



Dialogue on
Globalization

CONFERENCE REPORT
FES GENEVA

Challenges of Irregular Migration

Parallel event to the 7th session of the Human Rights Council

Geneva, 6 March 2008

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Parallel to the 7th session of the UN Human Rights Council, the **Friedrich-Ebert-Stiftung** (FES) and the **Office of the High Commissioner for Human Rights** (OHCHR) held on 6 March 2008 a public panel discussion on the **Challenges of Irregular Migration**. Before the floor was open to general debate, the following panellists presented various perspectives on the topic: Türkan Karakurt (FES), Carla Edelenbos (OHCHR), Jorge Bustamante (UN Special Rapporteur on the human rights of migrant workers), Ibrahim Awad (ILO), Ruth Weinzierl (German Institute for Human Rights), and Maggy Lee (University of Essex). During the panel and ensuing discussion, the debate moved on from issues of institutional concern to more specific and political issues. The current report aims at summarizing these and identifying the main issues in discussing the rights of irregular migrants.

Problem Background

In the last few decades our globalizing world is experiencing dynamic changes in the international migration patterns and migration flows. New countries of destination, new pull and push factors are some of the markers of this change. International migration, however, remains guided by the same basic rules: certain industries have a high demand for labour that cannot be met locally (receiving countries) and certain regions of the world have a high demand for employment that cannot be provided locally (sending countries). International labour migration is a practical and logical response of individuals to these shifting supply and demand structures.

While the dynamics of globalization have facilitated the possibility to travel over the last few decades we are witnessing an increasing tendency to restrict migration flows, particularly in regions of great demand for and of great interest to migrant workers such as North America, Australia and Western Europe. This is the result of an increased politicization of the issue of foreign migrants at the national level, with demands for protection of local labourers, but also with the progressive rise of racist and xenophobic sentiments towards foreign workers, which leads to migration policies incoherent with regional economic growth projections. Anti-immigrant sentiments in traditionally receiving societies are primarily the result of the unsuccessful integration of immigrant generations and the resulting social problems. Hence, the demand of expanding industries remains not entirely met by the legally supplied migrant workers and this leaves space for the logical alternative of clandestine employment.

The supply of this clandestine labour comes from countries affected by high unemployment and poverty rates. As most developing countries in Africa, Asia, Latin America and the Caribbean fall under this category, international labour migration becomes intertwined with the

problems of economic development and absolute poverty. Hence it becomes a dividing issue between the developing countries on one hand and the developed countries on the other hand. One could argue that economic migrants from the developing world are the product of a failure of the global North to energize and make sustainable the economies of the global South through failing to administer its international development aid. This also reinforces criticism of conditionality policies of the global rich such as managing irregular migration flows by tying development aid to border control obligations.

The deteriorating situation in sending countries, in combination with restricted opportunities for legal labour migration, have resulted in the growing number of people who resort to being smuggled into countries of destination or fall prey to traffickers of human beings. Very often both groups remain bound to criminal individuals or organizations and forced to accept payment lower than the one initially agreed upon; to accept substandard or dangerous working conditions; or to provide forced labour in slave-like conditions. As their status is not regulated and they are often employed in the informal economy, law-enforcement agencies find it difficult to monitor the situation of and to provide protection to these migrants. Hence, irregular migrants, whether voluntary or forced, are highly vulnerable to various human rights violations and hazards: various forms of discrimination; violations of or limitations to their economic and social rights, including the right to equality of payment with national workers, the right to life and personal integrity, the right to dignity of their person; subjection to human trafficking, erasure of personal identification documents, slavery and bonded labour, arbitrary or prolonged detention, torture and other cruel, inhuman or degrading treatment or punishment, as well as crimes of racism and xenophobia. Among regular and irregular migrants, children, women and ethnic minorities constitute the

groups most vulnerable to various forms of abuses and human rights violations.

There are numerous provisions for human rights protection of migrants (including both regular and irregular migrant workers) under international human rights law, international labour law, international humanitarian law, and even certain provisions in international trade law. The Universal Declaration of Human Rights as well as the other basic human rights instruments do not provide for a distinction between nationals and aliens residing whether legally or illegally in the country, and in fact contain the requirement of *non-discrimination* regardless of national origin with regard to their application. Therefore the human rights enshrined in these documents apply equally to all. Additionally, some human rights treaties contain provisions protecting from particular human rights violations that are most pertinent to the vulnerable situation of migrants: the obligation to suppress the trafficking and exploitation for prostitution of women (Convention on the Elimination of All Forms of Discrimination Against Women - CEDAW) and the obligation to prevent the sale of or trafficking in children (Convention on the Rights of the Child - CRC). Provisions for the protection of the rights of migrants are also indirectly contained in a number of basic ILO conventions, namely those which address the practice of forced labour, the freedom of association, the right to organize and bargain collectively, the right to equal remuneration with nationals, the issues of discrimination and minimum age in employment, and the prevention of the worst forms of child labour.

There are several international instruments that address specifically the rights and protection of migrant workers in countries of origin, countries of transit and countries of destination. Among these are the Migration for Employment Convention (ILO, 1949), the Migrant Workers Convention (ILO, 1975), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - ICRMW (UN, 1990) and the Convention Against Transnational Organized Crime (UN, 2000) and its complementary Protocols. While the latter concentrates on the prevention of human trafficking and smuggling of migrants, the remaining instruments address the human rights of migrants and two of them contain specific provisions for the protection of irregular migrants. The ILO Migrant Workers Convention spells out an obligation to respect the basic

human rights of all migrant workers, as well as to ensure equality of treatment in areas such as remuneration and social security. ICRMW elaborates the rights of irregular migrants in greater detail, referring to their freedom of movement, right to life, freedom from torture, as well as compulsory labour, freedom of thought, conscience and religion, freedom of expression, freedom of association, the right to access consular services, non-retroactivity of law, right to personal identity, right to emergency medical care, and the right to access education among others. To date the Convention has not been ratified by any major Western country of destination.

A number of human rights monitoring mechanisms, including the current UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, have called for an increased attention to the situation of irregular migrants, pointing to the adverse effects of restricting legal migration at the national level and to the real demand for migrant workers. Representing the fastest growing part of all migration, irregular migration has not been dealt with accordingly due to a lack of political commitment by many states to work out a global approach to irregular migration by addressing its root causes. For the purposes of the organized discussion, irregular migration was broadly defined to include migrants who gain entry (into the country of destination or transit country) by clandestine means; migrants who reside and/or take up employment illegally; migrants with expired residence/ work permits; and rejected asylum-seekers.

The Demand and Supply Argument

One issue that has become salient through the work of the UN Special Rapporteur on the human rights of migrants, Prof. Jorge Bustamante, is the observation that there is a real and growing demand¹ for migrant labour in many countries of destination and this demand is not adequately reflected in national (and regional) migration policies. In opening the panel to discussion, Prof. Bustamante emphasized the importance of recognizing the real demand for labour as a major factor that, in combination with current migration restrictions, explained both the causes for and the modalities of irregular migration. Irregular migration is in his

¹ See the report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante, submitted on the 30 December, 2005 to the Commission on Human Rights of the United Nations.

view a negative consequence of the globalization processes as it poses a number of challenges, especially in the area of human rights protection. While irregular migration is the response to the demand for labour by the countries of destination and the supply of labour by the countries of origin, in the absence of sufficient streams of regular migration, the orthodox view maintains an image of destination countries as the victims of irregular migration. This "victimization" of the countries of destination in his view accounts for the failure to acknowledge the problem of irregular migration from a multilateral standpoint and condones the search for "national" solutions to an otherwise global phenomenon such as irregular migration. These are not the desired win-win-win solutions advocated by the Special Rapporteur whereby the demand and the supply factors are well accounted for. Unfortunately, as conferred by another panellist, Mr. Ibrahim Awad, the responsibility to account for this demand-supply factor has failed to gain popularity with receiving societies and this in large part determines national migration policies. The urgent need to seek global/ multilateral solutions becomes transparent when looking at the global figures quoted by Mr. Awad – a total of 90% of all migrants today account for migrant workers and their families.

Human Rights for Irregular Migrants?

Failing to acknowledge the actual demand for migrant labour and the entailed responsibilities, the general public in countries of destination often fails to recognize irregular migrants as holders of human rights. As pointed out by the Special Rapporteur, the problem of growing xenophobic and racist sentiments in many countries of destination is closely tied with the relations between migrant and receiving societies. As pointed out by other participants, the resulting public opinion can then be easily manipulated in order to curtail the entitlements of migrants as rights-holders and to undermine initiatives supporting a rights-based approach to migration. Nevertheless, one needs to be careful in condemning the role of public opinion as a negative-only contributor to the discussion of migrants' rights issues. As pointed out by another participant, civil society, notably in the context of the EU, has often acted in solidarity with migrants and a great number of civil society organizations have pressured governments to become signatories to the ICRMW.

In large parts the anti-immigrant sentiments of receiving societies stem from the perceived

threat that migrants, and especially irregular migrants, "steal" the jobs from nationals, as they tend to accept employment of lower payment and hazardous working conditions. With this rationale in mind, public opinion in countries of destination is often found to blame irregular migrants for the unemployment rates among nationals. Looking at the problem of irregular migration, paradoxically, as pointed out by Mr. Awad, irregular migrants are there to meet the labour demand defined by a large informal economy; yet they are not the ones to have created this economy and the blame or punishment thereof should not fall on them. The interests of nationals can be effectively protected through measures such as expanding the avenues for regular migration, raising wages and formalizing irregular migrants, and ensuring the rights of migrant workers. If migrant workers are granted equal rights and paid equal wages, their arrival in destination countries would not result in "social dumping" - they would not be a cheap alternative to local work force.

Certain rights of irregular migrants are already covered by international human rights and labour law instruments such as ICRMW and these afford a good foundation for advocating the human rights of irregular migrants. During the discussion, a number of participants voiced their concerns about attempts to undermine the Convention with claims that it actually encouraged irregular migration. Ms. Carla Edelenbos stressed that it was important to realize that such arguments were the exact opposite of what was intended by ICRMW. As indicated in its Preamble, the recognition of migrant workers' fundamental rights serves the purpose of discouraging certain employers from taking advantage of the irregular situation of undocumented migrant workers by hiring them under less favourable conditions, and thus reaping the benefits of unfair competition.

Political Trends Affecting the Recognition of Migrants' Rights

The ILO regime for the protection of migrant workers, as emphasized by Mr. Awad, consists of three building blocks. These are formed by respectively: 1) the ILO Constitution and the eight fundamental international labour conventions which all states are expected to respect by the mere fact of their membership to the ILO and their acceptance of the Constitution;

2) the specific conventions² referring to the situation of migrant workers; 3) all other ILO conventions applying to all workers regardless of their origin and status and therefore including migrant workers.

The institutional experience of the ILO allows for pointing out the historical perspective in the development of international labour standards applicable to the situation of migrant workers. As pointed out by Mr. Awad, the ILO Constitution does not use the term “migrant workers”. According to the Constitution, however, one of the objectives of the Organization is the protection of the interests of workers when employed in countries other than their own. The term “migrant worker” is the transposition in conventions of the Constitution’s term “workers employed in countries other than their own”. The very first international labour convention adopted in 1920 contained provisions on migrant workers. The first specific convention on migrant workers was adopted in 1939 but never entered into force because of the breakout of World War II. This convention was revised in the years following WWII (1949) in order to encapsulate better the economic and employment reality in the period after World War II. International migration was politically accepted and promoted at the time as some countries were experiencing substantive excess of labour and others were facing labour shortages. Migrant workers thus contributed to the 30-year golden age of economic growth that followed the war. The second ILO convention dealing specifically with migrant workers – the Migrant Workers Convention (Supplementary Provisions), 1975 (No. 143), marks another era in the development of international migration, namely a time when the growth in traditional countries of destination begins to slow down, resulting in closing doors to regular migration. Increased clandestine migration emerged. This is the first time when provisions are elaborated to address the issue of clandestine migration, notably in the Convention’s 1st part titled “Migrations in Abusive Conditions”. The next ILO instrument to address the issue of labour migration - the non-binding ILO Multilateral Framework on Labour Migration – is the result of the General Discussion on Migrant Workers at the International Labour Conference in 2004.

² A list of the conventions can be found on the International Standards on Labour Migration webpage on the official website of the ILO:
<http://www.ilo.org/public/english/protection/migrant/about/standards.htm>

The non-binding character of the Multilateral Framework reflects the increasing unwillingness of States to accept legally binding standards. Mr. Awad considered that this did not necessarily mean reduced protection for migrant workers. Voluntarily translating into law and practice the principles and guidelines of the Multilateral Framework may provide a better protection than a binding, but non-ratified, legal instrument.

A. The Issue of Ratification

This lack of commitment to the issue of irregular migration and human rights of migrant workers within a large part of the international community was also noted by other observers. It was pointed out by Ms. Edelenbos that the ICRMW provided states with a framework to promote sound, equitable, and humane conditions of migration and to prevent clandestine movement such as trafficking and smuggling of migrants. Looking at this most progressive instrument addressing the rights of migrants Prof. Bustamante regrets that it has not yet been ratified by any major country of destination³ and is concerned about a growing dichotomy between those willing to recognize international migrants as rights-holders and those who are not. He feels that as the Convention lacks for political support from the countries of destination, its goals cannot be achieved and the UN mechanisms working with the Convention – notably the Committee on the Rights of Migrant Workers and the institution of the Special Rapporteur, run the risk of failing in the fulfilment of their mandate. The problem of ratification was also voiced by other participants who pointed there as an urgent need for western civil society to break the solidarity existing between states on the issue of migration. It was also noted that if human rights were to become universal and indivisible, as agreed under the Vienna Declaration and Programme for Action, there can be no space for such a dichotomy.

Another participant pointed out that ICRMW was in fact ratified by some major countries of

³ Ratification status of ICRMW, 18 December 1990 (as of 18 July 2007): Albania, Algeria, Argentina, Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Chile, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Honduras, Kyrgyzstan, Lesotho, Libyan Arab Jamahiriya, Mali, Mauritania, Mexico, Morocco, Nicaragua, Peru, Philippines, Senegal, Seychelles, Sri Lanka, Syrian Arab Republic, Tajikistan, Timor-Leste, Turkey, Uganda, Uruguay. Source: www.ohchr.org

destination such as Algeria and Morocco. Given that a large part of the migration flows are actually South-South, it was further noted that the migration debate is excessively concentrating on the artificially created North-South divide. Despite the unwillingness of Western countries to ratify the Convention, the provisions for migrants' rights in their national legislations are to a great extent already in tune with its provisions. The problem therefore must be sought elsewhere and one needs to concentrate on the lack of implementation of migration standards and on informing the public better, rather than on the issue of ratification.

B. The Criminalization of Migration and Detention Practices

Another concern brought forward during the discussion is the trend of the increasing criminalization of irregular migration through the use of particular techniques in migration management. According to Prof. Maggy Lee there is a trend towards the use of administrative detention of irregular migrants pending deportation or expulsion and of general criminalization through immigration laws and regulations. The research Prof. Lee has conducted into the use of imprisonment as an instrument for migration control demonstrates that in practice this raises a number of concerns: a) undocumented and irregular migrants subjected to administrative detention have fewer guarantees and rights; b) the legal grounds for administrative detention may be very broad or ill-defined (as in the case of punitive detention of irregular migrants); c) the period for administrative detention may be indefinite or very lengthy; d) significant discretionary powers may be exercised by immigration authorities; e) there are limited procedural safeguards; f) there are limited mechanisms for judicial review or appeal. The increasing criminalization in international migration has also affected the treatment of refugees, asylum seekers and victims of human trafficking, as law enforcement agents often wrongly use their personal discretion in differentiating between "deserving" and "undeserving" victims. While a number of western countries have high rates of detention of foreigners as a proportion of the general prison population (Italy, Austria, Greece and Switzerland are among those with the highest percentage) - there seems to be little ground to trust that punitive detention discourages irregular migration.

C. The Feminization of Migration and Detention Practices

Taking the example of Hong Kong which she studied in detail, Prof. Lee noted that it held the world's highest in the detention of female prisoners as a proportion of the general prison population (22% as compared to a global average of 2-9%). Furthermore, she notes, the penitentiary system of Hong Kong is marked by a rising number of women detained for immigration violations. The issue was also noted by other participants, one of them quoting the example of Qatar where state authorities had declared that all female prisoners were foreign nationals. Concerns were also expressed regarding the protection of the rights of children whose parents are detained or expelled for migration violations.

D. The Reinforcement of Border Management

Dr. Ruth Weinzierl pointed out yet another tendency, namely the increased use of border management practices which are in violation of fundamental international legal principles such as the law of the sea and the principle of *non-refoulement*. This she illustrated with the example of how the EU manages its southern maritime border under the increased pressure to resolve the problem of the many potential migrants who risk their lives in an attempt to cross the Mediterranean in search of a better life. When encountering persons who attempt to cross the seas into EU territory the EU border authorities are obliged, under international law, to examine the case of each "voyager" individually, especially the claims of asylum seekers, with respect for the principle of *non-refoulement* (protecting persons from extradition to countries where they are at risk of torture or other human rights violations) before decision to repatriate them. Instead, the current practice of EU border authorities appears to constitute mass expulsions and forced returns, increasingly concentrating on the early detection of ships (in high seas) and their escorting back without taking into account the reality of mixed migration flows (refugees and economic migrants). According to Dr. Weinzierl, asylum seekers encountered at sea have the right to be brought by their rescuers to an EU country in order to allow sufficient time for the proper examination of their claims, i.e. the right to an effective legal remedy with a suspensive effect on a removal order should be in place in order to protect potential refugees. The study⁴ that Ms.

⁴ Border Management and Human Rights, A study of EU Law and the Law of the Sea (electronic version available for download free of cost at www.institut-fuer-menschenrechte.de)

Weinzierl has conducted under the auspices of the German Institute for Human Rights shows that EU border management is faced with serious human rights challenges.

Steering the Migration Debate

Other participants pointed out the importance of keeping in mind certain conceptual considerations when engaging in the international migration debate. Firstly, in campaigning for the human rights of irregular migrants it is important to insist on their *right to decent work* in countries of destination and in countries of origin alike. Many participants reiterated the understanding that if the right to work was properly promoted and implemented in the countries of origin, there would be fewer persons willing to work as irregular migrants abroad. Secondly, participants felt it was important also to define the *relationship between migration and development* given the importance that some attached to migration as a means of achieving development (through remittances and investment in home countries). To put this in plain words, migration must be seen as being neutral with regard to development and therefore whether migration contributes to development (for example through encouraging the investment of remittances in the economy of the sending country) or is detrimental to development goals (as in the case of massive brain drain from countries of origin) depends on the policies of both the receiving and the sending countries.

Some Current International Efforts in Resolving the Issue of Irregular Migration

Dr. Weinzierl and other participants referred to the current elaboration of guidelines at the EU level, which aim at clarifying the obligations regarding persons encountered in interception, control and rescue measures at and beyond the EU's southern maritime border. These draft guidelines are currently under discussion in the Council of Ministers and the European Commission, where UNHCR has also been given the opportunity to contribute to the discussion. It was pointed out by participants that the outcome of this discussion and the resulting guidelines might have a monumental importance for the future development of international human rights standards.

Another participant referred to the current EU-level negotiations⁵ of common standards and

⁵ Commission of the European Communities. Proposal for a Directive of the European Parliament and of the Council on

procedures for returning illegally-staying third-country nationals, which are intended to be concluded by the end of June 2008. It was explained that a provision is under discussion that would allow for the detention of irregular migrants in the EU for up to 18 months and that this is to be adopted with a co-decision procedure of the European Parliament. This is a cause for grave concern from a human rights standpoint.

A number of participants reflected on the positive experience of the first Global Forum on Migration and Development⁶ held in July 2007 in Brussels and expressed their hopes for the upcoming Forum to be held in Manila in October 2008. A representative of the government of the Philippines - this year's host of the Forum, expressed his enthusiasm about the fact that the Manila Forum was to concentrate primarily on the human rights side of international migration and explained that his country was committed to participation in other bilateral and multilateral agreements in the area of international migration.

What Can NGOs Do?

A representative of the UNHCR emphasized the importance of not only looking at elaboration of international human rights norms and standards, but also of thinking creatively about their implementation. She illustrated this with the example of the 10 Point Plan of Action⁷ developed by the UNHCR which provides a framework for ensuring the "protection sensitivity" of national migration policies.

Another suggestion was that NGOs can be clearer about their position on international migration as a negative phenomenon and seek to steer the debate in the direction of safe and legal migration (as an alternative to irregular migration), as well as the development of the right to decent work in home countries, i.e. the promotion of the *right to not migrate*. Informing potential migrants on their rights is one way of ensuring that they would seek protection when in need but it is also important to think creatively and look for durable solutions as exemplified by the UNHCR approach in the context of refugees.

common standards and procedures in Member States for returning illegally staying third-country nationals.

⁶ More information on the Global Forum on Migration and Development can be accessed on the website of the initiative: www.gfmd-fmmd.org

⁷ The document referred to here - Refugee Protection and Mixed Migration: A 10-Point Plan of Action - can be in electronic form on www.unhcr.org

In view of the above-mentioned EU directive on common standards and procedures for the return of irregular migrants, it was suggested that now was the time to mobilize NGOs and raise questions about the said procedure, as well as to also raise awareness and inform the public better.

Many participants, including the OHCHR representative, also urged NGOs to report on migration rights issues whenever these came to their attention. These issues as well as questions regarding the protection of particular rights (right to information, right to due process, freedom from torture, right to equitable payment, etc.) should be brought to the attention of the relevant special procedures and treaty bodies in the NGO reports. The present

opportunity for NGOs to report in the context of the universal periodic review should also be utilized. It is finally important to recognize and promote migrants' rights as protected under the framework of both civil and political rights, and economic, social and cultural rights.

Conclusion

Due to time constraints, the discussion was not able to come up with concrete steps on how to steer the international migration debate in order to give priority to the human rights imperative, but nevertheless succeeded in mapping out the main problems such as the need to acknowledge the demand and supply argument, to strengthen ICRMW, to de-criminalize irregular migration, and to mainstream the idea of migrants as right-holders.

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