

**THE LEGAL STATUS OF MIGRANT WORKERS AND THEIR
FAMILIES IN INTERNATIONAL LAW**

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International migration is today a world phenomenon that affects almost all countries. It is calculated that around 200 million people participate in this phenomenon and that number is growing: between 1990 and 2006, the calculation is of the order of 35 million. The effects of migration are reflected in different aspects of both the countries of origin and destination, such as the economy, politics, culture and religion, and although migration is at times a voluntary decision on the part of people to pursue cultural, educational or religious objectives, the majority is motivated by economic reasons, and basically the lack of jobs, due in turn to the economic imbalance that exists between countries, as reported by the World Bank on 15 April 2007.

During the presentation of the report on migration and development before the General Assembly of the Organization of the United Nations on 6 June 2006, the Secretary General, Kofi Annan, stated that: "...international migration, if based on idoneous policies, can and should be very beneficial for the development both of countries of origin and receiving countries. However, these benefits are conditioned to respect and defense of the rights of migrants". To support the first affirmation, the Secretary General added:

It is not by accident, nor should it come as a surprise, that many countries that until recently were a "source" for migrants, such as Ireland, some countries in Southern Europe, the Republic of Korea and Chile, have experienced spectacular development and now enjoy prosperous economies that make them attractive destinations for migrants ... the benefits that the countries of origin and destination obtain have deep repercussions on development, since many developing countries belong to one of these two categories. In fact, some developing countries, such as Malaysia and Thailand, are moving from one category to another at this very moment. Current inter-governmental cooperation in this ambit is being evaluated, including norms, different world and regional initiatives that have been put in place and the bilateral focuses being experimented, including agreements on transferring pensions and medical payments ... international cooperation is likewise crucial to protect people against the execrable crime of trafficking in human beings.

The affirmation of the Secretary General in the sense that the benefits of migration are conditioned to respect for the human rights of migrants reflects the well-known fact that all sorts of abuses and crimes are committed against many migrants during the journey to the country of destination, especially to undocumented migrants. Also, in the countries of destination they are often exploited by unscrupulous employers, exposed to discrimination and even harassment, not only by some groups of the local population but also by representatives of the police force, which makes it impossible for the migrants to become integrated. Also well-known is the fact that migrant workers are very often obliged to accept work that national workers of the receiving country refuse to do, and for lower wages than what local workers would be paid, so they are also accused of supplanting the local work force. Some sectors of the receiving countries even accuse migrant workers of frequently committing serious crimes, such as drug trafficking or terrorism, but such cases would really be very exceptional.

Workers who migrate for economic reasons, not only undergo problems of this *status*, but others resulting from moving to a different social environment and that affect not only them but also the members of their families, either because of separation from them or because they are exposed to the same problems as the workers if they accompany them. Therefore, the very condition of the migrant phenomenon places its participants especially

those with no identity papers, in an extremely vulnerable situation. Moreover, it must also be mentioned that if migration is a benefit for the countries of origin and destination alike, it cannot be a permanent solution for the high costs that are incurred in the economic and social aspects for the countries of origin; one of them, leaving the countryside which the vast majority of the workers leave behind in the case of the American countries. At the same time, the populations in the country of destination feel affected if the migrant workers gain spaces in the economic, cultural and even political sectors of society. Another negative consequence of migration is the loss of skilled workers who, if they are welcomed by the countries of origin, in addition to losing them they lose the large sums of money invested in their training.

In the light of the above, the governments strive to obtain as many benefits as possible from migration while at the same time reduce to a minimum the adverse effects, since it cannot be ignored that the developed countries need migrant workers to boost their economy because emphasis should be given to benefits that the migrant workers bring to the destination communities since these benefits are often ignored – or are wanted to be ignored – and so migration must be considered even forgetting the negative aspects in order to fight them or at least mitigate their effects.

Anyhow, the migration phenomenon is a responsibility – of course, in a different way -, of both country of origin and the country that receives: the former because it cannot grant the pertinent economic rights and must, consequently, do everything in its power to put a stop to the economic migration on the understanding that it cannot occur while unfair systems of international exchange continue; in turn, the receiving country must respect, while they are in its territory under its jurisdiction, the basic rights of the migrants and treat them with humanity and consideration since they also contribute to its economic progress.

On March 7, 2007, during the 70th regular session of the Inter-American Juridical Committee, in San Salvador, El Salvador, it was resolved to include the topic “the legal *status* of the migrant workers in International Law”, whose purpose is to detect the legal aspects of human mobility, especially human rights of the migrant workers and the members of their families. The idea is that these rights as well as the regulations protecting them are first of all known by the migrant workers and so they can demand them, and then by all sectors in contact with them, such as governmental, especially police, employers and the general public, of the countries of origin and those in transit and destination, since, as is known, in many cases the human rights are ignored or simply disrespected.

There are no special human rights for migrant workers and the members of their families but the situation of mobility unique to international migration can make it hard to identify the human rights that protect the different stages of international migration due, on one hand, to the requirements of security, food, transportation, work, and so on, which involves the migration process and, on the other, to the fact that it involves various countries, namely, country of origin, of final destination and in some cases, those in transit, which all increases the risk that in these circumstances, human rights of migrant workers and their families are not respected. The different stages in international migration, as provided in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (hereinafter, CMW), negotiated under the auspices of the United Nations and adopted in New York on December 18, 1990, are: “The preparation for migration, departure, transit and the entire period of stay and practicing a paid activity in the State of employment, as well as the return to the State of origin or the States of normal residence” (the terms “State” and “country” will be used indiscriminately although the former is a legal term and the second a sociological term since it is considered in current language that the term country is used as a synonym of the State).

Article 2 of the CMW contains the following definition of a “migrant worker”: “The term ‘migrant worker’ refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”. Also, pursuant to this Convention the term “members of the family” refers to “persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent

persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned” (here the terms “members of the family” and “family” will be used as synonyms).

Let us begin with this inevitable principle. Everyone has every human right and must be respected in every country; it is not necessary that they be written to be mandatory and if they are included in the internal legislation of the States and international laws, it is in order to specify and assure their compliance, namely, as guarantee; consequently, all States are obliged to respect human rights and in the event of punishing their violation and for this purpose measures required to impart justice must be established. In other words, human rights are rights and basic liberties of every human being has by the sole fact of their being, say, inseparable from humankind and are based on the very nature of the human being that is a rational and social being; hence these rights and liberties must be respected in any situation involving people.

To specify what human rights are, to facilitate their compliance, and accordingly punish their violation, the States began to include human rights in their internal laws; later, the International Community, both at a regional and global level, did the same in treaties, declarations and other international instruments but insists that the enforcement and validity of human rights do not depend on legal provisions of a country or on an international treaty, or on another international instrument, since they arise due solely to the existence of the human being and cannot be separated from it, and this is immediately applicable in the case of regular or irregular international migration, namely, with or without identity papers; therefore, no power can suppress these rights and all authorities of any country are obliged to fulfill them and comply with their provisions.

It should also be made clear that with the above there is no intention to foster irregular migration or with no identity papers; what is stated and intended is that if this migration occurs the human rights of their players must be respected.

In the Appendix reference is made to the key multilateral international instruments that were adopted to protect human rights and that are applicable to the phenomenon of international migration; the value of these instruments, that is, if they involve mandatory compliance for all States or only for those that accept them, such as the treaties, or if they are recommendations or contain regulations that are not yet legal regulations, are about to become such and are “almost law”, commonly known as soft law, such as the regulations contained in the international declarations or other international instruments of a similar nature and that it is estimated that they can contribute to objectives of the San Salvador resolution.

The entire process of international migration is protected in general by the principles contained in articles 1 and 7 of the Universal Declaration of Human Rights (UD) that state the following:

Art. 1 - All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Art. 7 - All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

These rights are also acknowledged by the American Declaration of Rights and Duties of Man (AD) and was repeated and developed by international declarations and treaties that complement the aforementioned Declarations.

The CMW contains the third and fourth chapters that state the human rights of workers with no identity papers and their families, and other rights that workers with identity papers and their families have, respectively. On this matter, it is convenient to explain that CMW does not encourage migration without identity papers, but if this happens, it recognizes the need to assure for its players the basic human rights as stated in a paragraph of its preamble:

Bearing in mind that the human problems involved in migration are even more serious in the case of irregular migration and convinced therefore that appropriate action should be encouraged in order to prevent and eliminate clandestine movements and trafficking in migrant workers, while at the same time assuring the protection of their fundamental human rights.

It should be insisted upon that migrant workers and the members of their families, even without documentation, have these basic human rights that should be respected, because experience shows that such workers consider the abuses committed against them normal in violation of the human rights, because they have no documentation, and they even think that they deserve these violations of their rights, such as the undue use of force, intimidation or extortion.

It may then be concluded that, in order to prevent irregular migration, the countries involved must jointly seek organized forms for migration in order that the countries of origin assure treatment worthy of their members and the countries of destination have the workforce necessary for their economic growth.

Human rights especially applicable to international migration:

- The right to leave any country, including the migrants' country of origin, and return to it;

This right is provided in UD, article 13, paragraph 2; in the International Covenant on Civil and Political Rights (Pact I), article 12, paragraph 2; in AD in article 8 and in CMW in article 8.

The right to leave any country, including their own, and return to it, is logically the first required right for international migration. This right is an application of the right to freedom that all human beings have, but in the case of people who, for economic reasons, wish to leave their country, with or without their family, to work in another, would not require it if the following provisions were reality:

- Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment (Article 23, paragraph 1, UD);
- Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (article 25, paragraph 1, UD);
- Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection (paragraph 2, of the same article).

If migrant workers for economic reasons in their country of origin were to have employment in the conditions mentioned in the above articles, migration would only be: a right to be freely decided and this would be ideal, that migration is a choice and not a need; hence, when someone decides to emigrate for economic reasons, even if voluntarily, - nothing can force an individual to leave his own country -, it should be borne in mind that it is because he or she fails to find employment there that offers a dignified life to him or her and family; in other words, that the country of origin has failed to offer this person "just and favorable conditions of work".

The main reason for non-compliance with the aforementioned provisions on economic development is that it does not depend solely on the will of each State to do so, but on its wealth and on conditions of exchange with other States; and although development is the prime responsibility of each State, it consists of an entire process tending to create "a fair economic and social order that permits and contributes toward full accomplishment of the human being", pursuant to article 33 of the OAS Charter. Also article 2 of the International Covenant on Economic, Social and Cultural Rights (Pact II) provides that the States agree to take economic and technical measures "to the maximum of its available resources to

achieve progressively the full realization of the rights in this treaty"; in other words, they do not agree to immediately give their populations the rights mentioned in the Pact since overcoming underdevelopment does not depend solely on each State and besides it cannot be overcome from one day to the next.

It can also be concluded from the above that it would be enough for someone not to find work opportunities in their country of origin to be entitled to emigrate in order to find work to keep themselves and family; that is, it would be a right deriving from a vital requirement.

The right of a migrant worker and his family to leave his country of origin and return thereto is provided in article 8 of the CMW as follows:

1. Migrant workers and members of their families shall be free to leave any State, including their State of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention.
2. Migrant workers and members of their families shall have the right at any time to enter and remain in their State of origin.

When someone is getting ready to emigrate, with or without his or her family, in order to work in another country, and does not wish to leave without identity papers, he or she must first meet the requirements that countries impose on their nationals for this purpose, such as to obtain an ID document, normally, the passport, since this can facilitate the journey and his or her stay in the countries of transit and destination and also to prove his or her nationality on returning to the country of origin. Secondly, the right must be considered that all countries have to control their borders and by which migrants and their families must obtain permits required to travel through countries of transit and work in the country of destination; on the contrary, they are exposed to abuses and crimes at every stage of the journey: physical injuries, violations, theft or extortions, physical or psychological violence, such as insults, threats or intimidation. It should also be borne in mind that migrant women without identity papers traveling with their children are even more vulnerable to such offences.

There is the experience that on some occasions during the journey migrants have been forced, after having been robbed or suffered extortion, to leap from the moving means of transportation with the results that are easily imaginable. These aggressions are perpetrated by the forces of order or traffic wardens.

On other occasions, workers and their families are expelled from the country where they live and in this case it must be considered that in the event of expulsion, migrants and their families are entitled not to endure undue resources of force or mistreatment nor arbitrarily but should be treated with humanity and compliance with the laws in the country in question. These crimes are most often not reported out of fear.

In view of the above, the authorities of the migrant workers' States of origin must do their utmost to provide information to people who wish to emigrate about the requirements to be fulfilled in order to leave the country, the requirements of entering other countries and the convenience of obtaining permits to stay and work for them; the human rights that they and their families have, among them, work rights. On this point, it is worth repeating what is already well known: that the policy in some countries to refuse work permits forces the workers to emigrate without identity papers and incur all the already well-known consequences.

It is also very important to inform the migrants about the authorities in the country of origin, such as consuls, in the countries of transit and destination so that they can approach these authorities for information or help. There must also inform them about organizations that help migrants. At the same time, the authorities of the country of origin must inform the migrants about their duties that they have in the country of destination, for example, obey the laws, pay tax and not to participate in political activities.

Of course, preparation for the migrants' departure must include the necessary

economic means for food, transportation, contingencies such as sickness or accidents, and since they generally have them, most of the migrant workers must travel without protection; in fact, on occasions they must during the journey stop to work and be able to continue. In some cases, the workers borrow from usurers to meet these needs. It would be recommendable, considering that the responsible authorities in the migrant workers' country of origin cannot offer jobs so as not to emigrate, for them to at least be able to setup aid systems, for example, of credit in convenient conditions for these requirements.

There are two offences, "trafficking in persons" and "illegal trafficking in persons" to which people about to emigrate are especially exposed, that are so serious that they can in fact endanger people's lives:

I. TRAFFICKING IN PERSONS

The Protocol to Prevent, Repress and Punish Trafficking in Persons, especially Women and Children, in 2000, defines this crime as follows:

... the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs (art. 3, a).

Trafficking is a crime often committed against people who wish to emigrate to another country, such as workers or members of their families who travel to join their spouses, but especially against women and children. The traffickers offer these people their services to provide transportation, facilitate their entry or offer them work and, instead of doing this, exploit them; they offer women, for example, work as domestic servants and then force them to be prostitutes on the basis of punishment or threats. In other cases they force people to work in conditions of slavery and unhealthy places and steal their wages on the pretext of paying transportation expenses.

II. ILLEGAL TRAFFICKING IN PERSONS

The 2000 Protocol against illegal trafficking of migrants by land, sea and air defines illegal trafficking in persons as "facilitating illegal entry of a person (workers or not) in a Party State (a State that accepted the Protocol), where such a person is not a national or permanent resident for the purpose of obtaining directly or indirectly a financial or other material benefit". Even if trafficking occurs with the consent of the person, accepting the services of a trafficker is very dangerous since many of them not only fail to fulfill what they offered but also rob them, abandon them and even, if necessary, murder them.

In the cases in question, multiple human rights are violated, some of which are the right to life, liberty and security of person, ban on slavery and the right to just and favorable work to which reference will be made herein below.

The authorities and societies of the countries that intervene in the migration process should remember to take into account that the migrant workers are looking for work to improve the living conditions for themselves and their families; for that reason, migration, whatever its condition, must be regarded as an activity deserving respect and not as an affront or even worse as crime.

On the other hand, since the vast majority of migrations in America are for economic reasons, the migrant workers' countries of origin cannot prevent migration unless they eliminate the causes for it, which, obviously, cannot be done in the short term. Migration is an escape valve for unemployment of the poor countries but implies many problems because the worker's countries of origin must do their utmost to retain the migrant workers in potential, in just and favorable conditions.

1. The right to life, liberty and security

These rights are provided in: UD, article 3; DA, article 1; CMW, article 9; Pact I, article

6; AC, article 4.

The UD and AD provide that: "Everyone has the right to life, liberty and security of person". The text of these provisions is explicit if taking into account that the primordial right to life is a right that cannot be fully applied if it is not completed with human rights for liberty and security of person; in turn, the American Convention protects the right to life, "in general, from the moment of conception" and both this Convention and the Pact I refer to the rights in countries that have not abolished the death penalty, since unfortunately this penalty still exists as punishment for some crimes; in this case, care must be taken not to impose it arbitrarily, that is, without judgment that carries out the due proceeding, namely, in accordance with applicable laws and all strict guarantees, and thereby provide the two aforementioned instruments; moreover, both order that "the sentence of death may be imposed only for the most serious crimes" and that in any case everyone sentenced to death has the right to request amnesty, reprieve or commutation of the capital punishment and provide that the death penalty cannot be applied to under 18 or over 70 year olds, nor to pregnant women. Nor can this penalty be applied to political offences.

Due to the conditions of the workers' international migration, the right to life is constantly exposed and must therefore be protected throughout the migration process since the migrant workers who leave their country for economic reasons are generally in a very vulnerable situation and even more so if they are accompanied by their families and without the necessary identity papers, hence migrant workers and the members of their families are in danger of losing their lives, not only from accidents or disease but also from offences. The causes of danger of losing their life from accidents are explained since the migrant workers and their families travel under very precarious conditions: unsafe means of transportation, no or insufficient public security, extreme conditions of accommodation and unhealthiness, hazardous geographic and meteorological conditions due to tougher measures to prevent migration without identity papers, including obstacles, such as physical or virtual fences and walls, about which the OAS Secretary General said that "it is not a proper answer to emigration" and added: "bilateral and regional dialogue is the only feasible instrument to find realistic options to solve the problem of illegal migration". In turn, the UN Secretary General, Ban Ki-Moon, said at the Global Forum on Migration and Development, hosted by the Belgian government, about building the wall, that the measures taken regarding migration must respect the human rights of the migrants, one of which is security.

In fact, the migrants without identity papers in the countries of transit or arrival in the country of work are persecuted and obliged to take hazardous routes since even armed gangs of people unprepared for these purposes, also imperil the migrants' lives. "From 1995 to 2005 the number of migrant deaths increased by 500 percent, which indicates that control measures have not deterred migration, unless changes are made in the flows of persons through more inhospitable zones and including the increase in immigrants and criminal groups". (*El Financiero* newspaper, Mexico City, dated June 11, 2007). In the first six months of 2007 more than 275 people died in the desert. The mass media inform about migrant workers that die in accidents from transportation conditions.

The crimes most often committed against life, liberty and security of the migrant workers, especially those without papers, and their families, are armed robbery on the journey to rob or extort money from them, violence in transportation to prevent them from traveling, sexual abuse, extreme actions of border guards when clandestinely crossing a border.

To preserve and protect life, liberty and security of everyone in a country, whether nationals or not, is an obligation of the authorities of every country; in the case of international migration this obligation extends to all countries that are part of the migration process, such as the countries of origin, of transit and final destination. To preserve the right to life of migrant workers and their families implies that they have the necessary freedom to accomplish the normal activities that anyone, under the same circumstances, would accomplish and that they do so with security; in other words, that the State not only has the duty to respect the life of people who are in its territory, but also prevent other people from endangering it when violating rights that also protect the life of the migrants and members of

their families, such as not being submitted to inhuman working conditions, slavery and physical and sexual abuse.

2. The right to personal integrity, the right not to be subjected to torture or to cruel in human or degrading treatment or punishment and the right not to be held in slavery or servitude

These rights are provided in: UD, articles 4 and 5; Pact I, articles 7 and 8; CMW, article 10; AD, article 1 and AC, article 5.

The Pact I, article 7, states: "No one will be subjected to torture or cruel, inhuman or degrading treatment or punishment"; article 8 of the same Pact provides: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited. 2. No one will be held in servitude"; the AC, article 5, stipulates: "Every person has the right to have his physical, mental, and moral integrity respected. In particular, no one will be subjected, without his or her free consent, to medical or scientific experiments". In article 11 of CMW it is also forbidden for migrant workers or their families to be obliged to do forced or obligatory labor although permitted in certain circumstances, for example, should the law of a country admit for certain crimes hard labor prison sentences on the condition that the decision is taken by a competent court.

The aforementioned rights protect migrant workers against forced labor, inhuman working conditions such as long working days, no rest, and so on, in slavery or servitude. In accordance with experience, these human rights are violated first and foremost in five sectors: prostitution and sexual services, domestic service, agriculture, industrial workshops and restaurants and hotels.

When employers keep the passports and other documents of migrant workers to force them not to move or change jobs, they violate their right to freedom, to travel and freely choose their own work.

3. Right to recognition of everyone as a person before the law

The UD, article 6; Pact I, article 16; AC, article 3; AD, article 17; and CMW, article 24, recognize this right to all human beings; in other words, they recognize their right to be subject of rights and obligations and to enjoy the basic civil rights.

The human being is the natural legal subject but it is the right that converts a human being as a person before the law, that is, it gives an individual aptitude or capacity to possess rights and obligations. In the case of international migration, it means that a migratory worker or his wife or children are persons before the law. The family, as such, in other words, as a collective person of natural origin, also has an aptitude to be subject of rights and obligations and both the individual and family have right to recognition as persons before the law.

Everyone is a rational being by nature; that is, he or she is capable of a considered, reflexive conduct and therefore capable of free conduct; moreover, an unborn but already conceived being is capable of having rights, such as acquiring by donations, but also has other legal effects in the demand for paternity. Even before an individual is born, he or she is protected by law, as provided in article 4 of the CA.

Being a person before the law means that a migrant worker does not need representatives to sign or terminate a work contract, rent or buy or sell a house. Nor accept or leave an inheritance, make or accept a donation, claim due to default of a contract or theft or fraud, and so on.

To have the right to be recognized as a legal personality also means that a person must be responsible for a free and rational act.

4. Right of equality before the law

This right is provided in UD, article 7; P I, article 26; DA article 2; CA article 24.

Equality before the law implies another human right, the right not to be discriminated.

The right of equality before the law is applicable to all stages of the migration process, that is, from the worker's departure from his or her country, during the journey, and staying in

the country of destination, the work period and return to the country of origin and it is equally important that it is applied in all, but considering the period spent in remunerated activity is normally longer and than the consequences of this right reflect on the working conditions, it is considered that it is especially important to comply with this right at this stage.

Racism and xenophobia are two forms of violating the human right to equality and non-discrimination and the governments are obliged to adopt effective measures to protect everyone, especially the migrants and their families, from violation of such rights.

The right to equality and non-discrimination protects someone without preferring another with some characteristic such as race or skin color, to give a work agreement, or pay him more for the same job, or rent a house, sell or buy something, or previously attend in some service. In other words, this right is violated when there are no equal opportunities and the same job treatment as to the migrant workers even before the nationals of the country of destination.

On the other hand, migrants and their families who are responsible for understanding the laws and values of the society that welcomed them and the obligation to respect the rights of the others, especially their cultural identity. The welcoming society must in turn respect the cultural diversity of the migrants. Mutual understanding is the solution.

The governments must advocate the integration of the migrants, justice and equality as well as mechanisms for these conditions to be achieved.

The right to equality must not be violated even if questions of security or terrorism are alleged or because the worker has no documents. Such allegations, sometimes, are tinged with racism. A migrant worker, even undocumented, is also entitled to be treated equally as a national of the country in terms of human rights and in the case of migrant workers it is priority that these rights are adopted in carrying out a lawsuit in the correct manner.

Governments must also educate the native population to understand and assimilate the migrant workers.

In their turn, the migrant workers and their families are responsible for understanding the laws and values of the society where they arrive and the obligation to respect other's rights and customs, cultural differences, and so on. The welcoming governments should also explain to their nationals the contribution of migrants' work to the country's development.

Special training in this field should also be given to public servants, who are in charge of applying the laws, since often they infringe the provisions deriving from this human right.

5. Right to work and social security

The right to work is provided in UD, art. 23 and 24; Pact II, arts. 6, 7 and 19. The right to social security in UD, art. 22, Pact II, art. 9.

Article 23, paragraph 1, of the UD, states: "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment".

The following labor human rights are especially applicable to migrant workers: ban on forced labor and on child labor, rights specifically applicable to the working woman, trade union rights, social security, fair wages, adequate working conditions such as safety and hygiene, working hours and indemnity pay.

The right to work is a right that every human being has and permits everyone to carry on living. The migrant workers' human rights are violated if they work in conditions of exploration and danger.

The right to freedom protects the migrant workers from being isolated from the society in which they arrive since this prevents them from leading a normal life in contact with other people and also prevents them from forming societies with other workers or even trade unions – with which the right to freedom of meeting and peaceful association would be violated – and this prevents them from being able to complain or have means in their reach to prevent abuses in relation to work, which is nevertheless very frequent among the domestic workers who are mostly women. On other occasions the workers are victims of

expressions of xenophobia or racism. Problems also arise between groups of migrants and the communities of destination due to social, cultural or religious questions, especially when there are major differences in these aspects. The aforementioned conditions increase when the workers are in an irregular situation since they are especially vulnerable to exploitation because they are afraid of appealing to the authorities. The employers therefore take advantage and pay lower wages or make them work longer hours, sometimes in hazardous conditions.

Women face more restraints with regard to men since the latter are more likely to find themselves in situations that restrict their development. The fact that they are more likely to be admitted as “family members for support” in family migration, their lack of access to the labor market when they are admitted as accompanying spouses; their marginalization toward traditional female and poorly paid occupations when they migrate as workers and their greater vulnerability to sexual exploitation, are legitimate reasons for concern and realities that all too often generate unsatisfactory results of women’s migration, which depends basically on respect for the rights established in the principal instruments of human rights.

The best thing for everyone would be to integrate society in which the migrant workers arrive but it must be on an equal and non-discriminated level. On the other hand, we cannot but mention that the governments of destination also have difficulties for the employers to comply with the law, especially labor laws.

At the same time, and without it being interpreted as encouraging illegal migration, it should be considered that migrant workers and their families have, under any circumstance, and even undocumented, human rights that must be respected. An example is that of not being arbitrarily expelled, that is, in accordance with the law, and that due dignity of anyone must be considered because human rights must prevail in all countries under any circumstance.

The right to equality before the law also means that, in terms of working conditions, the migrants must be treated in the same way as the others, including the nationals of the country where they are working; in other words, the working hours, overtime, wages and other benefits, such as rest, paid vacations, housing programs, safety, health care, end of contract, minimum age, and so on. This right of equality before the law extends to the access to their children’s education, social security benefits and medical care.

Undocumented migrant workers also enjoy the right of equality before the law, including labor rights, although some domestic courts have refused it.

On the human right to equality and non-discrimination, the Advisory Opinion of the Inter-American Court of Human Rights, on September 17, 2003, on the *Legal Status* and Rights of non-documented migrants, states the following:

4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.
5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.
6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory *status* of a person.
7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of

his migratory *status*. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.

8. That the migratory *status* of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.
9. That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their *status* as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.
10. That workers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.
11. That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

The Advisory Opinion of the Inter-American Court does not oblige authorities to adopt it since it is not a law, but is valuable as an opinion based on human rights issued by a group of specialist jurists and, as such, a source of rules of international law. At the same time, it should be mentioned that it is mandatory for all States to respect human rights; for example, the human right to equality and non-discrimination as well as respect for individuals. It should be added that all constitutions of the countries in the American continent include the obligation to respect everyone's human rights.

In turn, article 6 of Pact II, which develops the principles contained in the aforementioned UD, provides:

1. The States Parties to this Pact recognize the right to work, consisting of everyone's right to have the opportunity to earn his living by a freely chosen or accepted job, and will take the proper measures to assure this right.
2. Some of the measures to be taken by each Member State herein to fully achieve this right shall be vocational guidance and professional technical training, preparation of programs, regulations and techniques toward cultural, economic and social development and full productive occupation, in conditions that guarantee fundamental political and economic freedoms of the human being.

Article 22 of the UD provides: "Everyone, as member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality".

On the other hand, it is indispensable that governments permit the payment of pensions and whatever other benefits that the migrant workers can receive and, especially, that payment of pensions is permitted abroad. The WLO Convention 157 on social security refers to this point. Also governments should facilitate the transfer of remittances, pensions and benefits of migrant workers and retired migrant workers in their countries of origin.

6. Right to due litigation

UD, arts. 7, 8, 9, 10, 11 and 17; AC, art. 8; Pact I, art. 3, 4, 9, 10, 11, 13, 14 and 26; Pact II, art. 3; AD, art. 2, 18 and 26; CMW, arts. 15, 16, 17, 18, 20, 21, 22 and 23.

The human right to due litigation, the right to justice, as it is also called, guarantees migrant workers and their families, whatever their migratory *status* may be, the right of equality with the nationals of the State, in a judgment before a court in which they participate either as plaintiffs or defendants; in other words, this full right in accordance with the established laws. This right protects the immigrant in any judgment, where labor, for example, on non-compliance with a work or migrant agreement.

When a migrant worker or a member of his family is arrested, they have the right to be immediately informed of the reason for his arrest in a language that they understand and are to be informed also of the legal resources available. The arrest of an immigrant or his family for checking his migrant *status* by an employee or any other police or public security authority can only be done if the legislation of the country permits; if so, the migrant aid organizations recommend keeping calm, not running and not insulting the person who arrests him.

In case of arrest, people have the following rights: first respecting for human rights, even in the case of being undocumented, for a translator and lawyer; to be put in touch with the consulate of his nationality and this has the obligation to provide the required proper consular services in any circumstance and advisory services should they go to court. On this point, it should also be borne in mind that, pursuant to article 36 of the 1963 Vienna Convention on Consular Relations, when the authorities of a country arrest someone, in this case a migrant worker or his family, the authorities themselves are obliged to inform him, without delay, of his right to communicate with the consulate of his nationality and his right to have consular assistance. They also have the right to communicate with a non-governmental organization for aid to migrants, to communicate with a family member or a person that can help them. If the arrested person is accompanied by minor children, it must not be permitted to separate them from each other since it is wrongful to arrest children and adolescents and for them to make a statement without the presence of a legal representative or adult responsible for them.

Arrested people also have these rights: to remain silent but should give their real name; not to sign, against his will, the voluntary exit or other paper; to have hygiene in the place of arrest, - which must not be prison -, and be given food and water. He also has the right against excessive force in custody, and the arrested person not to be insulted or attacked, harmed by handcuffs, and to be given medical care, and not to remove his money or other valuables. It is also advisable for the arrested not to lie, carry false documents – since this is an offense -, not to say he is a citizen of the country when he is not, not to drive without a license or documents. If he has a work permit he must show it if he is not a citizen of the country where he works.

If these human rights are violated he must denounce the agents who violated them; to do so he must note down the agent's identity number, his name, etc., that is, he must have the data to identify them and even better if there are witnesses, to prove the violation of his rights.

If the arrested person is not released, an order is required by the competent authority to keep him in custody and start a migratory process; that is, a decision before a court where the minimum guarantees should be observed that the law of the country grants to the accused, some of which are the right to have proper defense in order for the accused to have fair trial, in accordance with the prevailing laws and not arbitrarily; in other words, not in accordance with the free discretion of people who enforce them, but in compliance with the essential formalities of the law to be able to deprive someone of some right or be given a sentence. The decision regarding the migratory *status* of someone must be fully respected and guarantee given of the due legal proceeding and, when a sentence is given, humanitarian considerations regarding his migratory *status* must be taken into account.

The right to the due legal proceeding should also be applied to any lawsuit in relation to a job performed by an undocumented migrant worker when involving non-compliance of a

verbal or written contract.

It should be considered that, in any case, the arrested person has the right to receive his wage earnings.

7. No retroactivity in criminal law

UD, art. 11; Pact I, art. 15; AC, art. 9 and CMW, arts. 16 to 20.

The UD refers to this right as follows: "No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed."

Pact I, Art.15: "No one shall be held guilty of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed ...".

This right somehow complements the right to the due lawsuit that, if there is a proceeding based on a law that did not exist, this would be violating the right to a due legal proceeding since the fact or omission to be judged was not an offence and consequently there should be no legal proceeding.

This right is based on the general principle that the laws are made for the future and not for the past but if the new law benefits the accused, it should be applied.

8. Right to private and family life

CTM, arts. 14 and 44; UD, arts. 12 and 16; Pact I, arts. 3, 4, 17 and 26; AD, arts. 5, 6, and 7. Right to the protection of the family.

In its article 12, the Universal Declaration refers to the right to private and family life in the following terms: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks". The AC, in its article 17, sub-clause 1, provides: "The family is the natural and fundamental element of society and is entitled to protection by society and the State".

In turn, article 16 of the same Universal Declaration refers to the right of men and women to marry and found a family and sub-clause 3 of this article recognizes the natural right of protection that is due the family, as follows: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State". It is also recognized by the CMW.

It is important to address this section on the family unit and protection for the family, the *status* of migrant women since, if they travel alone, or accompanied only by their children, because of their *status* as women they are more exposed to all kinds of mistreatment, harassment, violence and abuse both in the countries through which they pass and in employment even in their own country, and if they travel they are generally more vulnerable in terms of employment rights. If she is married and has children and the spouse emigrates, her situation becomes more difficult because along with the separation from her husband, she must look after the children. If she accompanies her husband and they have children, very often she must not only look after them but also work outside the home. The husband does not always help take care of and educate the children.

Based on human rights recognized in the aforementioned international instruments, the Pastoral Letter of the Catholic Bishops of Mexico and the United States, dated January 23, 2003, proclaims: "Immigration must be based on the principle of the family unit". This principle would have to protect this natural institution, which is the family, and therefore the right of its members to live together: spouses and minor children which unfortunately is not always the case in international migration since not only not beneficial but also measures are taken against constitutional rights, such as not giving a child the nationality of the country in which it was born or postponing for years the reunion of the spouses in the case where one of them migrates. The separation of husband and wife has a negative influence on the professional development of the couple and on the education of the minor children.

Concerning unaccompanied minors, their situation is very often worrying since they are not given the proper care and are arrested or expelled and many of them travel alone to join their family. Measures such as those described herein favor undocumented migration.

In this section two human rights should be quoted:

- a) That of the inviolability of anyone's home, which gives right to its inhabitants not to permit entry even of an authority, to a home unless there is a written order from a relevant authority on such a matter and specifies what can be done in the home. This right extends to everyone who is domiciled there, that is, are nationals of the state or aliens;
- b) The right to inviolability of private correspondence. This right applies to letters, telegrams, telephone calls, in other words, any kind of communication sent to someone. As in the preceding right, it is necessary to have an order from a relevant authority to see these communications.

Raids that have increased recently go against human rights and lead to terror.

9. Right to freedom of thought, conscience and religion

UD, art. 18; Pact I, art. 18; AD, art. 33; AC, art. 12; CMW, art. 12.

Pact, article 18: "Everyone shall have the right to freedom of thought, conscience and religion ..." and 19 "No one shall be importuned because of his opinions". C A, article 12, "Everyone has the right to freedom of conscience and religion".

Everyone is free to profess the religious creed that they prefer and acts of worship.

10. Freedom of peaceful meeting and association

UD, art. 20; Pact I, art. 21 and 22; Pact II, art. 8; AC, arts. 15 and 16.

This freedom cannot be restricted but when addressing migrant workers or their families, in other words, aliens, meetings must not refer to political questions.

In Manitoba, Canada, seasonal alien workers obtained the right to join a trade union on July 2, 2007.

Freedom of opinion, (thought) and expression.

UD, art. 19; Pact I, 19; AD, art. 4.

11. Rights of the child

Pact I, art. 24.

AC, article 19: "Every child has the right to means of protection that his *status* as a minor requires by his family, society and the State".

UD, art. 15. AD, art. 24 children.

Children's human rights are violated:

- a) if they are arrested and imprisoned together with their fathers and are treated as adult criminals;
- b) if their father is arrested and separated from the children, if expels from the country unaccompanied minors
- c) if they suffer at school racial or any other kind of discrimination

In the last case human rights of the family are also violated since it is the natural element of society.

They must look for alternative methods to care for them and not subject them to the same regulations as the adults.

12. Right to education.

Pact I, arts. 14 and 15 on Dignity and 22 on Dignity. Pact I, art. 19 on Dignity.

CMW art. 29. "Everyone has the right to a nationality".

