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THE RIGHTS OF IRREGULAR MIGRANTS -
ENGAGING WITH THE HUMAN RIGHTS
MECHANISMS

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At the Civil Society Days of the Global Forum on Migration and Development 2011, the Office of the UN High Commissioner for Human Rights (OHCHR) and the Geneva office of the Friedrich-Ebert-Stiftung (FES) organized a panel discussion on the rights of irregular migrants with a group of civil society representatives and migration experts. Issues addressed by the panel and participants covered the following questions:

- i) To what extent do migrants in an irregular situation enjoy the same rights as nationals?
- ii) How can NGOs provide input and engage with the Committee on Migrant Workers, further treaty bodies and the Special Rapporteur on the human rights of migrants?

Lack of political mobilization

In his introduction, Craig Mokhiber, Chief of OHCHR's Development and Economic and Social Issues Branch, gave a brief overview of the often desolate situation of irregular migrants in their destination country. He stressed the applicability of human rights to everyone as well as their explicitly non-discriminatory language. Consequently, all persons, regardless of their migrant status, are entitled to the protection of their human rights. The reality, however, often looks different. Even where legislation exists to protect the rights of migrants, irregular migrants do usually not have access to institutionalized protection of their rights. In fact, as Mokhiber and further panelists agreed, irregular migrants who experience mistreatment are reluctant to seek help from state authorities for fear of detention and/or

deportation. Mokhiber emphasized the importance of considering this problem of enforceability of existing law in the process of devising strategies to assist irregular migrants.

François Crépeau, the UN Human Rights Council's Special Rapporteur on the Human Rights of Migrants in his remarks developed the thought of lacking enforceable protection for irregular migrants further by pointing to the resulting scarcity of political mobilization. Since irregular migrants are generally reluctant to speak out about their plight for fear of deportation, state authorities and NGOs alike are, firstly, left in the dark regarding the actual scope of maltreatment of irregular migrants and, secondly, under no pressure to address the issue of migrants' rights protection. Crépeau argued that due to this lack of political power, neither the executive nor state legislators are overly interested to invest

political capital in the protection of migrants' rights. The only state authority involved in the protection of the rights of irregular migrants is therefore the judiciary. As Crépeau pointed out, while the judicial system of some destination countries does invaluable work in this respect, the judiciary systems of the majority of countries fail to effectively protect the fundamental rights of irregular migrants.

Migrants as part of society

Migrants, and irregular migrants in particular, are all too often treated as elements external to society. However, as Abdelhamid El Jamri, Chairperson of the UN Committee on Migrant Workers, pointed out in his remarks, according to international human rights law only two rights are exclusive to a state's citizens: the right to vote and be elected and the right to enter and stay in their own country at their leisure. El Jamri argued, however, that the subtext of the political and public debate around migrants has at its core the message 'Rights are meant for us, the citizens' and not for non-nationals, especially irregular migrants.

In this regard, Anastasia Crickley, Member of the UN Committee on the Elimination of Racial Discrimination, highlighted the issue of terminology; in particular the discriminatory implications of the citizen language. The stark demarcation between 'us' and 'the other' is

particularly evident with regard to the issue of detention. As Crickley pointed out, the kind of detention practices applied to irregular migrants would not be acceptable if they were applied to anyone else, to 'us'. It has, for instance, become almost common practice to detain foreigners for security reasons without proper trial or process; a practice that is not publicly denounced despite its disgraceful character. In the same vein, both Crépeau and El Jamri called for the abolishment of the artificial dichotomy of 'us', the citizens, and 'the other', the (irregular) migrants. Rather than being seen as cheap labour, irregular migrants should be considered part of society. For instance, El Jamri made the interesting observation that those employing irregular migrants are never called irregular employers while the employees had for a long time even been referred to as 'illegal'. He consequently called for the acknowledgment of the crucial role of migrant workers to development and their resulting contribution to society. Indeed, El Jamri argued that the extent to which irregular migrants are understood as part of society by both citizens and the state reflects the stability of democratization and the rule of law within a country.

Engagement with UN bodies

On the issue of how to engage with the UN bodies and mechanisms, El Jamri highlighted

first of all that international treaties on migrant workers do not distinguish between irregular and regular migrants. In fact, Section 2 of the Convention on Migrant Workers explicitly stipulates the concept of non-discrimination, while Section 3 deals with fundamental rights for all migrant workers¹. Thus, international legislation offers a base for legal claims of both irregular and regular migrant workers to the protection of their human and labor rights. Crickley furthermore called on civil society actors to push UN agencies such as the Committee on the Elimination of Racial Discrimination and other international institutions to work towards a better implementation of existing jurisprudence. Moreover, she explicitly encouraged civil society to make use of UN mechanisms such as the Universal Periodic Review process

of the Human Rights Council. Crickley argued that the strategy of ‘name and shame’ was still an effective deterrent within the international community and should thus be efficiently used by actors involved.

Overall, panelists and participants agreed that the situation of irregular workers and irregular labor has been institutionalized. The discussion furthermore stressed the gap between existing international legislation protecting the rights of irregular migrants and realities on the ground as experienced by migrants in destination countries worldwide. Better education of migrants as well as NGOs working on migration issues regarding existing legislation, the engagement with international bodies, and strategies to put political pressure on national state actors continue to be of pressing concern.

On the Author:

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¹ For the full text of the Convention on Migrant Workers, please see:
<http://www2.ohchr.org/english/law/cmw.htm>