

REDRESS and IRCT submission to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on its draft general comment No. 2 on the rights of migrant workers in an irregular situation and members of their families

January 2013

1. REDRESS and the International Rehabilitation Council for Torture Victims (“IRCT”) would like to thank the Committee for the opportunity to contribute to the draft general comment on the rights of migrant workers in an irregular situation and members of their families.
2. We commend the Committee for the wide-ranging and well-considered draft, and express agreement with much of the text.
3. As organisations which focus on justice, reparation and rehabilitation for survivors of torture and ill-treatment, a group which includes migrant workers in an irregular situation, we provide the following comments with a view to further strengthening the text. Given our mandates, these comments are limited to issues of torture and ill-treatment, as well as effective remedies and reparation, as they are relevant to the draft.

I. The right of migrant workers in an irregular situation to be free from torture and ill-treatment

4. Although there are some limited references in the text to obligations concerning the prohibition of torture and cruel, inhuman or degrading treatment or punishment (“ill-treatment”), in particular the guarantee of *non-refoulement*,¹ we believe that this aspect of the rights of migrant workers in an irregular situation should be given more detailed attention in the text.
5. In particular we suggest that the Committee includes a separate section on this right, and highlights the following issues in the general comment.

Migrant workers in an irregular situation are particularly vulnerable to torture and ill-treatment, both at the hands of their employers and the State

6. Torture is not defined in the Convention, but is widely accepted to involve the intentional infliction of severe pain or suffering, whether physical or mental, for a purpose such as obtaining information or a confession, punishment, intimidation or coercion, or discrimination of any kind.² A state may be responsible for torture where it is carried out by its own officials, or where it has failed to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities.³
7. UN treaty bodies and regional human rights mechanisms have often highlighted that migrant workers, particularly women, are at increased risk of torture and ill-treatment at the hands of both private actors, including their employers, and state officials.⁴ This torture and ill-treatment may

¹ Draft General Comment, para. 40.

² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 1; Human Rights Committee (“HRC”), General Comment No. 20 (1992), HRI/GEN/1/Rev.1 at 30 (1994), para. 4; HRC, *Giri v Nepal*, Communication 1761/2008, 24 March 2011, CCPR/C/101/D/1761/2008, para. 7.5.

³ See, eg. HRC, General Comment No. 31 (2004), CCPR/C/21/Rev.1/Add. 13, para. 8; General Comment No. 20 (1992), para. 2. Committee Against Torture (“CAT”), General Comment No. 2 (2007), CAT/C/GC/2, para. 18.

⁴ See, eg. the following concluding observations: Mali, HRC, A/58/40 vol. I (2003) 47 at para. 81(18) (rape and ill-treatment of migrant worker girls); Kuwait, HRC, CCPR/C/KWT/CO/2 (2011), par. 18 (discriminatory and inhuman treatment suffered by migrant domestic workers raised concerns under Article 7); Greece, CAT, A/60/44 (2004) 20 at paras. 46-48 (torture and ill-treatment of migrant workers in immigration detention); Kuwait, CAT, CAT/C/KWT/CO/2 (2011) (2010),

take many forms, including rape or other sexual assault, beatings and other violence, threats causing severe psychological suffering, denial of access to medical care, lack of adequate food and water and inhumane living conditions (by employers) or conditions of detention (by state authorities).

8. This risk is heightened for migrant workers in an irregular situation in three distinct ways.
9. First, migrant workers in an irregular situation are removed from the reach of national regulation and monitoring and are often reluctant to report torture or ill-treatment by their employers or state officials, because of a well-founded fear of the consequences of doing so, which may include imprisonment or deportation.⁵
10. Second, migrant workers who are detained because of their immigration status face significant risks of torture and ill-treatment in detention.⁶ This risk is heightened further for individuals who have suffered torture and ill-treatment in the past (for example, at the hands of their employer or the police), who may experience torture or ill-treatment simply by the fact of that detention.⁷ This is addressed in the next section.
11. Third, migrant workers in an irregular situation and their families face known significant barriers to accessing justice, making them more vulnerable to abuse. This is addressed in the final section.

States parties have positive obligations to take steps to prevent and respond to torture and ill-treatment by private actors, including employers

12. In addition to refraining from committing torture or ill-treatment directly, states parties have positive obligations to prevent and respond to torture and ill-treatment committed by private actors.⁸ In the specific case of migrant workers in an irregular situation, States must exercise due diligence to monitor employers and prevent torture by private actors. They should put into place measures which allow victims of torture or ill-treatment to access protection from and make complaints about torture and ill-treatment without fear of repercussions in relation to their immigration status.⁹ This could include the provision of hotlines for reporting abuse, the setting up of shelters, and the provision of guarantees that those reporting crimes will not be referred to the immigration authorities.
13. Where there are reasonable grounds to believe that violations have occurred, States must thoroughly investigate such claims or information, and, where sufficient evidence is available, prosecute those responsible. Where torture or ill-treatment is proven, States should punish the perpetrators with sentences reflecting the gravity of the crime, and ensure victims are provided with adequate and appropriate reparation.¹⁰

par. 22 (concern about widespread reports of abuse of migrant domestic workers, particularly women); Sri Lanka, CAT, CAT/C/LKA/CO/3-4 (2011), par. 24 (concern about abuses of Sri Lankan migrant workers, particularly women); Indonesia, CAT, CAT/C/IDN/CO/2 (2008), par. 20 (concern about abuses of migrant workers, especially women, by Indonesian recruitment companies); Jordan, CAT/C/JOR/CO/2 (2010), par. 31 (physical, psychological and sexual abuse of female migrant workers).

⁵ See Committee on Migrant Workers (“CMW”), General Comment No. 1 (2011), CMW/C/GC/1 para. 50. See also para. 2 of draft General Comment No. 2. We submit that this makes migrant workers in an irregular situation also particularly vulnerable to torture or ill-treatment at the hands of state and private actors, and suggests that the words “and violence” be included at the end of that paragraph.

⁶ See, eg. the judgment of the European Court of Human Rights in *Zontul v Greece* (application no. 12294/07), judgment 17 January 2012. This case concerned one of REDRESS’s clients, who was a migrant in Greece. In that case the Court found that REDRESS’s client had been tortured by a member of the Coastguard who had intercepted and detained those on the boat on which he was travelling. The case highlights the poor conditions in which migrant detainees were held, ill-treatment inflicted on other individuals, and the particular risk of being targeted for abuse on the basis of sexual orientation. See also report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), paras. 25-26, 30.

⁷ See further the report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), para. 43-46.

⁸ HRC, General Comment No. 31 (2004), para. 8; General Comment No. 20 (1992), para. 2. CAT, General Comment No. 2 (2007), para. 18.

⁹ See, eg. CMW, General Comment No. 1 (2011), para. 50.

¹⁰ CAT, General Comment No. 2 (2007), para. 18; HRC, General Comment No. 31 (2007), para. 8.

States have specific obligations to provide an effective remedy and reparation to victims of torture and ill-treatment, including the means for as full rehabilitation as possible

14. Where a migrant worker in an irregular situation has been subjected to torture or ill-treatment, States parties have specific responsibilities under the Convention, the Convention Against Torture (to which most states are party) and under general international law, to provide redress to the victim. The Committee Against Torture has recently set out in great detail the scope and nature of the obligation to provide redress to victims of torture or ill-treatment in its General Comment No. 3 on article 14 of the Convention against Torture,¹¹ and we suggest that the Committee refer to this general comment in this regard. In particular, the Committee Against Torture has stressed that victims of torture or ill-treatment must obtain full and effective redress and reparation, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹²

Recommendations:

- Part C should include a section on the rights of migrant workers in an irregular situation to be free from torture and cruel, inhuman or degrading treatment or punishment as guaranteed in Article 10 of the Convention. This is linked to, but separate and additional to, protection from violence (Article 16). The section should address the issues outlined above including their particular vulnerability, positive obligations to protect from torture by private actors, and the specific obligations in terms of the right to an effective remedy and reparation, including as full rehabilitation as possible.
- Paragraph 2 of the draft should include the words “, torture and ill-treatment, and violence” at the end of the current text.
- The draft should include reference to the Convention Against Torture in the survey of other international legal instruments relevant to the rights of migrants in an irregular situation in Part II (A).

II. Protection Against Arbitrary Arrest and Detention

15. As indicated in the previous section, there are close links between the detention of migrant workers in an irregular situation and the potential for the infliction of torture and ill-treatment. This section addresses some particular concerns with the administrative detention of migrant workers from the perspective of the prohibition of torture and ill-treatment.

States parties should progressively abolish the detention of migrant workers in an irregular situation on account of their immigration status

16. By its nature, administrative detention impacts negatively on safeguards against the prohibitions of arbitrary arrest and detention, and torture and ill-treatment. It can also have devastating impacts on the physical and mental health of those detained, often severe enough to amount to torture or ill-treatment.¹³
17. The Committee recognises in its draft general comment that the principle of proportionality requires States parties to detain migrant workers only as a last resort, and to give preference to less coercive measures.¹⁴ However, given the risks involved in such detention, we urge the Committee to adopt the position taken by the Special Rapporteur on the Human Rights of Migrants in his most recent annual report¹⁵ that States should consider progressively abolishing administrative detention of migrant workers in an irregular situation.

¹¹ CAT, General Comment No. 3 (2012), CAT/C/GC/3.

¹² Ibid, paras. 5-6.

¹³ See report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), paras. 43-46.

¹⁴ Draft general comment, para. 24.

¹⁵ Report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), para. 72..

Indefinite detention will amount to inhuman treatment

18. The Committee rightly recognises in its draft general comment that administrative detention must never be unlimited or of excessive length.¹⁶ Because of the psychological suffering caused by indefinite detention, it has been recognised that indefinite detention without charge will, in fact, amount to a breach of the prohibition of torture and ill-treatment.¹⁷ We suggest that this point should be emphasised at the appropriate place in the text, by the addition of the words:

Indefinite detention of a migrant worker in an irregular situation will amount to a violation of Article 10 of the Convention and the State's obligations under other human rights instruments prohibiting the use of torture and ill-treatment.

Detention of migrant workers with particular protection needs

19. Certain groups of migrant workers have particular protection needs if they are detained. The draft refers to the special needs of children, but we suggest that it should also consider other groups including women, victims of trafficking, stateless persons, lesbian, gay, bisexual and transgender persons and particularly vulnerable migrant workers, including survivors of torture.¹⁸

Women

20. In relation to women, we suggest that the draft include reference to the provisions of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules),¹⁹ in addition to the Standard Minimum Rules on the Treatment of Prisoners at paragraph 33 of the draft.

Vulnerable categories of migrant workers

21. Detention can be particularly damaging to vulnerable categories of migrant workers, impacting negatively on their physical and mental health.²⁰ Those identified as being within such categories include victims of torture, unaccompanied older persons, persons with a mental or physical disability, and persons living with HIV/AIDS.²¹

22. In relation to torture survivors, international human rights bodies have recognised that the additional trauma caused to a torture survivor by imprisonment or detention can be of such gravity that it may amount to inhuman or degrading treatment contrary to Article 16 of the UN Convention Against Torture, Article 7 of the ICCPR and Article 5 of the American Convention.²² This view has also been expressed by the UN Special Rapporteur on the Human Rights of Migrants, in his report on detention of migrants in an irregular situation.²³ This could be the case,

¹⁶ Draft general comment, para. 24.

¹⁷ CAT, Concluding Observations on the United States of America, CAT/C/USA/CO/2 (2006), para. 22 (“*detaining persons indefinitely without charge constitutes per se a violation of the Convention*”).

¹⁸ See report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), paras. 36-47. Lesbian, gay, bisexual and transgender people are not specifically included in the categories of individuals with special protection needs, however we submit that as they may be at particular risk of sexual abuse these needs should be identified and responded to – see European Court of Human Rights, *Zontul v Greece* (2012) application no. 12294/07, judgment 17 January 2012

¹⁹ United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), A/C.3/65/L.5, 6 October 2010.

²⁰ See, e.g. in relation to asylum seekers, Coffey et al. (2010), ‘The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum’, 70 *Social Science & Medicine* 2070-2079. See also Newman, Dudley and Steel (2008), ‘Asylum, Detention and Mental Health in Australia’, 27(3) *Refugee Survey Quarterly* 110-127.

²¹ See Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), paras. 43-46.

²² View of the Committee against Torture in *A v The Netherlands*, CAT/C/22/124/1998, 12 May 1999, in particular paras 6.3 and 9. See also an analogous interpretation of the European Court of Human Rights in *Price v United Kingdom* (2002) 34 EHRR 53, [2001] ECHR 458, Application Number 33394/96, 10 July 2001, paras. 29-30 (in relation to the detention of a person with physical disabilities); available at: <http://www.bailii.org/eu/cases/ECHR/2001/458.html>; IACmHR (2010), Report on Immigration in the United States: Detention and Due Process, OEA/Ser.L/V/II., Doc. 78/10, 30 December 2010 (“Report on Immigration”), para. 69; available at: <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>.

²³ Report of the Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), para. 44.

for example, for a female domestic worker who had been raped or subjected to severe violence by her employer, or a migrant worker who had been tortured by police.

23. The potential for infliction of trauma, and the steps that must be taken to prevent this, by ensuring that vulnerable individuals are identified and only detained in exceptional circumstances, has been recognised both by international human rights bodies, and by national governments.²⁴ For example, the Inter-American Court of Human Rights and Inter-American Commission on Human Rights have recognised that special measures must be taken to protect vulnerable people when their liberty is at stake.²⁵ In relation to asylum seekers, Guideline 7 of the UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers provides that: “*Given the very negative effects of detention on the psychological well being of those detained, active consideration of possible alternatives should precede any order to detain asylum-seekers falling within [listed categories of vulnerable asylum seekers]*”. It goes on to specify certain steps that must be taken if such individuals are, as a matter of last resort, to be detained to ensure their physical and psychological health.²⁶
24. The Special Rapporteur on Human Rights of Migrants has expressed the opinion that the same principle should apply to vulnerable migrants, and that:

*in the event that individuals falling within these categories are detained, it is advisable that this should only be on the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being. In addition, there must be regular follow up and support by skilled personnel. They must also have access to adequate health services, medication and counselling.*²⁷

We support this position and urge the Committee to adopt it.

Recommendations:

The section on the protection from arbitrary arrest and detention should:

- stress, in line with the recommendation of the Special Rapporteur on the Human Rights of Migrants, that States should progressively abolish the administrative detention of migrant workers in an irregular situation;
- emphasise that indefinite detention of a migrant worker in an irregular situation amounts to a violation of Article 10 of the Convention;
- include reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), in addition to the Standard Minimum Rules on the Treatment of Prisoners (at para. 33 of the draft);
- refer to the fact that detention of migrant workers who have been subjected to torture or ill-treatment in the past may in and of itself amount to torture or ill-treatment, in violation of Article 10 of the Convention;

²⁴ For example, in the United Kingdom, government policy is that people in immigration detention must be screened to identify those for whom there is evidence of torture, and that such people should be detained only “*in very exceptional circumstances*”. The policy towards the detention of persons who claim to have been victims of torture is covered by a number of over-lapping policy and instruction documents: Chapter 55 of the Enforcement Instructions and Guidance (EIG), Detention Centre Rules 2001, Detention Services Order 03/2008, Asylum Process Instruction (Rule 35).

²⁵ I-ACtHR, *Advisory Opinion on Undocumented Migrants*, OC-18, 17 September 2003, Ser. A No. 18/03, para. 121; IACmHR (2010), Report on Immigration, para. 66. See also Principle IX(3) of the Inter-American Principles on Detention, which provides that: “*All persons deprived of liberty shall be entitled to an impartial and confidential medical or psychological examination, carried out by qualified medical personnel immediately following their admission to the place of imprisonment or commitment, in order to verify their state of physical or mental health and the existence of any mental or physical injury or damage; to ensure the diagnosis and treatment of any relevant health problem; or to investigate complaints of possible ill-treatment or torture*”.

²⁶ Office of the United Nations High Commissioner for Refugees, *UNHCR’s Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, February 1999 (the ‘UNHCR Detention Guidelines’), Guideline 7, available at: <http://www.unhcr.org/refworld/pdfid/3c2b3f844.pdf>.

²⁷ Special Rapporteur on the Human Rights of Migrants, ‘Detention of Migrants in an Irregular Situation’, A/HRC/20/24 (2012), para. 43.

- stress that States must screen for and avoid the detention of particularly vulnerable groups of migrants, including victims of torture, and that such persons should be provided with adequate medical and psychological assistance.

III. Right to an effective remedy for migrant workers in an irregular situation and their families

25. Article 83 of the Convention provides that, where a person's rights are violated under the Convention, States parties must ensure that the person has an effective remedy, and that the remedy is enforced. As recognised by UN Treaty bodies, the notion of an effective remedy encompasses both procedural aspects (accessing justice) and substantive rights (achieving adequate, effective and appropriate reparation).²⁸
26. The Committee considered this Article in its previous General Comment No. 1,²⁹ concerning migrant domestic workers, and made a number of points of relevance to migrant workers in an irregular situation. In addition to the points made in its first General Comment, we suggest that the new general comment addresses the specific circumstances of migrants in an irregular situation in relation to the right to an effective remedy.
27. As the Committee recognised in its previous general comment, one significant obstacle to the achievement of this right is the fear of being detained or deported when making a complaint. The Committee stressed that:

*[i]n order to ensure effective access to justice and remedies for all migrant domestic workers, ... migrant domestic workers should be able to access courts and other justice mechanisms without fear of being deported as a consequence, and ... migrant domestic workers should have access to temporary shelter when needed due to the abusive circumstances of their employment.*³⁰

It also encourages States parties “to enter into bilateral agreements in order to ensure that migrants who return to their country of origin may have access to justice in the country of employment, including to complain about abuse and to claim unpaid wages and benefits”.³¹ We suggest that the Committee refers to this part of the previous general comment, and stresses that the same considerations apply to migrant workers in an irregular situation.

28. Other obstacles to accessing an effective remedy can include language difficulties, a lack of information about mechanisms of complaint, and monetary constraints for court fees and legal advice. If migrant workers are detained because of their immigration status they can be shut off from mechanisms of redress for violations that occurred prior to the detention, and during it. The Committee should stress that States parties have positive obligations to address the specific difficulties faced by migrant workers in an irregular situation, and their families, in accessing justice. Given the difficulties faced by migrant workers in an irregular situation States parties should also create a mechanism that actively controls the respect for legislation and regulations by employers and investigates and sanctions their violations, and that does not depend excessively on the initiative of the workers themselves.³²
29. The Committee should also clarify that part of the obligation of providing an effective remedy under Article 83 is the provision of prompt, adequate, effective reparation, which may – depending on the violation involved – include measures of restitution, compensation,

²⁸ See, eg. HRC, General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 16; CAT, General Comment No. 3 on the Implementation of Article 14, para. 5.

²⁹ CMW, General Comment No. 1 on Migrant Domestic Workers, paras. 49-50.

³⁰ Ibid, para. 50.

³¹ Ibid.

³² See, eg., the recommendations of the Human Rights Committee concerning Kuwait in 2011, CCPR/C/KWT/CO/2 (2011), par. 18.

rehabilitation, satisfaction, and guarantees of non-repetition.³³ Guarantees of non-repetition are closely tied to the State party's obligation under Article 84 of the Convention to introduce the legislative and other measures that are necessary to implement its provisions.

Recommendations:

The Committee should include a paragraph addressing the right of migrant workers in an irregular situation and their families to an effective remedy under Article 83 of the Convention and other human rights treaties. That paragraph should:

- recognise the particular difficulties that migrant workers in an irregular situation may have in accessing a remedy for violations of their rights;
- stress that States parties have positive obligations to address barriers to justice faced by migrant workers in an irregular situation;
- cross-reference to paragraphs 49-50 of General Comment No. 1;
- clarify that the responsibility to provide an effective remedy includes the obligation to provide substantive reparation which may, depending on the violation, include measures of restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

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³³ See United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, 16 December 2005; HRC, General Comment No. 31 (2004), para. 16; CAT, General Comment No. 3 (2012), para. 6.