pdf>

⁴ European Parliament, “The Return Directive 2008/115/EC: European Implementation Assessment,” June 2020, pp. 90-92, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU\(2020\)642840_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf)

While the European Parliament notes that ATDs can be a broad set of different measures that change from one country to the next and can carry various names and titles, it is careful to frame these measures as legally defined entities that function within the narrow scope of ensuring the necessity and proportionality of detention decisions. In EU legislation, this role is provided in Article 15(1) of the Return Directive, which as the European Parliament notes, provides that “Member States may impose pre-removal detention unless other sufficient but less coercive measures can be effectively applied in a specific case. The preamble reiterates that detention is justified if the application of less coercive measures would not be sufficient (§16).”

In support of this characterisation of ATDs, the European Parliament cites jurisprudence at the European Court of Justice: “In *FMS and Others*, the CJEU stressed that the imposition of an alternative measure to detention can only be envisaged if the reason which justified the detention of the person concerned was and remains valid, but the detention does not appear or no longer appears necessary or proportionate.”

In other words, ATDs are only a legitimate immigration policy tool when they are considered in the application of a lawful detention decision procedure to assess whether a less coercive measure is available that can achieve the same goal as detention. In this way, ATDs underpin the necessity and proportionality of individual detention measures.

Other institutions and human rights bodies have similarly sought to narrowly frame ATDs and have expressed concern about their misuse. The UN High Commissioner for Refugees has consistently characterised national ATD measures as legitimate only when they are used in the context of people who would otherwise be detained. Thus, for instance, UNHCR has criticised Malta’s policy framework for the use of ATDs in asylum cases, which stipulates that non-custodial measures are to be applied when no detention decision is issued. According to Malta’s regulations, when a recommendation is made not to detain an asylum seeker due to the lack of applicable grounds or the absence of a sufficiently high risk of absconding, “the Officer making the recommendation shall indicate whether alternatives to detention should be applied in the specific case and, if so, which.”⁵

UNHCR has stated that these regulations lack sufficient clarity to be considered “alternatives to detention,” particularly due to the fact that the measures can be applied when no detention decision has been taken. Echoing the European Parliament’s assessment of ATDs, UNHCR argued that the conditions outlined in Malta’s policy appear to be “alternative forms of liberty” rather than “alternatives to detention.” It further argued that Malta’s policy is based on an incorrect interpretation of the right to liberty and security of person and fails to properly transpose Article 8(2) of the EU Reception Conditions.⁶

Malta’s framework governing non-custodial measures has also sparked criticism from civil society actors, precisely because both its Reception Regulations and its related strategy documents appear to imply that such measures can be used for asylum seekers who would not otherwise be detained. As such, these measures should not be considered as “alternatives.” Aditus and the JRS report that there have been numerous cases where asylum seekers have been released from

⁵ For a discussion of Malta’s policy framework, see Global Detention Project, “Immigration Detention in Malta: ‘Betraying’ European Values?” June 2019, <https://bit.ly/3gqL9LU>

⁶ United Nations High Commissioner for Human Rights (UNHCR), “UNHCR’s Observations on Malta’s Revised Legislative and Policy Framework for the Reception of Asylum-Seekers,” 25 February 2016, <https://www.refworld.org/docid/56e963824.html>

detention and one of these measures has been ordered, despite the detention grounds no longer existing.⁷

What these human rights observers and international organisations are identifying in Malta is what social scientists refer to as “net-widening.” This is “a concept developed by sociologist Stanley Cohen (1985) in relation to the criminal justice system [that] refers to administrative or practical changes that, often unintentionally, result in a greater number of people being subject to systems of state control.” In her exhaustive review of literature on ATDs for the UK Home Office, Oxford University criminologist Mary Bosworth writes that while there is evidence that “suggests that alternatives to detention are cheaper than immigration detention ... such cost-analysis does not take into account the net-widening effect of alternatives, but rather assumes a like-for-like substitution.” As a result, she concludes that “despite extensive evidence from the criminal justice system concerning the net-widening effect of non-custodial alternatives, and notwithstanding similarly negative accounts of ‘care in the community’ within the health sector literature, for the most part the literature on ATDs is upbeat.”⁸

It is precisely because of these considerations that the GDP urges the CMW to be cautious in how it employs concepts like “alternatives to detention” in this General Comment. There is a clear need for a course correction in advocacy on this issue to ensure that ATDs do not end up creating more problems than they resolve. Once ATDs are taken out of the limited legal role with respect to demonstrating the necessity and proportionality of detention decisions they can become instrumentalised in ways that can violate the human rights of migrants.

Ila. Children and ATDs

The case of children provides additional clarity for how we should frame ATDs. When properly understood in their limited role as being tied to legitimate, lawful detention measures, ATDs quickly become irrelevant with respect to protecting the human rights of child migrants. If there is no lawful ground for detaining a child, as numerous human rights bodies hold, it would be inappropriate to place him or her in an “alternatives to detention” measure. Rather, a child must be given proper care and security.

This point of view has been validated repeatedly by many international authorities, including the Committee on Migrant Workers and the Committee on the Rights of the Child (CRC) in their 2017 “Joint General Comment on State Obligations Regarding the Human Rights of Children,” which pointedly makes no references to ATDs for children but rather states that “child protection and welfare actors, rather than immigration agencies should take primary responsibility for migrant children.”

⁷ Aditus and Jesuit Refugee Service (JRS), “Country Profile: Malta,” *European Council for Refugees and Exiles (ECRE) and Asylum Information Database (AIDA)*, March 2019, http://www.asylumineurope.org/sites/default/files/report-download/aida_mt_2018update.pdf

⁸ M. Bosworth, “Alternatives to Immigration Detention: A Literature Review: Assessment of Government Progress in Implementing the Report on the Welfare in Detention of Vulnerable Persons: A Follow-Up Report to the Home Office,” S. Shaw eds, London: HMSO, pp. 213 – 247, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299532

In its 2018 alternatives to detention assessment toolkit, the UN High Commissioner for Refugees similarly states: “It is improper to refer to [child] reception measures as alternatives to detention for children, because children should not be detained for immigration related purposes.”⁹

Two other recent international initiatives have also avoided promotion of ATDs in the case of children and families. The UN Global Study on Children Deprived of Liberty, echoing the CRC-CMW Joint General Comment, states: “Compliance with the prohibition of immigration detention of children means that States have an obligation to provide migrant and refugee children with the same appropriate care and protection that all children are entitled to, consistent with the principle of non-discrimination.”¹⁰ Similarly, the UN Special Rapporteur on the Human Rights of Migrants, in his 2020 thematic report “Ending immigration detention of children and providing adequate care and reception for them,” avoids promoting “alternatives to detention” for children and families, instead calling for “a paradigm shift ... away from a focus on enforcement and coercion ... and towards providing human rights-based alternative care and reception.”¹¹

In contrast to these recent international human rights initiatives, the Global Compact for Migration urges states to implement ATDs “especially in the case of families and children.” This language threatens to sidestep years of advocacy around ending the detention of children, which found expression in the CMW-CRC joint general comment and in numerous other initiatives since then. The Global Compact is a political document that by necessity makes compromises. However, the CMW’s General Comment No. 5, based on the principles of a human rights treaty, does not have to make the same compromises. Doing so may represent a step backwards in ending the detention of children and protecting the human rights of all migrants.

IIb. The Slippery Slope of ATDs

Clearly, ATDs have a critical role to play in protecting the human rights of migrants, but only when they are applied during legitimate detention decision-making procedures and in the service of necessity and proportionality assessments. But as we have seen, according to the world’s foremost human rights authorities, this can never be the case with children. If the immigration detention of children is fundamentally at odds with their best interests, then ATDs likewise should not apply since by definition they form part of detention procedures. In effect, encouraging states to consider ATDs for children may reinforce or give rise to policies of detaining them. This is a quandary that we must not ignore. What is more, if immigration-related detention is never in children’s best interest, then not detaining them should arguably be framed as an obligation, not an alternative.

One way in which advocates have sought to sidestep this quandary is by framing ATDs as anything that is not detention, even measures that are applied outside lawful detention procedures, as discussed above in section II, “Framing the Role of ATDs & Non-Custodial Measures.” However, once you define ATDs in this way, not only do you make such measures vulnerable to harmful instrumentalisation, you also open a Pandora’s box—liberty itself may be considered an “alternative” rather than an inherent right.

⁹ UNHCR, “Guiding Questions for the Assessment of Alternatives to Detention,” <https://www.unhcr.org/protection/detention/5b17d9c47/guiding-questions-assessment-alternatives-detention.html>

¹⁰ M. Nowak, “The United Nations Global Study on Children Deprived of Liberty,” November 2019, p. 478, <https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/510>

¹¹ UN Special Rapporteur on the Human Rights of Migrants, “Ending Immigration Detention of Children and Providing Adequate Care and Reception for Them, A/75/183,” paragraph 83, <https://undocs.org/A/75/183>

In fact, at the Global Detention Project we have on numerous occasions seen this result. In one case, an advocacy group characterised access to asylum procedures as an “alternative to detention,” even though it is in fact a globally recognised right provided in international law and most domestic legal frameworks.¹² In another case, a UN human rights body circulated for comment a draft guidance on the human rights protection of migrants that stated that “legislation should include the obligation of administrative or judicial bodies to start from liberty as the first alternative.” Subsequent drafts eventually removed this language, but only after various actors strongly protested characterising “liberty” as anything other than an inherent right. However, such claims about viewing “liberty” as a “first alternative” continue to circulate in broader civil society endeavours across the globe.

III. COMMENTS ON SPECIFIC SECTIONS OF THE DRAFT GENERAL COMMENTS

In light of the considerations discussed in the preceding section, the GDP suggests the following editorial changes to various paragraphs in the draft General Comment (additions or changes are underscored and in *italics*).

Paragraph 9: Consider redrafting the final sentence of this paragraph to read: “The obligation to consider alternative measures to immigration detention, *in the context of ensuring that detention measures are both necessary and proportionate in every instance*, is also addressed.

Paragraph 22: Consider redrafting the final sentence and adding a final clarification to the paragraph: “*In cases where legitimate immigration policy goals, such as removal, remain viable despite Covid-19 related border closures and other emergency measures, States should expand use of alternatives to detention so that the detainee population is reduced to the lowest possible level in order to prevent the spread of the virus in detention facilities. However, if emergency measures nullify the objective of an individual’s detention order, States must promptly release the person into the community, providing any necessary care and assistance to ensure their well being outside detention.*”

Paragraph 26: Consider redrafting the paragraph to clarify the narrow, formal role of non-custodial measures in immigration procedures: “To guarantee the right to liberty, States should establish in their laws a presumption in favour of freedom, which is consistent with the duty of States *to assess whether any less coercive measures are available before resorting to detention in administrative immigration procedures involving migrant workers and members of their families.*”

Paragraph 28: Consider replacing the phrase “alternatives to detention” with “non-custodial measures” or “less coercive measures” as the latter are more commonly used in law and policy.

Paragraph 35: Consider replacing the phrase “alternatives to detention” with “non-

¹² For a more detailed assessment of the challenges and pitfalls of advocating ATDs for children, see M. Flynn, “The Debate Over Alternatives to Immigration Detention of Children,” In *Migration, State Obligations, and Rights in a Globalized Context (Conference Proceedings from Geneva Human Rights Week Colloquium: 11-12 October 2017)*, pp. 115-117, Global Studies Institute (University of Geneva), 2019, <https://www.globaldetentionproject.org/the-debate-over-alternatives-to-immigration-detention-of-children>

custodial measures” or “less coercive measures” as the latter are more commonly used in law and policy.

Paragraph 49: To bring this General Comment in line with the CMW-CRC Joint General Comment as well as numerous other related human rights initiatives, the Committee should consider amending this paragraph to replace references to “alternatives measures to detention” with a discussion of the appropriate care and reception of children.

Paragraph 58: Consider amending this paragraph and adding the accompanying source citations which are provided in this submission: “The Committee understands as alternatives to detention all community care measures or non-custodial accommodation solutions that are less restrictive than detention *and which must be considered in the context of lawful detention decision procedures to ensure that detention is necessary and proportionate in all cases, as stipulated by numerous States, international organisations, and regional governance bodies.*¹³ The ideal alternatives to detention are those that respect the right to personal freedom and therefore do not create any related restrictions or conditions, but rather generate other legitimate mechanisms and measures that are in line with human rights standards. *In cases where detention no longer has a legal basis—for example, when removal is no longer a viable objective—alternatives to detention are no longer applicable.*”¹⁴

Paragraph 88: To bring this General Comment in line with the CMW-CRC Joint General Comment as well as numerous other related human rights initiatives, the Committee should consider amending this paragraph to replace all references to “alternatives to detention” with a discussion of the appropriate care and reception of children and families.

Paragraph 88: Consider amending this paragraph in light of the same considerations mentioned with respect to Paragraph 89. As it stands, this paragraph appears to contradict previous statements made by the Committee with respect to the prohibition of child migration detention and the appropriate care and reception of families.

¹³ See, for instance:

- UNHCR, “Guiding Questions for the Assessment of Alternatives to Detention,” <https://www.unhcr.org/protection/detention/5b17d9c47/guiding-questions-assessment-alternatives-detention.html>
- CJEU - Joined Cases C-924/19 PPU and C-925/19 PPU, FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság, 14 May 2020, <https://bit.ly/39VcnZM>
- EU Return Directive, Article 15(1)

¹⁴ European Parliament, “The Return Directive 2008/115/EC: European Implementation Assessment,” June 2020, pp. 90-92, [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU\(2020\)642840_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642840/EPRS_STU(2020)642840_EN.pdf)