



JOINT RESPONSE TO THE DRAFT CMW DRAFT GENERAL COMMENT NO. 5 (2020) ON MIGRANTS' RIGHTS TO LIBERTY AND FREEDOM FROM ARBITRARY DETENTION

Introduction

This submission is made on behalf of 12 civil society organizations and individuals working on issues concerning gender, sexuality and migration from different perspectives. [See *Annex 1: List of Endorsements*]. We commend the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) for addressing the pressing issue of migrants' rights to liberty and freedom from arbitrary detention and welcome the opportunity to provide inputs to the Draft *General comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention* in a very critical time given the COVID-19, discriminatory government response against the migrant workers during the pandemic and worryingly increasing incidents and crackdown against migrant workers globally. We believe that integrating a clear intersectional and gender analysis will further strengthen the draft general recommendation and set out some analysis and recommendation below for the Committee's consideration:

1. Expressly recognize **multiple and intersectional forms of discrimination** in the context of violations of the rights to liberty and freedom from arbitrary detention of migrants

Relevant section: Section II Regulatory framework on protection of the right to liberty of migrant workers and members of their families

Requested change: insertion of new para B: right to freedom from intersectional and multiple forms of discrimination

The State obligation to eradicate intersectional and multiple forms of discrimination is recognized as being integral to ensuring the right to non-discrimination by several UN treaty bodies.¹ This is a significant consideration in context of migration, as migrants are often subject to discriminatory laws, policies and practices, including in relation to their rights to liberty and freedom from detention. Discrimination faced on the base of migration status is inextricably linked to other factors such as race, ethnicity, religion or belief, health status, age, profession, class, caste, sexual orientation and gender identity, etc. As such, States must take measures to identify and address the specific vulnerabilities of migrants arising

¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 16 December 2010, CEDAW/C/GC/28; UN Committee on the Elimination of Racial Discrimination (CERD) *General Recommendation No. 25: Gender related dimensions of racial discrimination*, 20 March 2000 (Contained in document A/55/18, annex V); UN Committee on the Rights of the Child (CRC Committee), *General Comment No. 11, Indigenous children and their rights under the Convention*, 12 February 2009, CRC/C/GC/11.



from the intersection of these factors as they ensure protection of their rights to liberty and freedom from arbitrary detention.

Reason: Discriminatory laws, policies and regulations addressing migration and beyond have a disproportionate negative impact on migrant women, adolescents, sex workers, people living with HIV, lesbian, gay, bisexual, transgender, gender non-conforming and intersex persons, persons with disabilities, and anyone who is perceived to have transgressed sexual and gender norms. In the context of migration and detention, such individuals and groups are more likely to suffer compounded rights violations. As a result, States cannot hold them in detention in relation to migratory measures and must always provide alternatives to detention.

2. Address the **xenophobic and nationalist discourse around migration** particularly as it is taking place as a fall out of the COVID-19 pandemic

Relevant section: Introduction

Requested change: insertion of additional text in paragraph 7

The Committee is alarmed by the widespread resurgence of xenophobia and racism manifesting as vilification of migrants and refugees as being responsible for the spread of COVID-19. The resulting discrimination and stigmatization of migrants is further exacerbating their precarity during the pandemic. The Committee is also gravely concerned that in some egregious instances, COVID-19 is being used as the pretext to arbitrarily detain and deport migrants and refugees.

Reason: It is important to call attention to the xenophobia and racism underlying the ongoing stigmatization and discrimination against migrants and refugees in many countries as a political and structural cause that States must recognize and address. For instance, in Malaysia, immigration raids have resulted in the arbitrary detention and deportation of thousands of migrants and refugees.² As noted by the UN Special Rapporteur on the human rights of migrants, the actions of State authorities in Malaysia created a climate of fear for migrants that was exacerbated due to rising hate speech against migrants.³ Additionally, human rights defenders faced threats and intimidation for supporting migrants, with one migrant human rights defender being deported from Malaysia for participating in a documentary spotlighting the human rights violations arising from the immigration detentions⁴.

² Fortify Rights, Malaysia: End Immigration Raids and Detention, Support Migrants and Refugees Amid COVID-19, available at: <https://www.fortifyrights.org/mly-inv-2020-06-23/>

³ Office of the High Commissioner for Human Rights, Press Release: Malaysia / COVID-19: “Stop crackdown on migrants, journalists and civil society” – UN rights experts, available at: <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25900&LangID=E>

⁴ Al Jazeera, Malaysia to expel Bangladeshi who featured in Al Jazeera report, available at: <https://www.aljazeera.com/news/2020/7/25/malaysia-to-expel-bangladeshi-who-featured-in-al-jazeera-report>



It is also critical to examine and address how xenophobia and racism translate to discriminatory immigration laws and policies that particularly impact marginalized groups of migrants, such as sex workers. Many countries explicitly prohibit the participation of migrants in their domestic sex industry, which otherwise remains open to citizens. For example, in the Netherlands, non-EU nationals are not permitted to work in the sex industry, and in Finland, non-EU nationals can be removed from, and denied re-entry into the country if they are suspected of selling sexual services. Even in New Zealand, the only country in the world where sex work is fully decriminalised, any person coming to the country or residing there on a temporary visa may have their visa cancelled and face deportation if they engage in sex work or operate a brothel. This affects all temporary visas, including visitor, work, and student visas. Further, the conflation of human trafficking with migrant sex work compounds these issues, as it results in the disproportionate policing, raids, and detention of migrant sex workers. Anti-trafficking policies developed from the conflation of sex work and trafficking are also informed by racism, xenophobia, and transphobia.

3. Address the **impact of structural inequalities and gender stereotypes** on violations of the right to liberty of migrants and reaffirm the rights to bodily integrity and autonomy

Relevant section: Introduction

Requested change: insertion of new paragraph in the Introduction

Structural inequalities and discrimination combined with harmful stereotypes have specific impacts on the rights of women migrants in detention, particularly impairing their rights to bodily integrity and autonomy and their right to be free from gender based violence.⁵ Women migrants are reported to have suffered gross violations of rights in detention including in the form of coerced sterilizations, arbitrary detention due to termination of pregnancy and mistreatment during childbirth. As recognized by the CEDAW Committee, these forms of gender-based violence may depending on circumstances amount to torture or cruel, inhuman or degrading treatment⁶. In defining and responding to the violations of rights of women migrants in this context, States must recognize the intersecting factors that might contribute to exacerbating the vulnerability of particularly marginalized groups of migrant women.

Reason: Structural inequalities and gender stereotypes impact all aspects of women's migration including their rights in the context of deprivation of liberty. Recognizing and

⁵ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. A/HRC/38/36, 10 April 2018, para. 72, available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/36

⁶ UN Committee on the Elimination of Discrimination against Women General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 14 July 2017.



addressing the specific and disproportionate effects of deprivation of liberty on women migrants is critical to shed light on patriarchal oppression as the root of these violations.

It is also essential to highlight the State obligation to address multiple and intersectional forms of discrimination occurring in this context to ensure stronger protection of rights of particularly marginalized groups of migrants such as sex workers. For example, the Global Network of Sex Work Projects has found that migrant sex workers face higher levels of vulnerability to exploitation and violence, especially from State authorities with extremely limited recourse to justice⁷.

Requested change: insertion of new paragraph in Section IV. E.

In the case of persons with disabilities, as recognized by the Committee on the Rights of Persons with Disabilities,⁸ several countries have migration laws that have discriminatory provisions against persons with disabilities, including those that bar migration based on disability status. Discriminatory immigration laws can lead to detention and discriminatory procedural laws that result in the forced diversion of persons with disabilities to mental health institutions. Discriminatory provisions that negate procedural accommodations for persons with disabilities lead to a breach of their right to a fair trial, to longer detention times and to diversion to mental health institutions where their detention conditions are often worse and restricts or negates their rights to access justice, to freedom of movement, to legal capacity, and to live in the community, amongst others.

Reason: Disability is often considered a legal basis for forced institutionalization of persons with disabilities, including migrants with disabilities. In addition to amounting to torture and other cruel, degrading and inhuman treatments as recognized by CAT and CRPD, the CRPD has raised concerns about the lack of access to justice of migrants with disabilities who are deprived of their liberty and face discriminatory obstacles to make use of legal proceedings.⁹

4. Include specific recommendations to strengthen the framework for ensuring **accountability and access to justice** for violations of migrant rights, especially women migrants' rights

Relevant section: Section V, D. Judicial guarantees and access to justice (articles 16, 17 and 18 of the Convention)

⁷ Global Network of Sex Work Projects, Briefing Paper: Migrant Sex Workers, February 2018. Available at: <https://www.nswp.org/resource/briefing-paper-migrant-sex-workers>

⁸ See e.g., Committee on the Rights of Persons with Disabilities [hereinafter CRPD Committee], Concluding observations on the initial report of the Republic of Korea, paras. 35-36, U.N. Doc. CRPD/C/KOR/CO/1 (2014); CRPD Committee; Concluding Observations: United Arab Emirates, paras. 49-50, U.N. Doc. CRPD/C/ARE/CO/1 (2016); CRPD Committee; Concluding Observations: Argentina, paras. 45-46, U.N. Doc. CRPD/C/ARG/CO/1 (2012); CRPD Committee; Concluding Observations: Slovenia, paras. 29-30, U.N. Doc. CRPD/C/SVN/CO/1 (2018); CRPD Committee; Concluding Observations: Armenia, paras. 29-30, U.N. Doc. CRPD/C/ARN/CO/1 (2016); Concluding observations: Mexico, para. 39, U.N. Doc. CRPD/C/MEX/CO/1 (2014).

⁹ See e.g., CRPD, List of Issues: France, para. 13(c), CRPD/C/FRA/Q/1 (2019); CRPD, Concluding Observations, para 35(a), CRPD/C/AUS/CO/2-3 (2019).



Requested change: insertion of new paragraph 68

States must guarantee the right of access to justice for migrants by establishing firewalls between labour, social services and immigration agencies so that migrants are not put at increased risk of exploitation, including in the form of arbitrary detention, due to fears of deportation. Enabling conditions must be created for migrants to access justice through provision of holistic support services including shelter, comprehensive health services, including mental health services and counselling and provision of social security. Migrants have the full right to reparation and remedies, including compensation¹⁰ as an element of access to justice.

States must further review and reform immigration laws and policies to ensure that any regulations concerning the employment of migrants do not directly or indirectly discriminate on the basis of gender, gender identity, sexual orientation, race, ethnicity, or national origin; repeal laws that explicitly prohibit the participation of migrants in the sex industry, as these effectively guarantee their reliance on third parties and render them extremely vulnerable due to the threat of deportation and ensure that the responses to trafficking are not used to impose border control and regulate the migration of sex workers.

Reason: Whereas bilateral agreements on migration place significant emphasis on the obligation of sending countries, there is a relative lack of attention to the specific and practical obligations of destination countries particularly in relation to the right of access to justice. As recognized by the CMW in this draft general recommendation, the right of access to justice is dual nature. Ensuring the full implementation of this right for a vulnerable group such as migrants necessitates that States expressly recognize and respond to the particular precarity of migrants and develop systems of support to enable them to access justice.

Migrant sex workers experience disproportionate barriers to accessing justice including the risk of arbitrary arrest, prolonged detention and deportation, as well as gender and racial profiling by the police. The convergence of restrictive migration legislation and laws criminalising sex work ensures that migrant sex workers are marginalised and targeted by the state, while the structural factors creating their vulnerability remain hidden. Migrant sex workers face heightened levels of risk across all of the vulnerabilities that sex workers typically encounter, while simultaneously having no access to justice because the authorities that should protect them are those that threaten to arrest, detain and deport them.

Relevant section: Section V, E. Judicial guarantees

Requested change: insertion of additional text to para 69.

¹⁰ UN General Assembly resolution 60/147 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



In recognition of the specific barriers preventing women migrants from accessing justice, States must review, eliminate or reform laws, regulations, or policies that result in a disproportionate number of women migrant workers being detained for migration-related reasons.¹¹ This includes restrictive immigration laws that discourage migrant women from reporting gender based violence, including in the form of arbitrary detention.¹² States must also take measures, including awareness-raising and capacity-building for all actors of justice systems and for law students to eliminate gender stereotyping and incorporate a gender perspective in all aspects of the justice system.¹³

Reason: As recognized by the CMW, women migrants face multiple and intersecting forms of discrimination throughout the migration cycle¹⁴. In relation to the rights to liberty and freedom from arbitrary detention, it is critical to consider the gender specific impacts of laws, policies and practices impacting migration, particularly those that may lead to the detention of women migrants specifically. For example, Malaysia requires migrants to undergo pregnancy tests prior to their arrival in the country for work and deports migrants at their own expense if they are found to be pregnant. A migrant woman was unlawfully detained in 2014 for terminating her pregnancy, after mandatory reporting by the medical service provider involved¹⁵.

5. Address the current economic context as a key driver/ structural cause of migration and the absence of corporate accountability for migrants' rights violations in the context of detention and immigration policies.

Relevant section: V. legal obligations of State parties

Reason: Under Section V, a stronger elaboration of the diverse contextual situations, contributory factors for increasing use of arbitrary detention of migrant workers and more nuanced guidelines outlining the responsibility and accountability of the state entities and non-state actors is needed. The manifestation of the contemporary economic climate and the dominance of neoliberal economic policies should be recognised in order to make the links between the prevalence of such ideology and how it has challenged State parties' ability to guarantee migrant workers' rights. This General Comment is an opportunity to question the

¹¹ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 26 on women migrant workers, 5 December 2008 CEDAW/C/2009/WP.1/R

¹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2017, CEDAW/C/GC/35

¹³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation on women's access to justice, 23 July 2015, CEDAW/C/GC/33

¹⁴ Joint Statement by the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW), the Committee on the Elimination of Discrimination against Women (CEDAW), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the Office of the United Nations High Commissioner for Human Rights (OHCHR), Addressing gender dimensions in large-scale movements of refugees and migrants. 19 September 2016

¹⁵ Center for Reproductive Rights, Nepalese Migrant Worker Free After Wrongful Imprisonment in Malaysia, January 2015. Available at: <https://reproductiverights.org/press-room/nepalese-migrant-worker-free-after-wrongful-imprisonment-in-malaysia>



accountability deficit of transnational corporations, recruitment agencies, private companies who are predominantly employing migrant workers in their supply chains with no direct employment relationship or employer responsibility. With the opaque recruitment policies, lines of accountability disjointed by borders, invisibility of the employer, these supply chains have become the breeding grounds for forced labour, unpaid and/or underpaid labour. The multinational companies claiming ignorance about forced labour in their supply chains; not accepting their involvement in creating situations where workers are pushed to be undocumented and end up in detention centers; and taking no responsibility for workers' legal and financial support should be brought into the regulatory framework.

Requested change: Suggest an additional paragraph, under Section V, sub-section G, to reflect the above context and state the new and emerging areas that require business entities to report on their human rights obligations towards migrant workers. State parties should ensure legal recognition of such violations committed by businesses and to act with due diligence to prevent abuse by non-state actors in particular private business actors.

Additional concern: endorsement of Working Group Arbitrary Detention's position regarding the sub-contracting of detention centers to private enterprises

Relevant section: Section III, sub-section B (paragraph 33 and 34)

Reason: The idea of sub-contracting the immigration detention centers to private enterprises should be used with caution. States parties should be discouraged for the private provisioning of immigration detention. Such provisioning takes significant effort of the States in making sure such detention centers abide by the human-rights compliant system to administer justice. More importantly, it is against the spirit of the independence of the States parties in administering justice and encouraging non-custodial measures.



ANNEX: LIST OF ENDORSEMENTS

1. Anita Ashong Katai, Barrister & Solicitor
2. Asia Pacific Refugee Rights Network (APRRN)
3. Beyond Trafficking & Slavery (BTS)
4. CREA
5. Dr. Samuel Okyere, University of Bristol
6. Global Alliance Against Traffic in Women (GAATW)
7. Global Network of Sex Work Projects (NSWP)
8. International Women's Rights Action Watch Asia Pacific (IWRAP AP)
9. Lawyers Collective
10. OutRight Action International
11. Sexual Rights Initiative (SRI)
12. WOREC Nepal