



SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS

GENERAL COMMENT NO.6 ON THE CONVERGENCE OF THE
INTERNATIONAL CONVENTION ON THE RIGHTS OF MIGRANT
WORKERS AND THE GLOBAL COMPACT FOR MIGRATION

SUBMITTED BY THE GLOBAL DETENTION PROJECT

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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 CONCERNING GENERAL COMMENT NO.6 ON THE CONVERGENCE BETWEEN THE INTERNATIONAL CONVENTION ON THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (ICRMW) AND THE GLOBAL COMPACT FOR MIGRATION (GCM)

The Global Detention Project (GDP) welcomes the opportunity to provide this submission concerning the Committee on Migrant Workers' (CMW) development of General Comment No.6.¹ This General Comment represents an important effort by the Committee to clarify mutually reinforcing goals of the Convention and the Compact, as well as an opportunity for the Committee to provide important explanatory and normative context for the Compact's "Objectives."

The GDP is an independent research centre based in Geneva that investigates migration-related detention laws, policies, and practices across the globe to foster adherence to human rights in the treatment of detained migrants, asylum seekers, refugees, and stateless persons. This submission focuses primarily on migration-related detention, which is covered in Articles 16 and 17 of the ICRMW and Objective 13 of the GCM, although it also has relevance to other provisions in both agreements.

1. PREVENTING ARBITRARY IMMIGRATION DETENTION

1a. The Global Compact's Objective 13 reiterates important norms provided in existing international human rights conventions that concern the deprivation of liberty of migrants for reasons related to their non-citizen status, including *inter alia*: the importance of ensuring that detention measures are never arbitrary; that they meet standards of necessity and proportionality; and that they only be used as a last resort and for the shortest possible time. Paragraph 29 highlights a key tool used to ensure that these basic human rights standards are respected, calling on states to "prioritize non-custodial alternatives to detention" (ATDs).

1b. It is important for states parties to the GCM to re-commit to these human rights norms. However, the Committee on Migrant Workers (CMW) could help bolster these commitments by clarifying in General Comment No.6 the mechanics of how ATDs can function to prevent arbitrary detention, which neither the GCM nor its various follow up initiatives fully explain.² The Committee could also highlight the effectiveness of ATDs in their role as lawfully established mechanisms that offer practical non-custodial "alternatives" during detention decision-making procedures, which states must consider in order to ensure that detention measures are in fact used only as a last resort and are both necessary and proportionate.

¹ This submission was authored by Michael Flynn, Executive Director of the Global Detention Project (GDP), with assistance and advice provided by GDP colleagues and external advisors.

² See, for instance, UN Network on Migration Working Group on Alternatives to Immigration Detention, "COVID-19 & Immigration Detention: What Can Governments and Other Stakeholders Do?"

https://migrationnetwork.un.org/sites/g/files/tmzbdl416/files/docs/un_network_on_migration_wg_atd_policy_brief_covid-19_and_immigration_detention_0.pdf

1c. In this regard, the CMW's **General Comment No.5 (2021) on migrants' rights to liberty and freedom from arbitrary detention** provides guidance that can assist states parties to the Global Compact in implementing Objective 13. Paragraph 48 of General Comment No.5 is particularly relevant, stating:

“The Committee understands as alternatives to detention all community-based 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, with the aim of respecting the human rights and avoiding arbitrary detention of migrants, asylum seekers, refugees and stateless persons.*”
[emphasis added]

1d. Paragraph 48 of General Comment No.5 also underscores the importance of the legality of detention measures as a grounding for the consideration of ATDs: “Alternatives to detention must respect the right to personal freedom and thus not create onerous 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 ... alternatives to detention are no longer applicable.*” [emphasis added]

1e. While there is no standard definition of alternatives to detention and the way they are used can vary greatly depending on the specific context of each country,³ we nevertheless think that the CMW's authoritative rendering of the rationale for and desired impact of ATDs in General Comment No.5 can serve as an important roadmap for countries as they seek to implement the provisions of the GCM. To the extent that the Committee is able to reiterate these considerations in its General Comment No.6, we think it will offer a substantive contribution to the multi-stakeholder dialogues and peer-learning initiatives that are part of the GCM implementation process.

2. PREVENTING IMMIGRATION DETENTION OF CHILDREN

2a. Paragraph 29(h) of GCM Objective 13 provides the important goal of protecting the “rights and best interests of the child at all times.” However, the Objective fails to reflect the growing international consensus of this norm as it relates to immigration detention—that the “best interests” norm requires states not to detain children for immigration reasons. Instead, the GCM calls on states “to work” to end this practice, including by ensuring the availability of alternatives to detention. Many observers have highlighted this failure of the GCM to reflect an emerging consensus on a crucial human rights norm.⁴

2b. In both their **Joint General Comment No.4 (2017) with the Committee on the Rights of the Child (CRC) concerning the human rights of children in the context of migration** and their General Comment No.5, the Committee on Migrant Workers stresses that it is never in the

³ See, for example, International Detention Coalition, “There Are Alternatives: A Handbook for Preventing Immigration Detention,” <https://idcoalition.org/publication/there-are-alternatives-revised-edition/>

⁴ I. Majcher, “Implementation of GCM Objective 13 in the UNECE Region: Little Added Value Provided by the Compact in Making Immigration Detention a Last Resort,” *Refugee Law Initiative*, 1 May 2021, <https://rli.blogs.sas.ac.uk/2021/05/14/implementation-of-gcm-objective-13-in-the-unece-region-little-added-value-provided-by-the-compact-in-making-immigration-detention-a-last-resort/>

best interests of a child to place them in immigration detention because of the inherently damaging nature of this type of detention on children.

2c. We encourage the CMW in General Comment No.6 to reiterate its interpretation of the “best interests” norm as calling for a general prohibition of the detention of children—including families. In this regard, it may be particularly effective to cite the relevant provisions of the Joint General Comment as they are co-authored by the CRC, including Paragraph 5, which states:

“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.”

2d. The CMW’s General Comment No.5 provides additional details about how states should receive children and families as part of their efforts to end their detention. In Paragraph 43, the Committee reiterates the CRC-CMW Joint General Comment No.4’s conclusion that the best interests principle for children extends to the prohibition of immigration detention to children and their families, stating that the “imperative requirement not to deprive the child of liberty extends to the child’s family and to implementing measures for the care and reception of the child and his or her family.” Importantly, this opinion is in line with Article 44 of the Convention affirming that states “shall take appropriate measures to ensure the protection of the unity of the families of migrant workers.”

2e. Regarding the care and reception of children, Paragraph 45 of General Comment No.5 provides that child protection or other social welfare institutions—and not immigration authorities—should take primary responsibility. Similarly, the CRC-CMW Joint General Comment No.4, Paragraph 13, states, “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.” These authoritative opinions contrast with the GCM’s insistence that states expand access to “alternatives to detention” for children, which implies that detention of children may still be used as a “last resort” and that children may remain under the overall care and supervision of immigration authorities and their needs superseded by migration policy objectives.⁵

2f. Although the provisions of the GCM contrast in important ways to the CRC’s and the CMW’s authoritative interpretations of the children’s best interests norm, this does not necessarily represent a complete divergence between the GCM and the relevant human rights conventions. We encourage the Committee to instead view these gaps in the GCM as an opportunity to

⁵ Majcher, *ibid*, writes, “Under para.29(h) of the GCM, states committed to ensure the availability and accessibility of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, and work to end the practice of child immigration detention. The immediate commitment under this provision is to place children in alternatives to detention, which would fall short of the evolving international norm of non-detention of children, as described above. According to the 2017 General Comment of the CRC and CMW, the principle of the best interests of the child, under Art.3 of the CRC, prevails over the last resort principle, which entails the use of alternatives to detention. Immigration detention is never in the child’s best interest and thus should be forbidden. Hence, there is no need for the concept of ‘alternatives to detention’ as there should be no decision to detain.”

articulate for member states of the Compact the full meaning and significance of the “best interests” norm, framing it as an effort to assist states in understanding already existing legal obligations that are only partially reiterated in the Compact.

3. ENCOURAGING DECRIMINALISATION

3a. Although the GCM calls on states to “avoid criminalisation of migrants who are victims of trafficking” (Objective 10, Paragraph 26g), it fails to explicitly call for the decriminalisation of irregular migration. This lacuna in the Global Compact contrasts with existing international norms and authoritative opinions. It also reflects a potential internal tension in the GCM, including in particular with provisions in Objective 13 that call on states to take a “human-rights based approach to any detention of migrants, using detention as a last resort.” To the extent that states continue to impose criminal sanctions and penalties for irregular entry and stay, including detention and incarceration, they are arguably unable to fully implement a “human-rights based approach” to migration-related detention. Deprivation of liberty may also not be applied only as a “last resort” if it is a legally established criminal punishment, which arguably also is counter to Article 10 of the Convention prohibiting “cruel, inhuman, or degrading treatment or punishment.”

3b. The CMW has repeatedly called for states to de-criminalise irregular entry and stay, including most recently in General Comment No.5, which says that these infractions “constitute at most administrative offences and should never be considered criminal offenses as they do not infringe fundamental legally protected values, and as such are not crimes per se against persons, property or national security” (Paragraph 36). Similarly, the **Working Group on Arbitrary Detention**, in its **Revised Deliberation No. 5 on deprivation of liberty of migrants (2018)**, provides that “The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flow” (Paragraph 10). Additionally, while it is not directly relevant to the treatment of irregular migrants, the **UN Refugee Convention’s** Article 31 prohibition of penalisation for illegal entry or presence takes on relevance in the context of the GCM insofar as many people who are apprehended as suspected irregular migrants may in fact be people seeking asylum.

3c. We encourage the Committee to address this gap in the GCM by framing its corresponding recommendations as authoritative clarifications of the content of relevant GCM provisions, in particular provisions in Objective 11 concerning border management policies. With respect to Paragraph 27c of Objective 11, the Committee could emphasise that the GCM’s advice that states revise their border screening procedures according to international human rights law in effect requires states to not criminally prosecute irregular border crossers in view of the consensus that such prosecution exceeds any legitimate purpose. Likewise, with respect to GCM Paragraph 27f, which calls on states to revise laws to ensure that “sanctions are appropriate,” the Committee should stipulate that laws that criminalise irregular entry or presence are contrary to fundamental human rights norms and refugee law, and that although the GCM does not explicitly call for decriminalisation, the framing of this provision in the Compact inherently implies that member states undertake such reforms.

4. ENCOURAGING ADHERENCE TO THE HUMAN RIGHTS FRAMEWORK

4a. Observers have expressed concern that the GCM, as a non-binding agreement that contains important gaps in its promotion of relevant international human rights norms, may encourage states to de-emphasise their international treaty obligations and avoid implementing important migrant rights and protections.⁶ One indication of this potential outcome is the fact that whereas the Global Compact has more than 160 member states, the International Convention on the Rights of All Migrant Workers and Members of their Families (ICRMW) remains the least ratified international human rights treaty, with only 56 ratifications. This raises the possibility that the emergence of the GCM will dilute pressure or momentum that states may have previously felt with respect to adopting the ICRMW, as well as divert the attention and resources of civil society groups from the important task of promoting the Convention.

4b. Civil society organisations involved in the GCM have expressed concerns about shortcomings in the reporting and monitoring of member state implementation of the Compact. As one GDP partner has noted, in contrast to the UN treaty body review procedures and the Universal Periodic Review—which provide ample space for civil society engagement during state reviews—at the GCM’s review forums “civil society is not invited to submit substantial written information or shadow reports, or request early warnings and urgent actions.” This enables states to make claims that go largely unchallenged and may amount to little more than “self-praise for mainly old, mostly unenforced reforms that have been repackaged to fit under the GCM’s objectives.”⁷

4c. We urge the Committee on Migrant Workers to use General Comment No.6 as: **(1)** a platform for emphasising the existing international human rights legal framework that buttresses the Global Compact for Migration; and **(2)** an opportunity to expand its engagement with the GCM in order to improve monitoring of state implementation of the Compact. The GCM repeatedly acknowledges the importance of the human rights framework despite its incomplete embrace of some key norms. By explaining the full content and implications of these norms—including with respect to the non-detention of children and the decriminalisation of irregular entry and stay—the Committee will ensure that GCM member states are fully aware of their commitments not only with respect to the *non-binding* GCM, but also to their *binding* treaty obligations. The Committee may also consider reminding those GCM states that have yet to ratify the Migrant Workers Convention that the provisions in the Global Compact which protect their own citizens abroad will have additional force, weight, and oversight if countries also adopt the ICRMW.

⁶ See, for instance, E. Guild and T. Basaran (eds), *The UN's Global Compact for Safe, Orderly, and Regular Migration: Analysis of Final Draft, Objective by Objective*, Refugee Law Initiative, <https://www.cjhm.org/wp-content/uploads/2019/03/The-UN%20Global-Compact-for-Safe-Orderly-and-Regular-Migration-Analysis-of-the-final-draft-Objective-by-Objective.pdf>

⁷ Migrant-Rights.org, “Fact-Checking ‘Progress’ Towards the Global Compact on Migration,” 31 July 2022, <https://www.migrant-rights.org/2022/07/fact-checking-progress-towards-the-gcm-objectives/>