STATEMENT BY MICHAEL FLYNN CONCERNING THE CMW'S GENERAL COMMENT NO.6 ON THE CONVERGENCE BETWEEN THE GLOBAL COMPACT FOR MIGRATION AND THE CONVENTION

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I would like to thank the Committee for inviting me to provide comments today concerning its development of General Comment No.6 on the convergence between the Global Compact for Migration and the Convention on the Rights of Migrant Workers. I would also like to thank the Committee for undertaking this initiative as it presents an opportunity for the Committee to provide important explanatory and normative context for the Global Compact's "Objectives."

I will focus my comments on three aspects of the Compact that concern migration-related detention: (1) alternatives to detention, (2) the detention of children, and (3) criminalisation. After making my comments, I will yield the remaining time that the Committee has provided the GDP to our partners at Migrant-Rights.org, who will address related aspects and concerns regarding the GCM process as it compares to the UN human rights system.

With respect to alternatives to detention (ATDs), the Global Detention Project's main concern is to optimize their use for preventing arbitrary migration-related detention. However, we are concerned that the way ATDs are framed in the Compact and in the guiding documents of the UN Network on Migration this objective is not emphasized. In fact, they are not carefully defined at all, which could encourage detrimental uses of ATDs, including leading to the creation of harmful migrant surveillance systems while doing nothing to minimize the use of detention itself.

The United States presents a revealing case in point of the unintended consequences of an open-ended framing of ATDs: US Immigration and Customs Enforcement describes ATDs as "technology and other tools to manage undocumented individual's compliance with release conditions while they are on the non-detained docket. *It is not a substitute for detention, but allows ICE to exercise increased supervision over a portion of those who are not detained*" [emphasis added]. Recent results from the US ATD program reveal a disconcerting picture of a growing ATD surveillance program that has no appreciable impact on the numbers of people placed in detention: As of 2020, there were some 92,000 people in ATD programs, while 183,000 were placed in detention. By 2021, the ATD program had grown to include 136,000 people, who had been under some form of ATD surveillance for on average 615 days, while the numbers of people in detention grew to 189,000 people.

We think that this result in the US is in part due to the fact that the US frames ATDs in a way that is largely in-line with what is provided in the Global Compact and by the Network for Migration. While the Network has helpfully asserted that electronic forms of surveillance like ankle bracelets should not be used as ATDs, it has neglected to characterize ATDs as legally established mechanisms whose sole legitimate purpose is to offer states practical alternatives to states for people who are in lawful detention procedures. It is in this that ATDs serve to limit arbitrary detention and ensure that detention is necessary and proportionate in each instance. We are concerned that this failure could ultimately encourage more states to use ATDs in the same way as the United States.

We urge the Committee on Migrant Workers to use General Comment No. 6 to provide an important corrective to this discussion. It could do this by re-iterating its formulation of ATDs as provided in its previous General Comment No.5 on the right to liberty: "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. *In cases where detention no longer has a legal basis … alternatives to detention are no longer applicable*" [emphasis added].

Secondly, concerning children in detention, the Global Compact does not 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, 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. While this lacuna in the Global Compact is an important gap, it 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 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.

Finally, although the GCM calls on states to "avoid criminalisation of migrants who are victims of trafficking," 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 is counter to Article 10 of the Convention prohibiting "cruel, inhuman, or degrading treatment of punishment."

In contrast, 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).

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 including provisions in Objective 11 concerning border management policies. With respect to Paragraph 27c of the GCM, the Committee could emphasize 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 of the state. 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.