

Criminalisation of migration And the importance of ‘firewalls’

The principles of security and national sovereignty cannot go against men and women’s fundamental human rights and gender equality. Governments should not use concerns about trafficking and people-smuggling to justify more intense border security, enforcement and criminalization, which further penalizes migrants. Anti-trafficking policies should not be anti-migration.

The human rights of all migrants, regardless of their immigration status, should be upheld, and all migrants should be treated with dignity and respect.

Border crossing, residence and work permits are administrative issues and undocumented migration should not be considered a crime. The UN Working Group on Arbitrary Detention and the Committee on Migrant Workers have stated: “Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecessary detention.”¹

Migrant women are at a higher risk of criminalisation due to the multiple barriers that they face while migrating—even through regular channels—such as gendered bans on migration; violence and abuse before, during and after migration; discriminatory regulations for residence when depending on a spouse; and discriminatory and gendered citizenship prerequisites resulting in limited access to travel documents.

The need for firewalls

Firewalls are needed to protect migrants’ human rights, especially for women with insecure or irregular migration status. Firewalls recognize that “other legitimate interests, such as fundamental human rights, public health concerns, fighting crime, legal certainty, as well as social policy considerations, should also be taken into account when enforcing immigration law”. Hence, a firewall between a migrant’s personal information and access to services is needed.²

The failure to establish clear and binding firewalls results in migrant women with insecure migration status risking double penalty, where in addition to experiencing violations of their

¹ Commission on Human Rights, Report of the Working Group on Arbitrary Detention, A/HRC/7/4, 10 January 2008, para. 53. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para.24. See also, Human Rights Council, Report of the Working Group on Arbitrary Detention, A/HRC/13/30, 18 January 2010, para.58; Committee against Torture, Concluding observations on the fourth report of Cyprus, CAT/C/CYP/CO/4, 16 June 2014, para.17(a); CMW, Concluding observations on the combined second and third periodic reports of Senegal, CMW/C/SEN/CO/2-3, 20 May 2016, para.27(a); Human Rights Council, Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24, 2 April 2012, paras. 13, 14.

² EU Fundamental Rights Agency (2013), *Apprehension of migrants in an irregular situation*, available online at <http://fra.europa.eu/en/theme/asylum-migration-borders/practical-guidance#irregular-migrants>, para (c)

human rights—to health, education, housing, work, etc., and within the criminal justice system—undocumented migrant women face the threat of expulsion, which has significant personal, social and economic ramifications.

Firewalls have a strong legal basis, having been supported and recommended by international human rights treaty bodies such as the Committee on Economic, Social and Cultural Rights; the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families; ILO Labour Inspection Convention, 1947; ILO Labour Inspection (Agriculture) Convention; ILO Committee of Experts, 2006 General Survey on the labour inspection instruments; ILO Committee of Experts, Promoting fair migration; OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders; and OHCHR, Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements; on the basis of existing legal norms.

In March 2016, the European Commission against Racism and Intolerance (ECRI), part of the Council of Europe, adopted a policy advocating for firewalls prohibiting the sharing of the personal data of, or other information about, persons suspected of irregular presence or work, with the immigration authorities for purposes of immigration control and enforcement.³

However, in February 2016, US federal immigration agents arrested and detained a transwoman survivor of domestic violence, in the El Paso, Texas, courthouse where she was seeking a protection order. Local authorities suspect the tip came from her abuser. Advocates point out that this will deter other undocumented survivors of violence against women from reporting violence, seeking help, and leaving abusers.⁴

The Global Compact should:

- Reject the criminal prosecution of undocumented or irregular status, entry or border crossing.
- **With regards to access to Justice:**
 - Ensure that migrant and refugee women have access to justice, including safe reporting and proper firewalls with immigration control. This should include access to legal advice and legal aid for migrant women independent of their migration status, and information about how to access support in the event that rights are breached.
 - Support clear and binding firewalls between law enforcement and criminal justice actors and immigration enforcement authorities in order to ensure access to justice for migrants who have been victims of crime, and to allow them to participate in criminal proceedings as witnesses, without fear of arrest, detention and deportation on the basis of their migration status.⁵

³ The European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf

⁴ Sejal Singh, ICE Detains Undocumented Woman Who Reported Domestic Abuse, *Feministing* (blog), 16 February 2016, <http://feministing.com/2017/02/16/ice-detains-undocumented-woman-who-reported-domestic-abuse/>;

⁵ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para.2: the

- Provide that firewalls must be binding on state authorities and the private sector in order to fully protect the human rights of those migrants designated as being in irregular status.⁶
- **With regard to access to services:**
 - Support clear and binding firewalls between immigration enforcement and public services. Education and health, including sexual and reproductive health and mental health should be granted to all women, independent of their nationality or migration status. Public service officials should be able to perform their important social missions without interference. Such firewalls also help to safeguard public health.
 - Support firewalls between service providers, housing providers and immigration authorities to ensure that migrants with insecure migration status, or those who help them in exercising their right to an adequate standard of living are not criminalised.⁷
 - Ensure firewalls between schools and immigration authorities, to make clear to administrators, teachers and parents that they are not required to report or share data on the migration status of pupils or their parents.⁸ Firewalls should further ensure that immigration authorities do not conduct enforcement operations on or near schools or other education premises.⁹
- **With regards to labour inspections:**
 - Existing and new mechanisms to ensure labour rights—such as complaints mechanisms and labour inspection services—should be separated by binding firewalls from immigration authorities to ensure they are not used to check the migration status of workers so that migrant women can safely report labour issues without fear of arrest, detention and expulsion.¹⁰

General Comment further details the civil and political rights of migrants in an irregular situation who come into contact with the criminal justice system whose realisation is only possible if there are binding firewalls in place – see for example para.21; Committee on the Elimination of Discrimination against Women, General Recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R, 5 December 2008, para.26(1); CEDAW General Recommendation 33 on women’s access to justice, CEDAW/C/GC/33, 23 July 2015, para.10.

⁶ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, preamble, p.7, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf

⁷ European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, Recommendations 2, 3, 11, 13, 15, 25-27, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf

⁸ Committee on Migrant Workers, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para.77; OHCHR, *Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations within large and/or mixed movements, on the basis of existing legal norms*, A/HRC/34/CRP.1, 23 February 2017. European Union Agency for Fundamental Rights (FRA), *Apprehension of migrants in an irregular situation*, 2013, Principles 4 and 5; European Commission against Racism and Intolerance (ECRI), General Policy Recommendation No. 16 on Safeguarding Irregularly Present Migrants from Discrimination, adopted on 16 March 2016, Council of Europe, Strasbourg, CRI(2016)16, Recommendations 2, 3, 11, 15, 18, 19, available at http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N16/REC-16-2016-016-ENG.pdf

⁹ Committee on Migrant Workers, General Comment No. 2 *ibid.*

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 23 on the Right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, 8 March 2016, para.54. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families, CMW/C/GC/2, 28 August 2013, para.63; ILO Labour Inspection Convention, 1947 (No. 81), Article 3(2); ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129), Article 6(3)