

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

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### INTRODUCTION

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, in other cases, 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, supported by the right policies, can be highly beneficial for the development of both the countries they come from and of those where they arrive. But it also stresses that these benefits are contingent on the rights of the migrants themselves being respected and upheld." To support the first affirmation, the Secretary General added:

It is no coincidence, and should be no surprise, that many countries, which not so long ago were primarily sources of migrants – for instance Ireland, several countries in southern Europe, the Republic of Korea and Chile – have developed spectacularly, and now boast thriving economies, which make them an attractive destination for migrants.

Benefits both to countries of origin and to countries of destination are highly relevant to development, since both categories include many developing countries. Indeed, some developing countries, such as Malaysia and Thailand, are at this moment making the transition from one category to the other.

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It surveys existing intergovernmental cooperation in this field -- including the normative framework, the various global and regional initiatives that have been taken, and the bilateral approaches that are being tried, such as agreements on the portability of pensions and health benefits. ... international cooperation is also crucial in the struggle to protect people against the odious crime of human trafficking.

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. Such acts can occur at any stage of the migratory process, that is, since leaving their country of origin, during the journey in the countries of transit, and in the country of destination.

On 10 July 2007, at the Global Forum on Migration and Development convoked by the Belgian government, Kofi Annan's successor as Secretary General, Ban Ki-Moon made the same appeal and stated that if governments have the right to monitor their borders, they should show full respect for the human rights and security of migrants.

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. These circumstances often lead to depression, anxiety and even mental disorders, or to excessive consumption of alcohol and drugs. Add to this the scant, if any, access to health services. 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 given 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. 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. As for the population of the destination country, they feel affected if the migrant workers gain space in the various sectors of their society – economic, cultural and even political. 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 the developed countries need migrant workers to boost their economy and the countries of origin need the money sent back home by the migrants.

Anyhow, the migration phenomenon is a responsibility both of the country of origin and the receiving country: 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 in the understanding that this cannot occur while unfair systems of international exchange prevail; in turn, the receiving country must respect the human rights and basic freedoms of the migrants while they are in its territory under its jurisdiction, either legally or illegally, and treat them and their families with humanity and consideration since they only seek through work better living conditions for themselves and their families. For this reason, whatever the condition, migration should be seen as an activity worthy of respect, rather than an affront, or worse still a crime.

At the same time, it must be borne in mind that the vast majority of migration in America is for economic reasons, and so the countries of origin cannot prevent migration before eliminating the causes, which obviously takes some time. Migration is an escape valve for unemployment in poor countries, but this entails many inconveniences, because the country of origin has to make great efforts to retain potential migrant workers in conditions of justice and well being.

On March 7, 2007, during the 70<sup>th</sup> regular session of the Inter-American Juridical Committee, in San Salvador, El Salvador, resolution CJI/RES. 127 (LXX-07), entitled “The Legal Status of Migrant Workers and Their Families in the International Law”, was adopted, its purpose being to detect the legal aspects of human mobility, especially the human rights of migrant workers and the members of their families, within International Law, that is, the human rights that all migrant workers, documented or not, have, as well as their families. The idea is that these rights, as well as the regulations protecting them, are first of all known by the migrant workers so they can demand that they be respected, since it has been known for migrant workers, especially those without documents, to consider as normal the abuses committed against them and their families precisely for not possessing documents; they even think they deserve such violations of their rights as undue use of force, intimidation or extortion. It is also the intention that these rights be known by all sectors in contact with them, such as governmental, especially police, employers and the general public, of the countries of origin and those of transit and destination.

It should be pointed out there are no special human rights for migrant workers and the members of their families but the situation of mobility, which involves many countries and entails multiple needs such as security, food, transportation, work, and so on, can make it hard to identify the human rights that protect the different stages of international migration. It is therefore felt appropriate and even necessary to prepare the catalogue of human rights of migrant workers, always bearing in mind that, documented or not, they and their families have an intrinsic human dignity that must be respected and a right to be treated humanely.

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: "... preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of habitual 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: human rights are the rights and basic liberties that every human being has by the mere fact of their being, that is to 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. The insistence is 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. States have begun to include in their internal legislations provisions to protect human rights. The International Community of States have done the same in treaties, declarations and other international instruments in order to make such rights explicit and ensure compliance, that is, a guarantee. In conclusion, all States are obliged to respect all human rights and if necessary see that any violations are duly punished.

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. Among other manifestations already mentioned, the International Community of States proclaimed this in the Declaration on Human Rights of Individuals Who are not Nationals of the Country in which they Live In, adopted by the General Assembly of the National Unions in Resolution 40/144 dated 13 December 1985. All the States are entrusted with observing this minimum of human rights for all migrant workers and their families.

This leads to another conclusion, namely that in order to avoid irregular migration, the States concerned should negotiate agreements to regulate migration.

Accordingly, reference is now made to the key multilateral international instruments adopted to protect human rights and applicable to the phenomenon of international migration; these instruments are:

The Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948. Its provisions have the quality of *jus cogens* norms, that is, “imperative norms of general international law, accepted and recognized by the international community of States as a whole and that admit of no agreement to the contrary” and are therefore obligatory for all States (hereinafter quoted as UD).

The International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 16 December 1966 is a treaty that develops the human rights indicated in the name and contained in the UD; moreover, it is obligatory for the member States (hereinafter quoted as Pact I);

The International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16 December 1966 is a treaty that develops the human rights indicated in the name and contained in the UD; moreover, it is obligatory for the member States (hereinafter quoted as Pact II);

The Convention on the Rights of the Child adopted at the General Assembly of the United Nations on 20 November 1989 is obligatory for the States that are parties to the Convention (hereinafter quoted as CRC);

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families adopted by the General Assembly of the United Nations on 18 December 1990 is obligatory for the member States (hereinafter quoted as CMW);

The American Declaration of the Rights and Duties of Man adopted at the 9th American International Conference in Bogotá, Columbia in 1948. Its provisions are *jus cogens* norms and so obligatory for all the States (hereinafter quoted as AD);

The American Convention on Human Rights adopted at the Specialized Inter-American Conference on Human Rights held in San José, Costa Rica in 1969, with obligatory norms for all the member States (hereinafter quoted as AC);

The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, called “Protocol of San Salvador”, is obligatory for the Member States (hereinafter quoted as PACA).

#### Human rights of migrant workers and their families

The Universal Declaration of Human Rights adopted by the International Community of States at the General Assembly of the United Nations on 10 December 1948 in a general sense protects the human rights of all migrant workers and their families in articles 1, 2, paragraph 1, and 7, as follows:

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. 2.1 – Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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 of 1948.

The third chapter of CMW states the human rights of workers with or without identity papers and their families; in chapter four, it states the other rights that workers with identity papers and their families have. On this matter, the CMW advises that it does not encourage

migration without identity papers but 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."

The human rights especially applicable to international migration of workers and their families, whether documented or not, are as follows:

1. 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, article 8 and in article 8 of CMW.

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 of the UD were reality:

Everyone has the right to work, to free choice of employment, to just and favourable 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);

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 (Article 25, paragraph 2).

If the conditions mentioned in the above articles held true, migration would only be a right to be freely decided and this would be ideal, with migration as a choice rather than 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".

Pope John 23<sup>rd</sup>'s encyclical "*Pacem in terris*" states that a person's right to live in his country is infringed if he or she has to emigrate for economic reasons. However, it is obvious that the main reason for a State failing to develop economically is that it does not depend solely on its will but rather on the wealth and conditions of international exchange. For example, the first free-trade agreement signed in the American continent between a developed and a developing country included in its proposals to impede workers from migrating from the rural regions of developing countries. The result, however, has been the opposite, because the proper measures were not taken to prevent the agricultural produce of the developed country that enter the developing country in accordance with the agreement compete advantageously with the produce of the latter.

It should also be remembered that although development is the prime responsibility of each State, it consists of an entire process tending to create "a more just economic and social order that will make possible and contribute to the fulfillment of the individual", 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 their available resources, with a view to achieving progressively the full realization of the rights recognized in the present

Covenant"; in other words, they do not agree to immediately give their populations the rights mentioned in the Pact.

With regard to the right to leave one's country, it can also be concluded from the above that it would be enough for someone not to find adequate 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 human 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.

So, this right is infringed if the State of origin prevents people who wish to immigrate from doing so, unless there is a legal reason for such prohibition. However, according to the above provisions, when someone is getting ready to emigrate, with or without his or her family, 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 a 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.

Similarly, one must consider the right that all countries have to control their borders and because of this migrants and their families must obtain permits required to travel through countries of transit and work in the country of destination. This right of all States to control their borders is not under question, but they are requested to do so in accordance with the obligation they have to observe the human rights of all persons and grant migrant and their families, whatever their migrant status, humane treatment.

Those who wish to emigrate without documents, with or without their families, must realize before making a decision that there have been frequent experiences of abuses and crimes at every stage of the journey: physical injuries, violations, theft or extortions, and others, practiced both by those enforcing the law, especially border guards, and by private persons who offer or provide some service to the migrants. It should also be borne in mind that migrant women without identity papers, traveling alone or with their children, are even more vulnerable to such offences. If after due consideration they decide to emigrate, they should take all possible precautions.

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, as well as to inform them of the dangers involved if they fail to present the necessary permits, but also of the human rights both they and their families have, in any situation and in any country. For example, if they are expelled from the country where they find themselves, whether it be the country of transit or destination, they have the right, whatever may be their migratory status, for such expulsion not to be carried out using undue force or mistreatment, nor arbitrarily but rather in accordance with the laws of the country and always in a humane manner.

The policy in some countries to refuse work permits forces the workers to emigrate without identity papers and this forces them to accept any work whatsoever, even in unfair conditions, because unscrupulous employers take advantage of the situation, which leads to a countersense: on the one hand they are given work, which means they are recognized and accepted, but their rights are not recognized. For instance, in some cases they are not even paid a minimum wage, they are made to work overtime without the corresponding payment, or else restrictions are placed on their sending remittances of money. "Labor

rights” refers to the rights that all migrant workers have, no matter what their migratory status is.

Of course, the migrant’s preparation to leave his/her country should include the necessary economic means for food, transportation and contingencies such as sickness, and since these are mostly lacking, the migrant worker has to travel unprotected, and on some occasions even has to stop for a while somewhere to work and earn some money to enable him to continue the journey. In some countries, in order to cover their costs, workers borrow from usurers to meet these needs. It would be recommendable for the responsible authorities in the migrant workers’ country of origin to set up aid systems for such needs. It is also very important for the authorities of the countries of origin to inform migrants and their families about the hazards of contracting certain contagious serious diseases, as well as the steps to take to avoid them.

It is likewise important that authorities in the country of origin inform migrant workers about persons who can help them during their journey and in the country of destination, such as consuls in the countries of transit and destination and private organizations that help migrants.

There are two offences, “trafficking in persons” and “smuggling of migrants” to which people about to emigrate are especially exposed and that they should be aware of. These two offences are a threat to many human rights, among others the right to life and freedom - persons may be exposed to conditions of slavery – personal integrity, fair and equal work, rights that will be dealt with later on. These offences are:

a) Smuggling of Migrants

The United Nations Protocol to Prevent, Suppress and Punish Smuggling of Migrants, especially Women and Children, adopted in 2000, defines this crime as follows:

... the recruitment, transportation, transfer, harbouring 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 labour or services, slavery or practices similar to slavery, servitude or the removal of organs (art. 3, a).

Smuggling 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. In many cases the traffickers take their victims’ ID documents and thus oblige them to remain with them and accept unfair working conditions.

b) Smuggling of Migrants

The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air defines smuggling of migrants as “facilitating illegal entry of a person (workers or not) to 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 financial or other material benefit”. Even if smuggling occurs with the person’s consent, 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.

## 2. The right to life, liberty and security

These rights are provided in: UD, article 3; AD, article 1; CMW, article 9; Pact I, article 6, 9, 10, 11, 12 and 13; and AC, article 4.

The UD and AD provide that: "Everyone has the right to life, liberty and security of person".

The primordial right to life is a right that cannot be fully applied if it is not complemented with human rights for liberty and security of person, so they have to be considered together. The American Convention protects the right to life, "in general, from the moment of conception" and both this Convention and 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 heeds due legal process in accordance with applicable laws and all strict guarantees, and thereby provide the two aforementioned instruments. Both the UD and the AD 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, as well as providing that the death penalty cannot be applied to persons under 18 or over 70 years old, nor to pregnant women. Also, this penalty cannot be applied to political offences.

Due to the conditions of workers' international migration, to a great extent 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 danger of losing their life from accidents can be explained by the fact that migrant workers and their families travel under very precarious conditions, unsafe means of transportation, no or insufficient public security, no or insufficient food, 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. With regard to these measures, the OAS Secretary General has declared that "it is not a proper answer to emigration", "bilateral and regional dialogue is the only feasible instrument in the quest for realistic options to solve the problem of illegal migration". In fact, the migrants, especially those without identity papers are persecuted and obliged to take hazardous routes in the countries of transit or arrival in the country of work.

From 1995 to 2005 the number of migrant deaths increased by 500 percent, which indicates that control measures have not deterred migration, but rather brought about changes in the flux of persons through more inhospitable zones and even an 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 migratory process.

The crimes most often committed against life, liberty and security of migrant workers, especially those without papers, and their families, are armed robbery on the journey to rob or extort money from them, violence and all sorts of physical aggression in the means of transportation to threaten them with not being able to travel, and violent actions of border guards when 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. The States not only have the duty to respect the life of people who are in their territory, but also to prevent other people from endangering it when violating rights that also protect the life of migrants and members of their families, such as excessive force, submitting them to inhuman working conditions, either because of the unhealthy conditions of the working places or excessive hours of work without rest. The life of migrants and their



families is likewise endangered in cases of detention in improper conditions together with common criminals and without appropriate health conditions and necessary care and medical attention when they fall ill.

### 3. The right to personal integrity

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 human right to personal integrity includes physical, mental and moral integrity, so this concept embraces the following rights of migrant workers and their families: not to be subjected to slavery, servitude, torture, cruel, inhuman or degrading treatment or punishment; not to be obliged to do forced or obligatory labor, except when permitted in certain circumstances, for example, when the decision is taken by a competent court.

These human rights are especially infringed in sectors such as domestic service, agriculture, industrial workshops and restaurants and hotels. Other particularly vulnerable activities are prostitution and sexual services.

The rights mentioned above protect migrant workers and their families in any place and in any circumstances from:

- being subjected to punishment or treatment that causes serious physical, psychological or humiliating pain;
- being subjected to slavery or servitude, for example, being forced to work excessively long hours;
- inhuman working conditions such as long working hours without rest or sufficient food;
- performing work that they do not want to do;
- taking experimental medicine or undergoing medical treatment without their consent.

There is evidence that in order to commit the above infringements, the passports and other documents of migrant workers and their families are confiscated so that they cannot travel, thus forcing them to perform the activities to which they are subjected.

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

This right is protected by UD, article 6; Pact I, article 16; AC, article 3; AD, article 17; and CMW, article 24.

These provisions recognize the right of all human beings to rights and obligations and to enjoy the basic civil rights. Such recognition is necessary because the human being is the natural legal subject but it is the right that converts a human being into a person before the law, that is, it gives an individual aptitude or capacity to possess rights and obligations. The law also recognizes the juridical personality of certain entities, such as the family.

In the case of international migration, this means that not only a migratory worker or his wife or children are persons before the law, but also 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 the right to recognition as persons before the law. This is expressed below in item 8: "The right to private life and the right to protection of the family".

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; an unborn but already conceived being is capable of having rights, such as acquiring by donations, but also has other legal effects, such as in paternity suits. Even before an individual is born, he or she is protected by law, as provided in article 4 of the AC.

Being a person before the law means that a migrant worker or his family does not need representatives to sign or terminate a work contract, rent or buy or sell a house, accept or leave an inheritance, make or accept a donation, file a claim due to default of a contract or theft or fraud, and so on. This also involves the right to have a nationality, of which nobody can arbitrarily deprive them.

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

5. Right of equality before the law

This right is provided in UD, article 7; Pact I, article 26; AD article 2; AC article 24; and CMW article 18.

Equality before the law implies another human right, the right not to be discriminated, expressed as “all human beings have the right to equal protection of the law”.

The right of equality before the law and not to be discriminated is applicable to all stages of the migration process. It is especially important that it be applied in the period spent in remunerated activity, since the consequences of this right reflect not only on the working conditions but also the living conditions of the migrant worker and his family. At this point it is also appropriate to quote a paragraph of Advisory Opinion OC-18, “Juridical Condition and Rights of Migrant Workers without Documents”, of the Inter-American Court of Human Rights, which is quoted at greater length in the item “Labor rights and the right to social security”: “On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment”. The Court’s opinion could not be more explicit: Work cannot be given to any person, whatever his or her migrant status, without recognizing his or her rights springing from this working relation. Failure to recognize these rights would imply infringement of the human right to equality before the law and to non-discrimination.

This Advisory Opinion of the Inter-American Court OC-18 is obligatory for all countries because it is based on valid *erga omnes* human rights such as the right to equality and non-discrimination and the right to due process of law; these rights are protected in all the countries of the American continent.

Racism, that is, differentiation for reasons of race or ethnic background, and xenophobia, that is, “hatred or repugnance of the foreigner”, are two forms of violating the human right to equality and non-discrimination, and governments are obliged to adopt effective measures to protect everyone, especially migrants and their families, from violation of such rights.

The right to equality and non-discrimination protects someone from preference being given to another with some characteristic such as race, skin color, age, sex, married status, language, religion, ideology, sexual preference, nationality, social or economic position, physical appearance or incapacity. This law also protects a person from one such characteristic being the cause of violence, insult, exclusion from some group, moral or material harm, or restriction of labor rights, for example, not receiving a work contract, being paid less for the same job, having to work longer hours, not being rented a house, not being sold or allowed to buy something, or being discriminated in the offer of some service.

On the other hand, migrants and their families arriving in a country have the responsibility and obligation to understand the laws and values of the society that has welcomed them. The welcoming society must in turn respect the rights and cultural diversity of migrants and their families. Tolerance, comprehension and mutual respect are the ingredients of the solution.

Integration of the migrants and their families is the best solution to the migration process, but this depends fundamentally on the receiving country accepting them, recognizing the contribution that migrants make to economic development, offering them equal conditions without any discrimination, and when necessary allowing their families to rejoin them.

The right to equality must not be violated even if questions of security or terrorism are alleged just because he is a migrant worker, with or without documents. Such allegations, sometimes, are tinged with racism or xenophobia, and governments must be careful to avoid abuses and infringement of the human rights of migrant workers and their families for these reasons. 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 to due legal process are adopted.

#### 6. Labor and social security rights

The right to work is provided in UD, article 22, 23, 24 and 25; Pact II, articles 6, 7, 8, 9, 10, 11, 16, 17, 18 and 19; AD, articles 14, 15 and 16; AC, article 16; PACA, articles 6, 7, 8 and 9; and CMW, articles 25, 26, 27, 28, 32, 83 and 84.

Article 23, paragraph 1, of the Universal Declaration of Human Rights states: "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment". If migrant workers, whatever their status, establish a working relation, they should be treated in labor matters in the same way as other workers, including nationals of the country where they work, in accordance with the human right to equality and non-discrimination before the law. Consequently, migrant workers must enjoy working conditions that allow them and their families living conditions in keeping with the dignity deserved by human beings, such as equal wages for equal work, prohibition of forced labor, the right to social security, access to education for their children, fair payment for overtime, reasonable limitation of the number of working hours, weekly rest, leisure time, periodical paid vacations, the right to set up trade unions and associations to defend their interests, and for working women to enjoy specific rights such as maternity leave and so on.

These labor rights, being human rights, are obligatory for all States.

On the human right to equality and non-discrimination, the Advisory Opinion OC-18 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:

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*. ... 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. ... The general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person. ... 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. ... 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. ... 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. ... 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. ... 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 is 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, the right to equality before the law, including the sphere of labor rights of irregular migrant workers, is confirmed by this Advisory Opinion.

The right to freedom that all human beings enjoy 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 integrating with the community, on equal and non-discriminatory terms, this being the most convenient for migrant workers and their families

Unfortunately, it often happens that problems arise between groups of migrant workers and the communities that they join because of racial, social, cultural or religious questions, especially when there are substantial differences in these matters. Isolating migrants and their families not only hampers their personal development but also prevents them from forming associations with other workers or trade unions that can defend their rights and protect them from abuses with regard to work, which is even more frequent among domestic servants, mostly women. Women face more restraints than 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 to support” in family migration, with less access to the labor market when they are admitted as accompanying spouses, plus their marginalization into traditional female and poorly paid occupations when they migrate as workers and their greater vulnerability to sexual exploitation, are legitimate reasons for concern. Avoiding these situations depends basically on respect for the rights established in the principal instruments of human rights.

Also, it is indispensable to facilitate the transfer of cash remittances, pensions and allowances of retired migrant workers, male and female, to their countries of origin.

#### 7. Right to due process of law, right to non-retroactivity and right to obtain indemnization

UD, articles 7, 8, 9,10, 11 and 17; AC, article 8; Pact I, article 3, 9, 10, 11, 13, 14, 15 and 26; AD, article 2, 18 and 26; AC, articles 9 and 10; and CMW, articles 15, 16, 17, 18, 19, 20, 21, 22 and 23.

If a migrant worker or a member of his family is arrested by a civil servant or a police or public security officer, in order either to check their migrant status or because of some criminal accusation or to determine their civil rights and obligations, migrant-aid organizations recommend keeping calm, not running and not insulting the person who arrests him in the understanding that they have the right to be immediately informed of the reason for their arrest in a language that they understand. The arrest of an immigrant or his family for the above reasons can only be done if the legislation of the country so permits; if so, migrants and their families have the following rights: firstly, respect for their human rights, even in the case of being undocumented; for a translator and lawyer; to be put in touch with the nearest consulate of his nationality, which 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, these same authorities 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, and 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 sometimes children and adolescents are wrongfully arrested and depositions are made without the presence of a legal representative or adult responsible for them. Arrested migrant workers also have these rights: to remain silent, but they should give their real name; not to sign, against their will any voluntary release or similar paper; to leave after paying bail; to have

hygiene in the place of arrest - which must not be a jail - and to be given food and water. They also have the right against excessive force in custody, and not to be insulted or attacked, harmed by handcuffs; and to be given medical care, and not to have their money or other valuables taken away from them. It is also advisable for the arrested not to lie, carry false documents, for instance false social security card – since this is an offense -, not to say he is a citizen of the country when he is not, and 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 the arrested migrant worker or member of his family is not released, an order is required by the competent authority to keep him in custody and start a lawsuit, that is, a decision before a court. The human right to due legal process, the right to justice, the guarantee to migrant workers and their families, no matter what their migrant status, that any ensuing legal process based on the accusation of having committed a crime such as homicide, robbery or fraude will be carried out according to the prevailing laws, by an independent and impartial court or tribunal established by law, in other words, with justice. During the process, the minimum guarantees granted to all must be given, including the right to adequate defense, to communicate with the defender of his choice or one appointed free of charge if he cannot afford to pay, to be tried without undue delays; to be present at the trial in order to have fair judgment according to the laws in effect and not arbitrarily, that is, not in accordance with the free criterion of those executing them but rather in compliance with the essential formalities that the law indicates to be able to deprive someone of some right or impose punishment. To this same end, the accused has the right to a public hearing in order that all the pertinent elements be included and the court accordingly prepared to pass sentence, as well as interrogating or having interrogated the accusation and defense witnesses and obtaining the appearance of the latter to be questioned in the same conditions as those for the accusation; to be assisted by an interpreter if he does not understand the language used in the court. And not to be obliged to make a statement against himself or declare himself guilty.

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. If a person is deported, he must be informed of the reasons for this and also the recourses he has available not to be deported. Persons accused of a crime have the right to be presumed innocent until proven guilty.

Migrant workers and their families have the same right to be heard when the trial takes place to determine rights and obligations of a civil nature, for example, non-compliance with a work or rental contract. 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.

If a person is arrested because of his physical characteristics to check his migrant status, the human right to equality is infringed before the law that prohibits all discrimination for reasons of race, color, language, religion, sexual preference, and so on. This right is also infringed if based on these criteria distinctions are made, restrictions imposed or preferences given among the persons arrested. Police roundups, whether in the working place, public places or homes, lead to a situation of generalized terror, and collective expulsions are illegal because each case must be judged individually, with due respect for human rights.

If these human rights are violated, the authorities or persons that committed the infringement must be denounced.

In short, the right to due legal process ensures migrant workers and their families full equality with the nationals of the country involved in a trial taken to court or tribunal.

The right to no-retroactivity complements the right to due legal process since if a lawsuit is carried out based on a law that did not exist when the crime was committed, the

right to due legal process would be infringed, since commission or omission would be judged without a law to punish it, plus the fact that this would infringe the principles of “no crime without law” and “no punishment without law”.

The UD (article 11.2) refers to this right in the following terms:

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.

Article 15 of Pact I provides that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law...”

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.

Paragraph 5 of article 9 of Pact I says: “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation”, and article 10 of the AC provides that: “Every person has the right to be compensated in accordance with the law in the event he has been sentenced by a final judgment through a miscarriage of justice.”

The above provisions are based on the general principle of international law that says: “Violation of a right allows for indemnization”.

#### 8. Right to private and family life

UD, articles 12 and 16; Pact I, articles 17 and 23; AD, articles 5 and 6; CA, articles 11 and 17, and CMW, articles 14 and 44.

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 honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

The right not to be subjected to arbitrary interference at home authorizes the inhabitants to not permit entry, even of an official, to a home unless there is a written order from a competent authority in this respect that specifies what may be done in that home. This right applies to all persons who have this home, that is whether nationals of the State or aliens.

The right to inviolability of private communications applies to letters, telegrams, telephone calls, electronic messages, 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.

Item 1 of article 17 of the AC states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. Article 44 of the CMW contains a similar article, adding that the States that are signatories to the Convention should take the “appropriate measures to ensure the protection of the unity of the families of migrant workers”.

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”. If children are separated from their parents because the latter have no documents, and then deported, this is a violation of the human right of persons who integrate the family, enshrined in article 16 of the UD. This is likewise recognized by the CMW.

It is important to address this section on the human rights of the family in order to preserve its unit as such. It is also important to recall the special protection required by migrant women since, if they travel alone or are 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 where they are employed, even if their own country, and if they work 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 besides being separated from her husband, she must look after the children and are more vulnerable to maltreatment, accusations or abuse by family members under her charge. If it is the mother who emigrates, the daughters are exposed to incest; if she accompanies her husband and they have children, very often she must not only look after them but also have an outside job. 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 is it not beneficial but also measures are taken against national 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 emigrates. 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 joint their family. Measures such as those described herein favor undocumented migration.

9. Right to freedom of thought, conscience and religion and the right to freedom of opinion and expression

UD, article 18 and 19; Pact I, article 18 and 19; AD, article 4; AC, article 12 and 13; CMW, article 12.

Articles 18 and 19 of the UD describe these rights amply and precisely:

Article 18 - Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19 – Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

10. Freedom of peaceful meeting and association

UD, article 20, paragraphs 1 and article 23, paragraph 4; Pact I, article 21 and 22; Pact II, art. 8; AC, articles 15 and 16; and CMW, article 26.

In the articles quoted, the UD establishes respectively that “Everyone has the right to freedom of peaceful assembly and association” and that “Everyone has the right to form and join trade unions for the protection of his interests”.

These rights are included in the other international instruments quoted in this item. Pact I provides that “no restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others”, to which is added that migrant workers and their families, being aliens, should not refer to political affairs of the welcoming country.

Evidence shows that foreign workers who work seasonally have joined trade unions.

11. Right to individual and collective private property

This right is dealt with in article 17 of the UD; article 3 of Pact II; and article 15 of CMW.

Migrant workers and their families have the right to individual and collective property, that is, to possess a good individually or in partnership with other persons and also to have the right not to be arbitrarily deprived of their property; nonetheless, the authorities have the right to impose on individual or collective property whatever is in the interest of society and to regulate such property in the benefit of society, but if a good that is private or collective is expropriated, fair compensation is only fair.

#### 12. Rights of the child

These rights are provided in UD, articles 25 and 26; Pact I, article 24; Pact II; article 13; CMW, article 29; and CRC, article 8.

The international instruments quoted in this item refer to the specific human rights of children, whatever may be their migrant status, as follows: special cares and assistance – similar to maternity; equal social protection – whether born in or out of wedlock - both on the part of the family and the society and State; protection measures required by their condition as minors, without any discrimination as regards race, color, gender, language, religion, national or social origin, economic position or birth; immediate registration upon birth, and bearing a name in order to have an identity; having a nationality like everyone else, and changing it; education, which should be free, except with regard to elementary instruction, which should be aimed at full development of the human personality and strengthening of respect for human rights and fundamental liberties. On their part, parents have the preferential right to choose the type of education to be given to their children.

Also in accordance with what the UD establishes, and other international instruments quoted in this item, the human rights of children in the migration process are infringed:

- a) if they are not registered immediately upon birth and given a name which gives them the right to have an identity that complements two others: the right to a nationality and the right to legal personality;
- b) if they are born in a country that concedes nationality to anyone born in its territory and does it grant it;
- c) if they suffer at school racial or any other kind of discrimination;
- d) if a child is forced to perform activities or work that could prove dangerous or impair their education or are hazardous to his health or physical, mental, spiritual, moral or social development;
- e) if children are recruited or enlisted in the armed forces or used to participate actively in hostilities;
- f) if they are arrested and imprisoned together with their parents – and not in adequate places - and are treated as criminals;
- g) if their parents are arrested and separated from the children; if unaccompanied minors are expelled from the country, especially if they are deported without from their family parents or at risk periods.

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