

Submission to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families in preparation for a Draft General Comment No. 5 on Migrants' Right to Liberty and Freedom from Arbitrary Detention

This submission is made by the Sexual Rights Initiative (SRI)¹. The Sexual Rights Initiative is a coalition of national and regional organizations based in Canada, Poland, India, Egypt, Argentina, and South Africa that work together to advance human rights related to sexuality, and gender at the United Nations.

1. Introduction

We welcome the opportunity to provide input to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) in preparation for a General Comment on Migrants' Right to Liberty and Freedom from Arbitrary Detention. This submission urges the Committee to clearly recognize that **any deprivation of liberty resulting from discriminatory laws, regulation and policies or their discriminatory application is by definition arbitrary and breaches the right of equal protection before the law (Art. 26 ICCPR)**.

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.² As a result, States cannot hold them in detention in relation to migratory measures and must always provide alternatives to detention.

This submission addresses issues raised by the CMW in its Concept Note and Questionnaire, in particular questions related to the impact of detention of women and other discriminated groups (A7, C2, C6) and the compliance with international standards of access to justice and due process in relation to the obligation of non-discrimination (B8, B11).

2. Arbitrary deprivation of liberty has a disproportionate impact on marginalized groups, specially pertaining to State's obligations to Equal Protection Before the Law (ICCPR Art. 26)

¹ <http://www.sexualrightsinitiative.com/>

² See e.g., talking about pre-trial detention, Comisión Interamericana de Derechos Humanos, *Informe sobre medidas dirigidas a reducir el uso de la prisión preventiva en las Américas*, (2017) OEA/Ser.L/V/II.163, Doc. 105, p. 145 Available at: <http://www.oas.org/es/cidh/informes/pdfs/PrisionPreventiva.pdf>; See also: Antje Ellermann, *Discrimination in migration and citizenship*, *Journal of Ethnic and Migration Studies*, (2019)

The Working Group on Arbitrary Detention (WGAD) adopted the umbrella term of deprivation of liberty to include imprisonment, detention, incarceration, and custody, amongst others.³ The adoption of this term seeks to make a comprehensive interpretation that includes all situations of deprivation of liberty and all frameworks across different human rights instruments.⁴ The WGAD also adopted a framework to determine when deprivation of liberty is arbitrary.⁵ Using this framework, deprivation of liberty is arbitrary under Category II when it results from the exercise of rights and freedoms enshrined in the Universal Declaration of Human Rights (UDHR) or in the ICCPR, including article 26 regarding equal protection before the law.⁶ Hence, any deprivation of liberty resulting from a discriminatory treatment on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”⁷ is arbitrary.

2.1. State Obligations

Often migrants are detained as a routine procedure and without adequate due process safeguards.⁸ Migrants are regularly seen as the ‘other’ who will disrupt established organised social structures. This “otherness” is exacerbated when migrants are from communities, countries, groups that are subjected to racial, gender and ethnic stereotyping. Stigma and stereotypes inform a vicious cycle, with legislation, regulations and policies reinforcing each other to reject and dehumanize migrants, resulting in the increasing tendency to criminalize migration.⁹ To counter the tendency, States have two obligations. As this Committee and the Inter-American system have asserted, they must not consider “irregular migration status, including irregular entry/stay, a criminal offense.”¹⁰ Furthermore, in compliance with article 7 of the CMW, as well as equivalent international law provisions, to ensure non-discrimination States must take active measures to counter discriminatory practices, social stigma, and stereotypes.

³ Working Group on Arbitrary Detention, *Fact Sheet No. 26, Section IV. B.*, Available at: <https://ohchr.org/Documents/Publications/FactSheet26en.pdf>

⁴ Id.

⁵ Id.

⁶ Id.

⁷ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 26, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); S. Treaty Doc. 95-20; 6 I.L.M. 368 (1967). [hereinafter ICCPR]

⁸ Office of the High Commissioner of Human Rights, *Combating Discrimination against Migrants*, Available at: <https://www.ohchr.org/FN/AboutUs/Pages/DiscriminationAgainstMigrants.aspx>

⁹ Id.

¹⁰ United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families [hereinafter CMW], *Draft General Comment No. 5 on Migrants’ Right to Liberty and Freedom from Arbitrary Detention. Concept Note and Questionnaire.* (2018); Comisión Interamericana de Derechos Humanos, *Derechos Humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y Estándares del Sistema Interamericano de Derechos Humanos*, (2015) OEA/Ser.L/V/II. Doc. 46/15, para. 383. Available at: <http://www.oas.org/es/cidh/informes/pdfs/MovilidadHumana.pdf>

2.2. Migration is not a uniform experience

Migrants are not a homogenous group and face different kinds of barriers and discrimination related to their own background and identity. Although human rights mechanisms often recognize discrimination against migrants, they do not delve into exactly who is being stigmatized, at least not any further than the initial recognition of those that have an “irregular migration status”. As a result, there is almost no analysis of how poor migrants, migrant sex workers, and migrants with disabilities -just to mention a few- face particular and complex forms of discrimination.

What is and what is not considered worthy of attention in the context of migration also responds to a social hierarchy of labour. Race, ethnicity, socio-economic background and nationality affect what kind of labour is perceived as valuable in ways that are often gendered.¹¹ “Intellectual” labour is privileged over care work, sex work and other forms of labour deemed to be “low-skilled” and most often dominated by women.

Portrayals of “good” migrants (i.e. from the Global North) and “bad” migrants (i.e. from the Global South) , fuel nationalist and racist ideologies that affect how labour is valued. This translates, for example, in high expectations for immigrants from the Global South in Global North countries in terms of “cultural integration” while Global North immigrants often do not face the same expectations.¹² Similarly, Global North countries show “intolerance towards dual citizenship for immigrants, but tolerance of such a status among”¹³ their own nationals abroad. And although several European Union states no longer ask naturalizing immigrants to renounce their citizenship of origin, eight still do (Austria, Bulgaria, Croatia, Czech Republic, Estonia, Germany, the Netherlands, and Slovenia).¹⁴

Most EU states are not parties to the Convention. However, this does not mean that their influence on immigration regulation cannot be addressed in the context of the CMW. If the CMW intends to confront the unequal power dynamic between the Global North and the Global South, the CMW must analyze and highlight how criminalization of migration and enforcement of discriminatory practices are a direct result of Global North policies.¹⁵ For

¹¹ Sexual Rights Initiative, Submission to the CEDAW Committee on their draft General Recommendation on Trafficking, (2019).

¹² A survey reporting on workers from Europe or North America living abroad “suggests that less than 30% of respondents reported speaking the local language well, while more than 40% reported speaking only a little of the local language, or not at all.” Wing Wong, *Expat or Immigrant? The West’s Double Standards*, The McGill International Review, (2019) Available at: <https://www.mironline.ca/expat-or-immigrant-the-wests-double-standards/>

¹³ Maarten Vink, Hans Schmeets & Hester Mennes, *Double standards? Attitudes towards immigrant and emigrant dual citizenship in the Netherlands*, Ethnic and Racial Studies, (2019) 42:16, 83-101

¹⁴ Id. at 84.

¹⁵ See e.g. Janie A. Chuang, *The United States as Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking*, 27 Mich. J. Int’l L. 437 (2006). Available at: <http://repository.law.umich.edu/mjil/vol27/iss2/2>

example, how the United States shapes Mexico’s immigration policies,¹⁶ while the EU plays a similar role with Turkey.¹⁷

In summary, arbitrary detention of migrants must not be seen as independent from complex structures of power. Hence, it is necessary to address how migration legislation, regulations and policies, including arbitrary detention, affect migrants in different ways. In this context, this submission will mention migrant sex workers, migrant trans persons and migrants with disabilities.

2.3. Sex Workers

Even in jurisdictions where sex work is decriminalized, migrant sex workers cannot benefit from decriminalization. For example, the New Zealand Prostitutes’ Collective¹⁸ in the most recent CEDAW review cycle, challenged the claims made by New Zealand in its State Party Report indicating the “advancement of the rights of migrant women” and “preventing the exploitation of migrant women.”¹⁹ Sex workers experience firsthand that they are often left out of any progress made in migratory laws and that migrant sex workers are often left out of any progress related to the recognition of sex work as work. In this sense, they highlight that

"For non-migrants, the evidence is that violence and exploitation have markedly declined since decriminalisation in 2003. For migrant sex workers, while recent research did not find evidence of trafficking, it did find many migrant sex workers experience exploitation and that discriminatory migration laws create conditions rendering migrant sex workers vulnerable to trafficking."²⁰

Migrant sex workers are regularly targeted and detained under the guise of anti-trafficking.²¹ In the case of Canada, “not only are distinctions between sex work and human trafficking not made in the language used by law enforcement, but it is evident in much of the police response

¹⁶ Congressional Research Service, *Mexico’s Immigration Control Efforts*, (2019) Available at: <https://fas.org/sgp/crs/row/IF10215.pdf>

¹⁷ See. e.g., Open Democracy, *Turkey is doing the dirty work of Europe’s immigration control*, (2016) Available at: <https://www.opendemocracy.net/en/can-europe-make-it/turkey-is-doing-dirty-work-of-europe-s-immigration-control/>; Beste İşleyen, *Turkey’s Governance of Irregular Migration at European Union Borders: Emerging Geographies of Care and Control*, *Environment and Planning D: Society and Space*, vol. 36, no. 5, (2018), pp. 849–866

¹⁸ The New Zealand Prostitutes’ Collective, *Shadow Report to CEDAW* (2018) Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NZL/INT_CEDAW_NGO_NZL_31455_E.pdf

¹⁹ *Id.* at p. 9.

²⁰ *Id.* at p. 1

²¹ See Canadian Alliance for Sex work Law Reform and the Sexual Rights Initiative, *Joint Stakeholder Submission for the Universal Periodic Review of Canada*, April/May 2018. Available at: <http://www.sexualrightsinitiative.com/wp-content/uploads/CASWLR-UPR-FINAL-.pdf>

to sex work that anti-trafficking initiatives are driving the repression of sex work.”²² Any detention resulting from these discriminatory provisions in migration law is arbitrary.

2.4. Trans Migrants

Regarding trans migrants, Argentina is another example of how progressive legislation excludes migrants.²³ Discriminatory migration laws do not allow trans migrants to benefit from the Gender Identity Law where the State recognizes trans persons’ identities based only on their voluntary request. As a result, trans migrants are forced to use their original identity documents for years before they can change them, creating an enormous barrier to access basic social services, but also leaving them in a situation of precarity that makes them an easy target for detention. As a result, while only 3% of the total population deprived of their liberty in the province of Buenos Aires is migrant, 85% of trans persons deprived of their liberty are migrants: **trans migrants are 28 times more likely of being imprisoned** than non-migrant Argentinians.²⁴ Any detention resulting from these discriminatory provisions in migration law is arbitrary.

2.5. Migrants with Disabilities

In the case of persons with disabilities, as recognized by the Committee on the Rights of Persons with Disabilities, several countries have migration laws that have discriminatory provisions against persons with disabilities.²⁵ Discriminatory immigration laws can lead to detention and discriminatory procedural laws can allow the diversion of persons with disabilities to health institutions.²⁶ 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 health institutions where their detention conditions is often worse and restricts or negates their rights to access justice, to freedom of movement,

²² Sexual Rights Initiative & Global Network of Sex Work Projects, Submission to the Working Group on Discrimination Against Women, (2018) para. 7.

²³ OTRANS Argentina, Convocatoria Federal Trans y Travesti de Argentina & Akahatá - Equipo de Sexualidades y Géneros y la Iniciativa por los Derechos Sexuales, *Informe sobre Argentina para el tercer ciclo del Examen Periódico Universal (EPU)* (2017)

²⁴ Id.

²⁵ 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).

²⁶ “Immigration to Australia is governed by the Migration Act, which is explicitly exempted from the Disability Discrimination Act. While disability discrimination is against the law in Australia, the Department of Immigration and Multicultural Affairs (DIMA) is exempted from this law when dealing with potential migrants and refugees with disability.” Council of Canadians with Disabilities, *Disability & Immigration Law in Australia*, Available at: <http://ccdonline.ca/en/socialpolicy/access-inclusion/disability-and-immigration-law-in-australia>

to legal capacity, to live in the community, amongst others.²⁷ Any detention or extension in detention resulting from these discriminatory provisions in migration law is arbitrary.

2.6. Migrants Living with HIV

In a similar way, persons with HIV cannot migrate due to entry and stay restrictions related to public health. Consequently, discriminatory legislation and practices, such as mandatory HIV testing, can lead to longer times in detention associated to “waiting” times for tests results, and those who are not in detention can be placed in detention for deportation after the results arrive.²⁸ Any detention or extension in detention resulting from these discriminatory provisions in migration law is arbitrary.

3. Criminalization and penalization of other issues (in combination with migration), including discriminatory enforcement of these regulations, affects the most poor and oppressed groups of migrants.

The exercise of freedom of movement, that in the context of migration translates to access to territory and citizenship, is set by differential legal provisions that respond to gender, race, nationality, and class, amongst others.²⁹

“Whereas legal precarity has long been associated with undocumented and temporary immigration status, over the past two decades precarity has penetrated all immigration status, including those that have long been understood as secure and ‘permanently permanent’.”³⁰

This is related to the way in which migration laws replicate power structures that exclude and marginalize.

Furthermore, laws that are not seen as directly regulating migration have an impact on migrants, particularly on those who are perceived to transgress social norms, especially those related to gender and sexuality. And although most legislation, regulations and policies are permeated and reinforced by those social norms, the development of this General Comment is

²⁷ See, e.g., “39. The Committee is concerned that migrants with intellectual or psychosocial disabilities are detained in migrant holding centres, that the authorities set stricter requirements for entry into the country for persons with disabilities and that persons injured as a result of falling from the train known as “La Bestia” (“The Beast”) receive inadequate care. Committee on the Rights of Persons with Disabilities [hereinafter CRPD], *Concluding observations on the initial report of Mexico*, para. 39, U.N. Doc. CRPD/C/MEX/CO/1 (2014).

²⁸ UNAIDS, *The impact of HIV-related restrictions on entry, stay and residence: an annotated bibliography*, (2009) Available at: http://www.unaids.org/sites/default/files/media_asset/jc1729_bibliography_en_0.pdf

²⁹ Antje Ellermann, *Discrimination in migration and citizenship*, *Journal of Ethnic and Migration Studies*, (2019)

³⁰ *Id.*

an opportunity to recognize that they lead to the arbitrary detention of migrants and, as a result, any detention or extension in detention resulting from these discriminatory provisions is arbitrary. The necessary measures to stop arbitrary detention of migrants in this context is to refrain from detaining all persons on the basis of the exercise of their sexuality and gender and/or health and disability status.

Criminalization or penalization of same-sex relationships, sex work, HIV, non-conforming gender expression etc. leads to detention. When detainees are migrants, this often leads to immigration detention with the purpose determining their “deportability”. Criminal records, even resulting from discriminatory laws or discriminatory enforcement, have a relatability with immigration records and can lead to detention and deportation.³¹ Even after deportation, migrants with a criminal record are usually required to declare this to border control agencies in immigration procedures, creating a permanent stigma and insurmountable barriers to their freedom of movement.³² When such detention happens in the context of migration or leads to migratory detention, it is arbitrary and falls under the scope of the CMW.

3.1. Sex Work

Criminalization of sex work is a way of criminalizing consensual sex. Police enforcement may involve surveillance and detention of migrant sex workers and women sex workers belonging to racial or ethnic minorities. Migrant sex workers are frequently stereotyped as potential victims of trafficking, and thus indoor workspaces used by migrant sex workers are disproportionately targeted in raids on sex work establishments. Migrant sex workers are exposed to specific immigration offenses that prohibit migrant sex workers from engaging in sex work and are afforded fewer rights upon arrest for these violations.³³ Migrant sex workers who do not speak the language of the host country are frequently denied adequate interpretation services at some or all points in the judiciary process, and they are particularly vulnerable to fabricated or coerced evidence and ineffective representation during trial.³⁴ When this detention happens in the context of migration or leads to migratory detention, it is arbitrary and falls under the scope of the CMW.

3.2. Persons with Disabilities

Many States have criminal law provisions that include persons with disabilities as being incapable of consenting to sex, even if they actually consent. Although these provisions are

³¹ The New Zealand Prostitutes’ Collective, Shadow Report to CEDAW (2018). Available at: https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NZL/INT_CEDAW_NGO_NZL_31455_E.pdf

³² Id.

³³ Sexual Rights Initiative & Global Network of Sex Work Projects, Submission to the Working Group on Discrimination Against Women, para. 28, (2018)

³⁴ Id.

mostly socially enforced,³⁵ they can be cause to criminal prosecution and, therefore, having a criminal record with the aforementioned consequences.

3.3. Trans and Gender Non-Conforming Persons

Criminalization or penalization of “immoral” acts, targets, amongst others, the public existence of trans persons or gender non-conforming persons. The morality that emphasizes controlling sexuality as ‘deviancy’ was brought to the colonial territories to control the people in the territories. The project of colonialism codified this “morality” of colonial powers in their “territories”. Upon re-claiming their independence, former colonial States used these very same laws as the bedrock to formulate the norms and values in dealing with marginalised subjects of the nation particularly while dealing with issues of sexuality and gender.³⁶ Some of these provisions are now being removed from legislation.³⁷ In a similar way as with sodomy and sex work criminalization, sentences for these crimes can lead to detention, deportation and barriers to migrate to other countries even after deportation due to criminal records.

3.4. Drug Use

Drug use criminalization has been used historically to target poor and black persons, as well as other groups. For example, disproportionately in relation to the rest of the population, trans migrant women in the province of Buenos Aires are criminalized for alleged infractions of Law 23.737 that regulates the possession and sale of narcotics.³⁸ In all documented cases, they were arbitrarily detained in the context of raids or anonymous complaints of sex work that never involved anyone other than a trans person, openly violating international standards in relation to minority profiling, particularly of migrants.³⁹ Detention of trans persons can lead to cruel, inhumane and degrading treatment, as well as to torture that in some cases (like those of Angie Velásquez and Pamela Macedo Panduro) cause their death.

³⁵ “I would have broken the law several times...” Reflecting on the Criminal Law Sexual Offences Act (1993) in the Republic of Ireland. Ger Minogue et. al. IN Rohhs Chapman, Sue Ledger, Louise Townson and Daniel Docherty, *Sexuality and relationships in the lives of people with intellectual disabilities. Standing in my shoes*. Jessica Kingsley Publishers. 2015. London. P. 79

³⁶ Sexual Rights Initiative & Global Network of Sex Work Projects, Submission to the Working Group on Discrimination Against Women, (2018)

³⁷ See e.g., The Caribbean Court of Justice, *CCJ Declares Guyana’s Cross-Dressing Law Unconstitutional* (2018). Available at: <http://www.cj.org/news/ccj-declares-guyanas-cross-dressing-law-unconstitutional>

³⁸ OTRANS Argentina, Convocatoria Federal Trans y Travesti de Argentina & Akahatá - Equipo de Sexualidades y Géneros y la Iniciativa por los Derechos Sexuales, Informe sobre Argentina para el tercer ciclo del Examen Periódico Universal (EPU) (2017)

³⁹ See. eg., Oficina Regional para América Central del Alto Comisionado de las Naciones Unidas para los Derechos Humanos (OACNUDH), *Guía Práctica para elaborar informes sobre perfilamiento racial*, (2015) Available at: http://www.oacnudh.org/wp-content/uploads/2016/02/guia_practica_informes_perfilamiento_racial.pdf; Comisión

Interamericana de Derechos Humanos, *Derechos Humanos de migrantes, refugiados, apátridas, víctimas de trata de personas y desplazados internos: Normas y Estándares del Sistema Interamericano de Derechos Humanos*, (2015) OEA/Ser.L/V/II. Doc. 46/15 pg. 96. Available at: <http://www.oas.org/es/cidh/informes/pdfs/MovilidadHumana.pdf>

“On September 4, 2016, about 25 Peruvian and Ecuadorian trans persons were arrested in La Plata in what the press described as "operative against narco-transvestites"... Six days later, Chamber IV of the Chamber of Appeals and Guarantees of La Plata issued a historical decision ("Zambrano decision") nullifying the police procedure due to it being "extremely humiliating" and recognizing the rights of migrant trans women. However, in its subsequent actions, the Province of Buenos Aires police ignores this ruling.”⁴⁰

4. Conclusion

Discriminatory laws, policies and regulations addressing migration and beyond have a disproportionate negative impact on migrant women, 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. Any deprivation of liberty resulting from discriminatory laws, regulation and policies or their discriminatory application is by definition arbitrary and breaches the right of equal protection before the law (Art. 26 ICCPR). The Committee, in its guidance to States, must establish that:

- Any deprivation of liberty resulting from discriminatory laws, regulation and policies or their discriminatory application is by definition arbitrary and breaches the right of equal protection before the law (Art. 26 ICCPR),
- States must decriminalize migration and remove discriminatory laws, even when they are not directly regulating migration, especially those criminalizing and penalizing sexuality and gender,
- States have the positive obligation of reviewing migratory laws and its impact on marginalized groups,
- States must collect and analyze data indicating if marginalized groups are overrepresented in migration detention facilities and why.
- States must provide a wide array of alternatives to detention by assigning resources for the creation and support of alternatives to detention. Prioritize funding and access to alternatives to detention to persons from marginalized groups.

⁴⁰ OTRANS Argentina, Convocatoria Federal Trans y Travesti de Argentina & Akahatá - Equipo de Sexualidades y Géneros y la Iniciativa por los Derechos Sexuales, Informe sobre Argentina para el tercer ciclo del Examen Periódico Universal (EPU) (2017)