

## ***End Criminalization of Migrants and Those Who Assist Them***

### **The Issue**

- Criminalization of migration fuels a situation of potential discrimination and verbal or physical aggression on migrants or those perceived to be non-citizens.
- The criminalization response is often linked with discriminatory profiling, particularly on the grounds of race, ethnicity, language and religion.
- Abusive employers and law enforcement officials use the threat of arrest, detention, and deportation to exploit undocumented migrants, including through corruption, forced labour, rape or other forms of sexual violence.
- Human rights defenders such as activists, humanitarian workers and migrants themselves often come under attack. This may include unfair prosecution for “harbouring” or even smuggling migrants in irregular status, attacks and threats including the risk of sexual and gender-based violence.

### **Gender Dimensions**

- Women migrants have less access than men to regular migration pathways making them more at risk of criminalization on the basis of their migratory status.
- Because of pervasive gender discrimination women migrants typically migrate with fewer resources to pay the costs of regular migration, often migrating in debt or having to resort to smuggling and trafficking schemes.
- Trans migrants are often excluded as a result of gender-based discrimination from education and work that could provide resources for safer migration.
- Women may face gendered bans on migration instigated in the name of their protection but limit their rights and do not address the drivers of their migration, leaving some to opt for irregular migration with the risks of criminalization.
- Gender discrimination sees women migrants largely excluded from the so-called high-skilled work that offers regular pathways, instead over-represented in the lowest paid occupations and the informal economy, including as contributing family workers.
- Women migrants face discriminatory residency regulations where their documentation is premised on the sponsorship of a spouse or an employer, including in diplomatic households, creating situations where women lose regular status if they leave abusive situations.
- When detained, women migrants may be housed in inadequate facilities and are at risk of sexual and gender-based violence, more so in migration and borders detention where is not always subject to judicial review.

## Policy Recommendations – States should:

- Ensure that it is not a criminal offence to leave, enter or stay in a country irregularly.
- Ensure opportunities for regular migration, which are non-discriminatory and gender-responsive, that occupations dominated by women migrant workers, such as domestic work and some forms of entertainment are equally protected by labour laws, and that women migrant workers can enjoy the same rights and protection that are extended to all workers in the country.
- Recognize border crossing and residence and work permits as administrative issues and ensure that administrative detention is not applied as a punitive measure for violations of immigration laws and regulations.
- Take all measures to protect the right to life, liberty and security of person of those who defend the human rights of migrants. Provide, in law and in practice, a safe, accessible and enabling environment for individuals and organizations that work to promote or protect the human rights of migrants, ensuring that they are not subject to judicial or other forms of harassment for their legitimate human rights work.

## Relevant International Policy:

**Global Compact for Safe, Orderly and Regular Migration**, (11) States chose not to endorse the criminalization of irregular entry or stay, reaffirming their obligation to protect the human rights of all migrants, regardless of status (2, para 4, 11, 15, 18). Non-criminalization of migration is an important principle in human rights as it enables the realization of the right to seek asylum, a universal human right that must not be criminalized.<sup>1</sup>

The human rights guidance is that *“The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health.”*<sup>2</sup>

**Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)**, General recommendation No. 26 on women migrant workers, CEDAW/C/2009/WP.1/R.

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<sup>1</sup> As well as the provision under international criminal law against the criminalization of smuggled migrants, international refugee law expressly provides that refugees should not be penalized for irregular entry under certain conditions, see the Convention relating to the Status of Refugees, Article 31

<sup>2</sup> Report of the Working Group on Arbitrary Detention, A/HRC/39/45, 2 July 2018, Annex: Revised Deliberation No. 5 on deprivation of liberty of migrants, para.10