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Discrimination Against Undocumented
Migrant Workers in Latin America
*with a focus on Haitian migrants in The
Dominican Republic*

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Summary

Intra-regional migration in Latin America is an increasing phenomenon. Many inter-regional agreements and treaties are being consolidated in the region; however, there are many cases of irregular migration, which leads the migrant worker to be undocumented in the country of destination. The main problem experienced by these undocumented migrant workers is therefore the discrimination experienced by them in the destination country.

This thesis will therefore analyze the discrimination experienced by undocumented migrant workers in Latin America, focusing on the situation of undocumented Haitian migrants in The Dominican Republic. For this analyses then, it will be first described the International and Regional Instruments to protect the Human Rights Violations of undocumented migrant workers. Further, an overview of the situation of these migrants will be provided, followed by a description of the violations suffered by Haitians in Dominican Republic.

The main focus of the analysis of this thesis will be on the impact of the Inter-American System of Human Rights on the protection of undocumented migrant workers in Latin America. The main jurisprudence of this regional system analyzed in this thesis will be the Advisory Opinion on the Juridical Conditions of Undocumented Migrant Workers and their Access to Justice¹. After this general analysis, it will be analyzed the impact of the Inter-American System of Human Rights on the protection of Undocumented Haitian migrant workers in Dominican Republic, focusing on the Provisional measures issued by the Inter-American Court of Human Rights concerning Haitians and Haitian-origin Dominicans in the Dominican Republic. Moreover, it will be examined an important case law on the right to nationality judged by the Inter-American Court of Human Rights concerning the problem.

¹ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights.

Preface

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Abbreviations

AI	Amnesty International
CEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESFRONT	Specialized Border Security Corps in The Dominican Republic
CRC	Convention on the Rights of the Child
ECtHR	European Court of Human Rights
IACHR	The Inter-American Commission on Human Rights
IACtHR	The Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERCD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ILO	International Labour Organization
IOM	International Organization for Migration
MERCOSUR	Southern Common Market
NGO	Non-Governmental Organization
OAS	Organization of American States
REDH-JV	Red de Encuentro Dominicano Haitiano Jacques Viau
SNU-RD	United Nations System in the Dominican Republic
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNASUR	Union of South American States
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
WVI	World Vision International

Chapter 1 – Introduction

Latin America is considered to be the region in the world with the most unequal income distribution.² Therefore, many people from this region migrate to other parts of the world, legally or illegally, in search for better work opportunities and life conditions. However, since Latin America has also regional differences in development, many people choose to migrate within the region. In fact, according to the International Organization for Migration (IOM), “intra-regional mobility in Latin America is not a new phenomenon”³, and it has increased recently, specially between neighboring countries.⁴ Thus, this thesis will examine the instruments to protect the rights of undocumented migrant workers in Latin America under the Inter-American System of Human Rights and the International Legal instruments, focusing on the situations where it presents discrimination towards undocumented migrants at the workplace.

The factual conditions and the policies towards undocumented migrant workers in Latin America will be described and analyzed, to then investigate how the International and Regional Bodies protect these workers and, mostly important, how these workers have access to human and labour rights instruments. Further, due to the wide legal framework provided by Human Rights Law related to migrant workers, the focus will be on the mostly related and relevant to undocumented migrant workers.

In sum, this paper will examine the impact of the international and regional remedies in regards to undocumented migrant workers in Latin America focusing on the case of Haitians in Dominican Republic. In this study the focus is on the discrimination of undocumented migrants at the workplace, and therefore it will also be investigated the practices of Human Trafficking and exploitation in the region. Finally, a general perspective on the life conditions of this vulnerable group at work, such as forced labour, lower wages, long working hours, among other labour violations suffered by this group will be presented and analyzed.

1.1 Aim and Purpose

The aim of this research is to investigate the impact of the Inter-American System of Human Rights and the International Human Rights Law on the protection of the undocumented migrant workers rights, by also analysing what rights they are entitled to. The research brings different perspectives about the situation in Latin America, such as economical, political, social and legal, to approach the discrimination problems that this group faces in the destination countries.

² United Nations Development Programme. (2010, July 23). *United Nations Development Programme Newsroom*. Retrieved on 15/05/2012, from United Nations Development Programme: <http://content.undp.org/go/newsroom/2010/july/pnud-presenta-el-primero-informe-regional-sobre-desarrollo-humano.en>.

³ International Organization for Migration. (2011). *World Migration Report 2011: Communicating Effectively About Migration*. Geneva: International Organization for Migration, p. 66

⁴ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 213.

The International and Regional Human Rights Law have contributed to the development of human rights law in the area. However, even though most countries ratified most of international conventions, the situation of undocumented migrant workers has not been yet very developed in Latin America countries. Thus, as it will be illustrated in the further chapters, violations of human and labour rights are still a major concern in this region in relation to these migrants.

1.2 Research Problem

This thesis focuses on the discrimination aspect that undocumented migrant workers face in the destination countries. Therefore, it will be analyzed in the further chapters what are the international and regional instruments to protect this group from discrimination in Latin America. Moreover, the research will approach the impact of the Inter-American System of Human Rights towards the implementation of labour and human rights to undocumented migrants, as well as it will analyze the legal remedies provided in this system to ensure their access to justice.

Therefore, this thesis will address the following research questions:

- What are the international and regional instruments in relations to undocumented migrant workers in Latin America?
- What kind of discrimination the undocumented migrant workers suffer at the workplace in the destination country?
- What is the impact of the Inter-American System of Human Rights on the legal protection and access to justice to undocumented migrant workers in Latin America?

Furthermore, since this thesis is basing the study on the situation of undocumented Haitians in the Dominican Republic, the research questions will also be addressed to this specific case.

1.4 Methodology

The approach of this thesis is by using a descriptive, interpretative and analytical method. The factual conditions, which, in this study, are the conditions and policies towards undocumented migrant workers in Latin America, will be described and analyzed under the related legal instruments. These legal instruments include universal human rights law in general, migration law, labour law, and the regional instruments towards the protection of rights of undocumented migrant workers. Moreover, the analyses of these legal instruments is also interpreted under the Inter-American System of Human Rights, in relation to its promotion and protection of human rights regionally and the access to justice through its Human Rights Court and Commission. Therefore, it will be analysed in this thesis the jurisprudence of this regional system, such as legal cases, provisional measures and advisory opinions ruled by the Inter-American Court of Human Rights in relation to this group.

1.5 Definition of Key Words

According to the ILO approach on the migration status, migrant workers can be classified within three different categories. They can be in “a regular status, with the right to permanent settlement and naturalization; they may be temporary workers in regular status, but required to leave when their contracts expire; or they may be in irregular status and liable to deportation at any time”⁵. For the migrant workers in irregular status, there are various terms used by Governments, NGOs, International Organizations and International Conventions to define these migrants, who enter and work in the foreign country with no legal authorization. The Migrant Workers Convention No. 143, from 1975, for instance “uses the terms “clandestine” to refer to irregular migratory movements and “illegal” to refer to undocumented employment”⁶. However, both terms (“illegal” or “clandestine”) may have a negative connotation.⁷

Thus, the terms mostly used by International Organizations are “undocumented” or “irregular” migrant workers.⁸ Even though, the term ‘irregular’ is considered to be more complete, as covers the “conditions of entry, stay and employment, including possession of appropriate documentation”⁹, the ICRMW¹⁰ uses “irregular” and “undocumented” with a similar meaning, referring to migrant workers who are not authorized by the destination country’s law to enter, stay and work.¹¹ It is important to mention here that the irregular status of a migrant is determined “by reference to the norms of the country of destination or transit.”¹²

For the purpose of this thesis, it will be used the terms and definitions established by the Inter-American Court of Human Rights in its Advisory Opinion on the Juridical Status and Rights of Undocumented Migrant Workers, which were based in the article 5 of the ICRMW, as it follows:

- 1- “Documented migrant worker or migrant worker in a regular situation-
A person who is authorized to enter, stay and engage in a remunerated activity in the State of employment, pursuant to the law of the State and international agreements to which that State is a party.

- 2- Undocumented migrant worker or migrant worker in an irregular situation-
A person who is not authorized to enter, stay and engage in a remunerated activity in the State of employment, pursuant to the law of the State and

⁵ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 77.

⁶ *Ibid*, p. 31.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 202.

¹⁰ UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

¹¹ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 31.

¹² International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 202.

international agreements to which that State is a party and who, despite this, engages in the said activity.”¹³

In this study the focus will be on migrant workers in an irregular situation, as they are the group most discriminated in the destination countries, being “highly vulnerable to abuse and exploitation by employers, migrant agents, corrupt bureaucrats and criminal gangs.”¹⁴

1.6 Limitations of the study

As mentioned, the focus of this thesis is on undocumented migrant workers in Latin America. Among the problems faced by this group, it will be mainly studied the discrimination aspect. In relation to the international legal instruments that will be analyzed in the next chapter, the focus will be on the UN and ILO systems, and on the Inter-American System of Human Rights. Therefore, the study will not cover the domestic legislation in details, and this will only be briefly mentioned when necessary.

Also, a general overview of the region will be described in this thesis, to better illustrate the intra-regional phenomenon of migration. However, to narrow down the topic, one case will be highlighted throughout the thesis: the undocumented Haitians workers in Dominican Republic. This case was selected due to a number of violations presented in the receiving country against Haitians, after a deep analysis on the situation of undocumented migrant workers in the whole Latin America. Moreover, as this research is focusing on human rights on a general labour law perspective, other rights entitled to undocumented migrants, such as right to health will not be detailed discussed. In relation to migrant women in an irregular situation, the rights described will be of a general nature. And towards children, the thesis will deal with violations considered to be as a consequence of the status of their parents who are in the destination country as an undocumented migrant worker. Therefore, issues such as child labour, right to education, violations and discrimination of women at the workplace will not be covered in this study.

1.7 The Structure of the Thesis

To better analyze the issues towards discrimination on undocumented migrant workers in Latin America, this thesis will be divided into seven chapters:

- Chapter 1, already described here, is the introductory chapter, which briefly defines the main facts of the problem, as well as it explain the purposes of the thesis, the definition of key words, pointing out the research questions, the methodology and the limitations of the study.
- Chapter 2 provides the description of the Legal Backgrounds for the Protection of Undocumented Migrant Workers, focusing on the UN System and the ILO regime in the International sphere; and on the Inter-American System in the regional Sphere. In

¹³ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 69.

¹⁴ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 99

this last one, special attention will be given to its latest developments in relation to migrant workers, i.e., the Special Rapporteurship on Migrant Workers and their Families.

- Chapter 3 outlines the real situation, the causes and conditions of Undocumented Migrant Workers in Latin America and the current problems experienced by this groups in the region. A brief description of the historical background of Latin America Community will be given in this chapter. Also, a section will describe the important role of economic integration in the region to regulate and facilitate migrant workers status in the receiving countries. Moreover, the relation of informal work ties with undocumented migrant workers will be analyzed, to better understand the violations of human and workers rights suffered by them.

- Chapter 4 discusses the factual conditions of the specific case studied in this thesis, which is the undocumented Haitian migrant Workers in Dominican Republic. Firstly, the background information on Haiti and Dominican Republic will be described briefly. Then, a general overview on the human rights violations experienced by undocumented Haitians in Dominican Republic will be examined, followed by a section focusing on the labour rights violations and the discrimination at the workplace. Finally, a section will analyze the responsibility of the Receiving State, in this case Dominican Republic, on undocumented migrant workers.

- Chapter 5 analyses the impact of the Inter-American System of Human Rights on the protection of Undocumented Migrant Workers rights. The jurisprudence of the Inter-American Court of Human Rights and its Advisory Opinion on the Juridical Conditions of Undocumented Migrant Workers and their Access to Justice¹⁵ will be detailed analyzed in this chapter.

- Chapter 6 analyses the impact of the Inter-American System of Human Rights on the protection of Undocumented Haitian migrants in Dominican Republic, focusing on the Provisional measures issued by the Inter-American Court of Human Rights concerning Haitians and Haitian-origin Dominicans in the Dominican Republic. Moreover, it will be examined an important case law on the right to nationality judged by the Court concerning the problem.

- Chapter 7 will conclude the study by restating the research questions, summarizing the answers brought by the analysis of the research, as well as it will give recommendations to the problem.

¹⁵ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights.

Chapter 2- Legal Background for the Protection of Undocumented Migrant Workers

2.1 Universal Instruments on the Protection of Undocumented Migrant Workers

First of all, it is important to state that migrant workers, whatever their status are, are part of all members of the “human family”, and therefore are always entitled to human rights.¹⁶ Moreover, discrimination of any kind is prohibited in the UN Charter, and the principle of non-discrimination has been developed in a number of Human Rights treaties. Having mentioned that, the specific protection on discrimination of undocumented migrant workers, under human rights perspective can be analyzed from basic two legal perspectives: the International Human Rights Law instruments (the UN system) and the International Labour Law legal framework (ILO instruments).

2.1.1 The International Human Rights Law Instruments on the Protection of Undocumented Migrant Workers

The Universal Declaration of Human Rights (UDHR, 1948)

The Universal Declaration of Human Rights (hereinafter UDHR), adopted in 1948, was the first settlement of international character which affirms on the universality of the man dignity.¹⁷ The origin of United Nations is based in the idea that we are “citizens of the world”¹⁸, bringing the invitation “to be an exile from the comfort of patriotism (...)”¹⁹, to “transcend national boundaries”²⁰, to obtain the basic preservation and protection of these universal basic rights for human beings. The Universal Declaration of Human Rights aims, thus, the implementation of a “common ideal to be reached by humanity...”²¹. The article 2 of this Declaration brings the universal aim of its rights, that are destined to all persons, “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”²².

¹⁶ Office of the UN High Commissioner for Human Rights. Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights. United Nations, Geneva, 1996.

¹⁷ Universal Declaration of Human Rights (1948), Article 1.

¹⁸ Laertius Diogenes in Nussbaum, Martha. (1994). Patriotism and Cosmopolitanism. Available at: <http://bostonreview.net/BR19.5/nussbaum.html>

¹⁹ *Ibid.*

²⁰ Lechner, F. J., & Boli, J. (2004). *The Globalization Reader*. Blackwells Publishing, p 280.

²¹ Universal Declaration of Human Rights, preamble.

²² *Ibid*, Article 2.

Despite the various regional and international conventions, human rights norms presume a universal approach, based on the fundamental postulate that embraces all human beings, the equal human dignity²³, which “exists uniquely in each individual”²⁴.

The rights particularly relevant for migrant workers established in the Declaration are “the right to be free from slavery or servitude; equality before the law and equal protection of the law; protection against discrimination; effective remedy by national tribunals; freedom from arbitrary arrest, detention or exile; freedom of movement and residence; peaceful assembly and association; and social security”.²⁵

The International Covenant on Civil and Political Rights (ICCPR, 1966)

The rights provided in the ICCPR are rights entitled to all human beings²⁶, including then undocumented migrant workers. However, the covenant also states specific articles focusing more on this group, with rights related to the prohibition of forced labour and slavery, access to justice and the due process of law in cases of detention and deportation. These articles are: article 8 prohibition of slavery, forced or compulsory labour and servitude, article 13 the right to due process of law, article 14 the right to a fair hearing, article 21 right of peaceful assembly, article 22 right to freedom of association with others, article 26 right to equality before the law and the prohibition of any kind of discrimination, and article 27 that states the right of minorities to express their culture.

Moreover, the ICCPR General Recommendation No. 15, from 1986, on the Position of Aliens under the Covenant, re-state the principle of non-discrimination on the enjoyment of the rights, provided by Article 2 (1) of the Covenant. Thus, this General Recommendation affirms: “the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”²⁷

In Latin America, the ICCPR has been broadly accepted, and Dominican Republic, and Haiti are parties of the Covenant through accession.

The International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)

The ICESCR states provisions related to economic social and cultural rights, establishing that the State Parties should guarantee these rights to all individuals, without any kind of discrimination.²⁸ In this Covenant, the most important articles

²³ Steiner, Henry J., Alston, Philip, & Goodman, Ryan (2007). *International Human Rights in Context: Law, Politics, Morals*. New York: Oxford University Press, p. 519.

²⁴ Comparato, Fábio Konder (2001). *A Afirmação Histórica dos Direitos Humanos, "The Historical Affirmation of Human Rights"* (2nd Edition ed.). Sao Paulo: Editora Saraiva, p 31, my translation.

²⁵ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 118 and 119.

²⁶ ICCPR, Article 2 (1).

²⁷ Human Rights Committee, General Comment No. 15 on the position of aliens under the Covenant (1986), Para. 1

²⁸ ICESCR, Article 2 (2).

related to undocumented migrant workers rights are: article 6 (right to work), article 7 (right to the enjoyment of just and favourable conditions of work), article 8 (right to form trade unions and join the trade union of his choice), article 9 (right to social security), article 10 (prohibition of child labour), and article 11 (right to adequate standard of living).

In addition, the Committee on Economic, Social, and Cultural Rights, re-states the principle of non-discrimination in several General Comments of the ICESCR. The main ones in relation to migrant workers are the General Comment No. 18 and the General Comment No. 19. The General Comment No. 18 on the Right to Work reaffirms the principle of non-discrimination in article 2(2), providing that it should be applicable “in relation to employment opportunities for migrant workers and their families.”²⁹ Moreover, this General Comment establishes that State parties are obliged “to respect the right to work by, inter alia, prohibiting forced or compulsory labour and refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including (...) migrant workers”.³⁰ The General Comment No. 19, on the Right to Social Security, establishes the right to primary and emergency medical care to all individuals “irrespective of their nationality, residency or immigration status”.³¹

In Latin America, several countries are parties in the ICESCR, including Dominican Republic. To the present date, Haiti has not yet ratified the Convention.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD, 1965)

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERCD) was adopted by the UN General Assembly in 1965, entering into force in 1969. Concerning the specific discriminations faced by undocumented migrant, the Committee on the Elimination of Racial Discrimination (CERD) adopted in 2004 the General Recommendation No.30 on the Discrimination Against Non Citizens. The recommendation states several provisions to protect this group from a discriminatory treatment, such as, among others, measures of general nature (Part II), protection against racial violence (Part III), the right to access citizenship (Part VI), and principle of equality before law (Part V). In relation to the right of citizenship, the Committee encourages the regularization of “the status of former citizens of predecessor States who now reside within the jurisdiction of the State party.”³²

Towards the rights of undocumented migrant workers, the Recommendation provides that State parties should, *inter alia*:

- “Take effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers,

²⁹ The Committee on Economic, Social, and Cultural Rights (CESR), General Comment No. 18 on the Right to Work (2005), Para. 18.

³⁰ *Ibid*, Para. 23.

³¹ The Committee on Economic, Social, and Cultural Rights (CESR) General Comment No. 19 on the Right to Social Security (2008), Para. 37.

³² The Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No.30 on the Discrimination Against Non Citizens (2004), Para. 17.

including debt bondage, passport retention, illegal confinement, rape and physical assault”³³;

- “Ensure the non-discrimination ‘among non-citizens on the basis of race, colour or ethnic or national origin’ in laws concerning deportation, providing to non-citizens the ‘equal access to effective remedies’”³⁴;

- “Ensure that non-citizens are not subject to collective expulsion”³⁵

- “Recognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”³⁶.

In Latin America, this Convention has been broadly accepted, and among the countries, Dominican Republic, Haiti are members of the convention.

The International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1979)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), from 1979, is an international instrument, which provides protection towards gender discrimination.³⁷ Moreover, the Convention applies to all women³⁸ “and provides that States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure the same rights, on the basis of equality between men and women.”³⁹

In addition, towards migrant workers, the Committee on Elimination of All Forms of Discrimination against Women adopted the General Recommendation No. 26 on Women Migrant Workers (2008). This recommendation provides rights of a general nature to broadly protect women’s rights. However, concerning the particular vulnerability of undocumented women migrant workers⁴⁰, the Recommendation also provides recommendations to the State Parties specifically towards this group, such as:

- To protect the undocumented women migrant worker from “discrimination or sex-based exploitation and abuse.”⁴¹
- To protect the “rights of women migrant workers in detention, whether they are documented or undocumented”⁴²

³³ *Ibid*, Para. 34.

³⁴ *Ibid*, Para. 25.

³⁵ *Ibid*, Para. 26.

³⁶ *Ibid*, Para. 35.

³⁷ CEDAW, article 1.

³⁸ The Committee on Elimination of All Forms of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers (2008), Para. 4

³⁹ International Labour Conference. (2004). *Report VI: Towards a fair deal for migrant workers in the global economy. Sixth item on the agenda*, Geneva. Para. 259

⁴⁰ The Committee on Elimination of All Forms of Discrimination against Women, General Recommendation No. 26 on Women Migrant Workers (2008), Para, 22.

⁴¹ *Ibid*, Para. 25 (i)

⁴² *Ibid*, Para. 25 (j)

- To protect the basic human rights of the undocumented women migrant workers, ensuring them to “have access to legal remedies and justice in cases of risk to life and of cruel and degrading treatment, or if they are coerced into forced labour, or face deprivation of fulfilment of basic needs.”⁴³

In Latin America, this Convention has been ratified or accessed by many countries, and among the ratified members there are Dominican Republic and Haiti.

The International Convention on the Rights of Child (CRC, 1989)

The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly in 1989, coming into force in 1990. The CRC provides rights concerning all children, establishing that the States Parties should ensure and respect these rights without discrimination of any kind⁴⁴. Moreover, States “shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members”⁴⁵.

In addition, the Committee on the Rights of the Child adopted General Recommendations on the protection of the rights of the child with also provisions specifically regarding the situation of migrant workers’ children. For instance, the General Recommendation General Recommendation No.7 on Implementing Child Rights in Early Childhood (2005) recommended to State Parties to ensure access to services, especially for the most vulnerable children, in which migrant children are included.⁴⁶

Moreover, the General Recommendation No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin states that the State parties are obliged to ensure the rights established in the Convention “to each child within the State’s territory”, including, among others, “migrant children - irrespective of their nationality, immigration status or statelessness.”⁴⁷ Further, the Recommendation emphasizes the principle of non-discrimination, in which prohibits “any discrimination on the basis of the status of a child as being unaccompanied or separated, or as being (...) migrant”⁴⁸, seeking therefore the best interest of the child⁴⁹.

In Latin America, all countries have ratified this Convention.

⁴³ *Ibid*, Para. 25 (l).

⁴⁴ CRC, Article 2 (1).

⁴⁵ CRC, Article 2 (2).

⁴⁶ The Committee on the Rights of Child, General Recommendation No. 7 on Implementing Child Rights in Early Childhood (2005), Para. 24.

⁴⁷ The Committee on the Rights of Child, General Recommendation No. 6 on the Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, Para. 12.

⁴⁸ *Ibid*, Para. 18.

⁴⁹ *Ibid*, (c).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)⁵⁰ is the most important international treaty in relation to the rights of migrant workers, establishing minimum standards for all migrant workers and members of their families.⁵¹ It contains provisions that ensure basic human rights to all migrant workers, in a regular or in an irregular situation. However, the Convention establishes rights entitled only to documented migrant workers, and its Part IV⁵² is the main evidence of this distinction.

Thus, regarding undocumented migrant workers, the most important rights are established under Part III⁵³ of the Convention, which provides rights entitled to all migrant workers and members of their families. The rights provided in this part are mostly rights of a general nature, already stated in other Human Rights Treaties. The preamble of the Convention states the relevance in adopting rights also entitled to undocumented migrant workers, considering that “they are frequently employed under less favourable conditions of work than other workers and that certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.” Concerning these facts, the Convention established in the Part III the article 25, which provides to the migrant worker the right to equal treatment as “nationals of the State of employment in respect of remuneration” and working conditions.

In addition, the Convention also establishes in its part VI⁵⁴ provisions towards the prevention and elimination of irregular migration, and employment of migrant workers in an irregular situation, stating “the need to formulate appropriate migration policies to that effect; the imposition of sanctions to give effect to regulations in this area; exchanging information; providing information to migrant workers; and facilitating the provision of consular services.”⁵⁵

Unfortunately, many countries have not yet ratified this UN Convention. And, even though there are a great number of signatory countries in Latin America, to the present Dominican Republic and Haiti have not yet ratified the ICRMW.

⁵⁰ The ICRMW was adopted by UN General Assembly in 1990, entering into force in 2003.

⁵¹ International Organization for Migration, 2008, p. 357.

⁵² ICRMW, Part IV: Other Rights of Migrant Workers and Members of their Families who are Documented or in a Regular Situation

⁵³ ICRMW, Part III: Human Rights of All Migrant Workers and Members of their Families

⁵⁴ ICRMW, Part VI: Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

⁵⁵ Barauah, N., & Cholewinski, R. (2007). *Handbook on Establishing Effective Labour Migration Policies. Mediterranean edition*. Organization for Security and Co-operation in Europe (OSCE), International Organization for Migration (IOM), International Labour Office (ILO), p. 31.

The Palermo Protocol on Trafficking in Persons

According to the Palermo Protocol on Trafficking in Persons⁵⁶, adopted by the United Nations, human trafficking is based on non-consensual and exploitive relations between the migrant and the trafficker. The Palermo Protocol brings an international definition of human trafficking as being 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 giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”⁵⁷. Therefore, the purpose of human trafficking is exploitation.

According to the protocol definition, 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.”⁵⁸ Thus, forced labour, servitude and slavery are together to define exploitation, which is the purpose of Human

In the context of the ILO, the ILO Committee of Experts, in its General Survey (2007), clearly mentioned that the definition of “trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour” in the use of context as it is in the Palermo Protocol.⁵⁹ The definition of slave can be found in the Slavery Convention of 1926 as: “...the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised...”⁶⁰ To be a slave is then to be under the control of others in a way that the person does not determine his/her life, and does not receive, neither can claim any payments for the work. Finally, even though there is no definition of servitude in international law, the European Court of Human Rights (ECHR) has defined servitude as meaning “an obligation to provide one's services that is imposed by the use of coercion, and is to be linked with the concept of slavery”.⁶¹

When it comes to undocumented migrant workers, since many of them are being trafficked from their country of origin to the destination country, they are facing situations of extremely exploitation and vulnerability, both from the trafficker and from the employer in the country of destination.

In Latin America, the Palermo Protocol has been ratified or accessed by many countries, including Dominican Republic and Haiti.

⁵⁶ The Palermo Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime.

⁵⁷ *Ibid*, Article 3(a)

⁵⁸ *Ibid*.

⁵⁹ International Labour Organization. (2007). *Report III (Part 1B) General Survey concerning the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105). Third item on the agenda: Information and reports on the application of Conventions and Recommendations Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution)*. International Labour Office, Geneva, p. 41, para. 77

⁶⁰ Article 1.1 of the Slavery Convention of 1926.

⁶¹ ECtHR Case of Siliadin v. France, Application no. 73316/01, Strasbourg, 26 July 2005. Para. 124.

2.1.2 The ILO Instruments on the Rights of Undocumented Migrant Workers

In this section, it will be analyzed the ILO instruments related to undocumented migrant workers, which mainly “provides protection on migrants in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers.”⁶² Therefore, under the ILO Labour Standard, the instruments mostly related to migrant workers are the Convention No. 97 (1949) revised on Migration for Employment and the Convention No. 143 on Migrant Workers (Supplementary Provisions). However, due to the fact that the Convention No. 97 only deals with the protection of migrant workers “lawfully residents in the hosting country”⁶³, for the purpose of this thesis, only Convention No. 143 will be examined.

Moreover, due to their relevance on the issue of undocumented migrant workers rights, the ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up (1998), and the ILO Multilateral Framework on Labour Migration (2005) will be also analyzed in this section.

The Convention on Migrant Workers (C143)

The Convention on Migrant Workers Convention (C143) (Supplementary Provisions) brings provisions that protects the irregular migrant workers rights, not covered in other related ILO instruments. However, it is important to mention that only Part I of this Convention deals with undocumented migrant workers, since Part II only bring provisions to protect migrant workers who have been "regularly admitted" for the purposes of employment⁶⁴.

According to the ILO Conference on Migrant Workers, from 1999, the first part of this convention and several provisions of Recommendation No. 151 “deal explicitly (...) with the suppression of clandestine migration flows and the protection of irregular status migrants”.⁶⁵ Thus, the Article 1 of the C143 states: “each Member for which this Convention is in force undertakes to respect the basic human rights of all migrant workers.” Meanwhile, article 3 brings provisions to suppress the clandestine movement of labour migrants and the illegal employment of migrants.⁶⁶

Moreover, the article 9 provides a clear protection on irregular migrant worker’s rights, stating that migrant workers who are in unlawful conditions shall “enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.”⁶⁷

Unfortunately, according to the ILO Conference⁶⁸, “the introduction of the protection of irregular-status migrants to Convention No. 143 may appear at first sight to explain

⁶² ILO Convention 143

⁶³ International Labour Conference. (1999). *Migrant Workers- International Labour Conference*. Geneva: International Labour Office, p. 42.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ ILO C143, Article 3.

⁶⁷ ILO C143, Article 9.

⁶⁸ International Labour Conference. (1999). *Migrant Workers- International Labour Conference*. Geneva: International Labour Office, p. 42.

the low number of ratifications”. Up to date, the only Latin America country that has ratified the Convention is Bolivia.

The ILO Declaration on Fundamental Principles and Rights at Work and Its Follow Up (1998)

In connection with human rights, the ILO took a significant measure by adopting the Declaration on Fundamental Principles and Rights at Work and its Follow-up in 1998. This Declaration includes the eight fundamental ILO Conventions, which are considered to be the eight ILO core standards. They are: the Forced Labor Convention, 1930 (No. 29)⁶⁹, the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), the Abolition of Forced Labor Convention, 1957 (No. 105), the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), the Equal Remuneration Convention, 1951 (No. 100), the Minimum Age Convention, 1973 (No. 138), the Worst Forms of Child Labour Convention, 1999 (No. 182). The ILO considers these rights as a precondition for all the others in that they provide for the necessary foundation to attempt for the improvement of individual and collective conditions of work. The member states of ILO are still required to put an effort into the realization of these core standards even if they have not ratified the eight fundamental conventions.

The promotion of this principles and the ratification of the mentioned conventions, with the obligations that non-ratifying states have to submit annual reports and also the obligations of the ILO to provide assistance for applying the fundamental principles, confers the relevance of the main aim of the Declaration on Fundamental Principles and Rights at Work, which is to provide assistance to the ILO member states in order to fulfill the rights of all the fundamental conventions.

Thus, all these conventions mentioned in this Declaration is relevant to improve the condition of undocumented migrant workers in many cases, as the Declaration requires ILO to give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers.

This Declaration has been broadly accepted in all Latin America countries, been ratified by Dominican Republic and Haiti.

The ILO Multilateral Framework on Labour Migration (2005)

The ILO Multilateral Framework on Labour Migration is comprised by “non-binding principles and guidelines for a rights-based approach to labour migration” adopted by the tripartite constituents (governments, employers’ and workers’ organizations) in June 2004, an endorsed by the ILO in 2006.⁷⁰

⁶⁹ This Convention defines forced labor as all types of work and services in which the worker did not join on a voluntary basis : “*all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily*”.

⁷⁰ ILO, Multilateral Framework on Labour Migration.

The Multilateral Framework establishes a “collection of principles, guidelines and best practices on labour migration policy”⁷¹ to its tripartite constituents, as well as to civil society, international and regional bodies, towards the protection, implementation and development of labour migration policies.⁷² In relation to undocumented migrant workers, the framework states that migration policies should include principles and practices to protect the vulnerability faced by workers in an irregular situation.⁷³ Further, the major themes underlined in the Framework are: decent work for all (Part I), international cooperation on labour migration (Part II), effective management on labour migration (Part IV), protection of migrant workers and abusive migration practices (Part V and VI), and promotion of social integration and inclusion (Part VII).⁷⁴

The Framework supplements then the ILO and UN instruments towards the protection of migrant workers rights, taking into account “the new global challenges and developments such as (...) the high incidence of irregular migration, including trafficking and smuggling of human beings.”⁷⁵ Moreover, its characteristic as a non-binding instrument allows the State to formulate legislation based on the principles and guidelines set up by the Framework.⁷⁶

In conclusion, it is important to state here, that even though a separation of the UN system and ILO system was made in this thesis, the ILO treaties and the UN treaties “are complementary and mutually reinforced”, with the aim to broadly protect workers’ rights.⁷⁷ Further, it is recognized by the ILO’s Committee of Experts the essential need of a “cooperation between the ILO and the United Nations with regard to the application of relevant instruments”, to therefore protect and ensure the fulfillment of those rights.⁷⁸

2.2 Regional Instruments on the Protection of Undocumented Migrant Workers

2.2.1 The OAS and the Inter-American System of Human Rights

The Organization of American States (OAS) “is an international organization created by the American States to strengthen the order of peace and justice of the continent, to promote their solidarity, and to defend their sovereignty, their territorial integrity and

⁷¹ ILO, Multilateral Framework on Labour Migration, Preface.

⁷² International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 280.

⁷³ ILO, Multilateral Framework on Labour Migration, p. 11.

⁷⁴ ILO, Multilateral Framework on Labour Migration.

⁷⁵ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 280.

⁷⁶ *Ibid.*

⁷⁷ ILO Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) – Third item on the agenda : Information and reports on the application of Conventions and Recommendations, 2011, p. 37, Para. 109.

⁷⁸ *Ibid.*

their independence”⁷⁹. It was created in Bogotá, Colombia, in 1948, which also coincides with the formal beginning of the Inter-American system for the promotion and protection of Human Rights, with the adoption of the Declaration of Rights and Duties of Man by its Member-States.⁸⁰

The organization is composed by 35 member-States⁸¹, and it has as the four fundamental pillars: “democracy, human rights, security, and development”⁸². Moreover, the respect for “the fundamental rights of the individuals” is among the basic principles of the OAS, which was proclaimed in the OAS Charter.⁸³

The Declaration of the Rights and Duties of Man (1948)

The Declaration of the Rights and Duties of man is an international human rights instrument providing fundamental rights to all individuals of the American States⁸⁴. In relation to worker’s rights, its article XIV brings more specifically provisions⁸⁵ that protect the “right to work and to fair remuneration”, without making any distinction or discrimination, stating this right to “every person”.⁸⁶

Moreover, besides the Declaration of the Rights and Duties of Man, adopted by all members of the OAS, several other human rights instrument were adopted by this system. However, the most relevant one is the American Convention on Human Rights, which will be further explained in the following section.

The American Convention on Human Rights (1969/ 1978)

The American Convention on Human Rights (hereinafter the American Convention) was adopted in 1969, but it only came into force in 1978.⁸⁷ As of May 2012, a total of 24 member states are parties to the Convention: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua,

⁷⁹ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights., p. 1.

⁸⁰ *Ibid*, p. 4

⁸¹ Member-States of the OAS, available at: Organization of American States. About the OAS – Who We Are – Member States. Last accessed on 29/05/2012, from the Organization of American States: http://www.oas.org/en/about/member_states.asp.

⁸² Organization of American States. About the OAS – What We Do – Political Dialogue. Last accessed on 29/05/2012, from the Organization of American States: http://www.oas.org/en/about/political_dialogue.asp (accessed on 03/05/2012)

⁸³ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p. 4

⁸⁴ The American Declaration of the Rights and Duties of man, chapter 1.

⁸⁵ Davidson, S. (1997). *The Inter-American Human Rights System*. Dartmouth Publishing Company Limited, p. 352.

⁸⁶ The Declaration of the Rights and Duties of Man. Article XIV.

⁸⁷ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p. 10

Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela.⁸⁸ The Convention defines the human rights that the ratified states are obliged to respect and guarantee.⁸⁹ However, it is important to remember here that even though the other 11 members are not parties of the Convention, they are still obliged to fulfill the rights established by the OAS Charter and by the Declaration, since they are members of the OAS.

Moreover, the Convention also states the organs that have the competence to promote and fulfill the rights of the Conventions by the States parties. The Convention then establishes the functions and procedures of these two organs, which are the Inter-American Commission on Human Rights (hereinafter the IACHR) and the Inter-American Court of Human Rights (hereinafter the IACtHR).⁹⁰

An additional protocol to the Convention was also declared by the OAS General Assembly in 1988, named 'Protocol of San Salvador'⁹¹. This protocol entered in to force in 1999⁹², obliging the ratified member states to ensure protection in the area of "Economic, Social and Cultural Rights"⁹³. Currently, 16 States have ratified the Protocol⁹⁴. There are no specific rights in relation to undocumented migrant workers. However, the protocol states provisions in relation to 'right to work' (article 6) and right to 'Just, Equitable, and Satisfactory Conditions of Work' (article 7), in which does not discriminate the rights in relation to the status of the worker.⁹⁵ Several Latin American countries have ratified the Additional Protocol. However, up to date, Haiti and Dominican Republic have only sign and not yet ratified the Protocol.⁹⁶

⁸⁸ Organization of American States, Washington D.C. Department of International Law. Multilateral Treaties. B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica" Last accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/juridico/english/signs/b-32.html>.

⁸⁹ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p. 11

⁹⁰ The American Convention on human Rights, Chapter VI, VII and VIII.

⁹¹ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p. 11

⁹² Organization of American States, Washington D.C. Department of International Law. Multilateral Treaties. Signatories and Ratification: A-52: Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social, And Cultural Rights "Protocol Of San Salvador" B-32. Last accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/juridico/english/signs/a-52.html> (accessed on 02/05/2012)

⁹³ Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p. 11

⁹⁴ Organization of American States, Washington D.C. Department of International Law. Multilateral Treaties. Signatories and Ratification: A-52: Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social, And Cultural Rights "Protocol Of San Salvador" B-32. Last accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/juridico/english/signs/a-52.html> (accessed on 02/05/2012)

⁹⁵ Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol Of San Salvador", Article 6 and Article 7.

⁹⁶ See Ratification of the Additional Protocol of "San Salvador": Organization of American States, Washington D.C. Department of International Law. Multilateral Treaties. Signatories and Ratification: A-52: Additional Protocol To The American Convention On Human Rights In The Area Of Economic, Social, And Cultural Rights "Protocol Of San Salvador" B-32. Last accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/juridico/english/signs/a-52.html> (accessed on 02/05/2012)

Therefore, the Inter-American System of Human Rights is a regional system for the promotion and protection of human rights in the Americas, composed by two institutional bodies, the IACHR and the IACtH, which will be described in the following sections.

The Inter-American Commission on Human Rights (IACHR)

The Inter-American Commission on Human Rights is an autonomous body, based in Washington DC, established in 1959, and it is considered the principal organ of the OAS.⁹⁷ Its role is “to promote the observance and defense of human rights in the Americas”⁹⁸, based on the competence provided by the OAS Charter (in relation to the American Declaration on the Rights and Duties of Man), and the American Convention on Human Rights.⁹⁹ According to Steiner, Alston, & Goodman, “the Applicable standards in the Inter-American System consist of the originally non-binding American Declaration on the Rights and Duties of Man (1948) and the American Convention on Human Rights (1969). The relationship between the two is comparable in some ways to that between the UDHR and the two International Covenants. Similarly, many of the techniques used by the Commission and Court is familiar to the UN and ECHR systems. However, the Inter-American System is distinctive in many ways. The issues dealt by the Commission and the Court are sometimes different than the ones from the ECHR.”¹⁰⁰

The main procedural principles of this international human rights body are the ‘effet utile’ - principle of effectiveness, in which the norms should be interpreted with the most effective respect of human rights¹⁰¹ - and the “principle of non-restrictive interpretation”¹⁰². Furthermore, as stated in the Annual Report of the IACHR of 2011, “In addition to examining complaints of violations of the American Convention committed by the instrument’s states parties, the IACHR has competence, in accordance with the OAS Charter and with the Commission’s Statute, to consider alleged violations of the American Declaration by OAS member states that are not yet parties to the American Convention”.¹⁰³

The Inter-American Commission is following the situation of migrants in the region, especially “due to alarming reports of acts of violence and even torture and massacres

⁹⁷ Organization of American States. Inter-American Commission on Human Rights (IACHR) – About the IACHR- What is the IACHR? Last accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/en/iachr/mandate/what.asp>

⁹⁸ Organization of American States. Inter-American Commission on Human Rights (IACHR) – Basic Documents in the Inter-American System. Last Accessed on 29/05/2012, from the Organization of American States: <http://www.oas.org/en/iachr/mandate/Basics/intro.asp>, Part III, Para. 3.

⁹⁹ *Ibid.*

¹⁰⁰ Steiner, Henry J., Alston, Philip, & Goodman, Ryan. (2007). *International Human Rights in Context: Law, Politics, Morals*. New York: Oxford University Press, p. 1020.

¹⁰¹ IACtHR Case of the “White Van”(Paniagua-Morales et al.) v. Guatemala, 25/01/1996, para 38: “The procedural system is a means of attaining justice and that the latter cannot be sacrificed for the sake of mere formalities”.

¹⁰² IACtHR, Case of Ivcher-Bronstein v. Peru, 24/09/1999, para 41.

¹⁰³ The Inter-American Commission on Human Rights. (2011). *Annual Report of the Inter-American Commission on Human Rights*. Retrieved on 29/04/2012, from <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>. P. 7

that were perpetrated” last year¹⁰⁴. In relation to migrant workers, “the Inter-American Commission considers as another matter for preoccupation the systematic and progressive deterioration of working conditions for migrants, both documented and undocumented, in several Member States of the Organization.”¹⁰⁵

In relation to the rights of undocumented migrant workers, the Commission created, in 1996, the Special Rapporteurship on the rights of Migrant Workers and Their Family. The aim of this special rapporteur is to promote and implement the Inter-American human rights provision on this group that is particularly vulnerable to human rights violations.¹⁰⁶ Further explanation on this is available in section 2.2.2.

The Inter-American Court of Human Rights (IACtHR)

The Inter-American Court (IACtHR), established in San Jose (Costa Rica) in 1979, is “an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights”.¹⁰⁷ To the present, 21 member-States of the OAS recognize the contentious jurisdiction of the Court.¹⁰⁸ The objective of the Court is to interpret and apply the American Convention, as well as its additional protocols¹⁰⁹, in particular by declaring judgments on cases, advisory opinions¹¹⁰ and adopting provisional measures¹¹¹.

The advisory opinion is an important tool to the Inter-American system of Human Rights, as “any member State of the Organization may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American States”¹¹², establishing then legal obligations to States that have not ratified the Convention. An example of this was the Advisory Opinion No. 18 of 2003, requested by the United Mexican States, on the ‘Juridical Condition and Rights of the Undocumented Migrants’ is an extremely important jurisprudence in relation to undocumented migrant, stating also principles entitled to undocumented migrant workers. This advisory opinion will be deeper analyzed when discussed the impact of

¹⁰⁴ *Ibid*, Para. 10

¹⁰⁵ *Ibid*, 2011, p. 2.

¹⁰⁶ Organization of American States. The Inter-American Commission on Human Rights. Rapporteurship on the Rights of Migrants. Mandate of the Rapporteurship on the Rights of Migrants. Last accessed on 29/05/2012. Organization of American States: <http://www.cidh.org/Migrantes/migrants.background.htm>

¹⁰⁷ The Statute of the Inter-American Court of Human Rights, article 1. (Resolution AG/RES. 448). Available at: <http://www.oas.org/en/iachr/mandate/Basics/23.STATUTE%20COURT.pdf> (last accessed on 05/05/2012)

¹⁰⁸ *American Convention*, art. 62. “States that have ratified the Convention may accept the Court’s jurisdiction for any cases arising under the Convention, or they may subject their acceptance of jurisdiction to time limits, to reciprocity (in the case of State-to-State complaints), or to specific cases.” List of members that recognize the jurisdiction of the Court available at: Organization of American States. Inter-American Commission on Human Rights. B-32: American Convention on Human Rights “Pact of San Jose, Costa Rica”. Last accessed on 29/05/2012: <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>

¹⁰⁹ American Convention on Human Rights, article 62 (3).

¹¹⁰ American Convention on Human Rights, article 64 (2).

¹¹¹ American Convention on Human Rights, article 63(2).

¹¹² Organization of the American States. (2003). *Basic Documents Pertaining to Human Rights in The Inter-American System*. Inter-American Court of Human Rights. San Jose, Costa Rica: Secretariat of The Inter-American Court of Human Rights, p.16.

the Inter-American System of Human Rights towards undocumented migrant workers in chapter 5.

In relation to contentious, “only the Commission and the States parties to the American Convention that have recognized the Court’s binding jurisdiction are authorized to present a case before the Court”¹¹³. Individuals then may submit their petition to the Commission¹¹⁴ and, if the Commission considers necessary, it may submit the case to the Inter-American Court of Human Rights.

Even though most of the issues addressed to the Court are in relation to forced disappearances or rights of indigenous people, the on going human rights violations on undocumented migrant workers in the region requires an effective role of the Inter-American System in protecting these violations.

Up to date, several Latin American States have recognized the contentious jurisdiction of the Court, including Dominican Republic and Haiti.

2.2.2 The Inter-American System Body on Undocumented Migrant Workers- The Special Rapporteurship on Migrant Workers and their Families

Due to the state of vulnerability and the discrimination of migrant workers, in 1996 it was created the Special Rapporteurship on the Rights of Migrant Workers and Their Families by the IACHR.¹¹⁵ The principal objectives of the Rapporteurship include: “to generate awareness of the states’ duty to respect the human rights of migrant workers and their families, to make specific recommendations to the member states on areas related to the protection and promotion of the rights of migrant workers and their families, to prepare reports and special studies on the situation of migrant workers and, to act promptly on petitions in which the human rights of migrant workers and their families are violated in any member state of the OAS.”¹¹⁶

The Rapporteurship assists the IACHR through its country visits reports, thematic reports, implementing the protection of migrant workers’ rights in the Americas¹¹⁷. Even though the main purpose of this rapporteurship is on migrant workers and their families; the rappourter also works towards the implementation and safeguard of the rights of other “vulnerable groups in the context of human mobility.”¹¹⁸

¹¹³ *Ibid*, p.15.

¹¹⁴ American Convention on Human Rights, Article 44.

¹¹⁵ Organization of American States. The Inter-American Commission on Human Rights. Rapporteurship on the Rights of Migrants. Mandate of the Rapporteurship on the Rights of Migrants. Last accessed on 29/05/2012. Organization of American States: <http://www.cidh.org/Migrantes/migrants.background.htm>

¹¹⁶ Organization of American States. The Inter-American Commission on Human Rights. Rapporteurship on the Rights of Migrants. Functions and Objectives. Last Accessed on 30/05/2012: <http://www.cidh.org/Migrantes/migrants.functions.htm>

¹¹⁷ Organization of American States. The Inter-American Commission on Human Rights. Rapporteurship on the Rights of Migrants. Mandate of the Rapporteurship on the Rights of Migrants. Last accessed on 29/05/2012. Organization of American States: <http://www.cidh.org/Migrantes/migrants.background.htm>

¹¹⁸ *Ibid*.

Recently, the Rapporteurship concluded its draft on the “Report on immigration in the United States: detention and due process”. Even though this thesis is not dealing with the situation of undocumented migrant workers in the US, this report is important to the region, since it “includes an analysis of relevant international standards on the human rights of immigrants; the IACHR’s observations and concerns with regard to immigration detention, certain immigration enforcement procedures, detention conditions and the impact on due process...”¹¹⁹ Currently, the Rapporteurship is finishing a report “on the Inter-American standards of human rights for migrants”¹²⁰, which will be an important document for the implementation and protection on the human rights of this group in the American States.

¹¹⁹ The Inter-American Commission on Human Rights. (2010). *Annual Report of the Inter-American Commission on Human Rights 2010*. Washington, DC: General Secretariat Organization Of American States, p. 21

¹²⁰ The Inter-American Commission on Human Rights. (2011). *Annual Report of the Inter-American Commission on Human Rights*. Retrieved on 29/04/2012, from <http://www.oas.org/en/iachr/docs/annual/2011/TOC.asp>. P. 23.

Chapter 3 – Factual Conditions on Undocumented Migrants in Latin America

3.1 Introduction

The States, based on their sovereignty right, controls their domestic migration law and policies¹²¹, which are usually characterized by rules and legislation often discriminatory, as there are distinctions between nationals, documented migrants and undocumented migrants. In most, if not in all countries, legislation has been enacted to regulate and control the entrance of non-nationals and their right to work in the receiving country. The implementation of such legislation is in many countries not adequate. As the former UN Secretary-General Kofi Annan affirmed: “Few if any states have actually succeeded in cutting migrant numbers by imposing such controls. The laws of supply and demand are too strong for that. Instead, immigrants are driven to enter the country clandestinely, to overstay their visas, or to resort to the one legal route still open to them, namely the asylum system”¹²².

Recently, with the impact of globalization, there is being an increasing demand on regulations and legislations about migration, to better facilitate the flow of people between countries, changing also the objectives and means of the State in relation to international migration.¹²³ Migration between States is often regulated through agreements, bilateral or multilateral. In Latin American countries, for instance, some agreements in relation to migrants were signed in the last two decades, in which “promotes the regularization of irregular migrants, considering enhanced mobility to be a positive factor in increased regional integration”¹²⁴. This will be further explained in the next section.

3.2 The Economic Integration in Latin America and its Impact on Migration Policies

In Latin America there are several agreements for regional integration and free circulation of people. In South America, for instance, there are two major Regional Integration and free movement agreements: the Mercosur, (Southern Common Market, from 1995), in which Argentina, Brazil, Paraguay and Uruguay are members; and the Andean Community, established between Bolivia, Colombia, Ecuador and Peru.¹²⁵ According to the ILO, “these agreements reflect recognition of the economic

¹²¹ ILO Multilateral Framework on Labour Migration, p. vi.

¹²² International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 101.

¹²³ Lavenex, Sandra. (2007) ‘The Competition State and Highly Skilled Migration’ *Transaction Social Science and Modern Society*, vol.44, n.2 ,p.33

¹²⁴ International Organization for Migration. (2011). *World Migration Report 2011: Communicating Effectively About Migration*. Geneva: International Organization for Migration, pp. 66 and 67.

¹²⁵ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p.199, box 6.1.

and social advantages of integrating labour markets”, since they provide “a normative framework for the treatment of migrant workers”, establishing “a basis for safeguarding their rights”.¹²⁶

Moreover, these treaties extended the agreement on free movement of people with other countries in the region. An example of this is the Agreement from Mercosur on “Residence for Nationals of Mercosur States, Bolivia and Chile” in 2002, in which “permits nationals of one signatory State to obtain legal residence in another signatory State, if they wish.”¹²⁷ This agreement is being an important tool to regulate the “current informal flow of workers across the internal borders of the region.”¹²⁸ In addition, in March 2011, the South American countries sign the Constituency Treaty of UNASUR (Union of South American Nations). This treaty aims to achieve a free movement within South America region, as well as trade and economic cooperation.¹²⁹

Thus, the economic development in the region is showing the importance of these treaties in also establishing labour regulations and free movement of people within intra-regional migration. Furthermore, these agreements have a more immediate impact in providing labour and human rights protections for the migrant worker’s than international declarations or conventions.

3.3 Undocumented Migrant Workers and Informal Economy

According to the ‘Resolution concerning decent work and the informal economy’, “the term ‘informal economy’ refers to all economic activities by workers and economic units that are- in law or in practice- not covered or insufficiently covered by formal arrangements”¹³⁰. Thus, the informal employment is present in all sectors of the economy, not only being an issue only in informal enterprises, but also in the formal ones. Most people are in fact not in the formal economy. As stated by the ILO, “the larger part of the world’s working population earns its livelihoods under the vulnerable and insecure conditions of the informal economy”.¹³¹ And the main problem of informal labour ties is that, in many countries, the workers do not have the full protection of law without the written contracts.¹³² Thus, this informal employment results in several consequences to the workers.

¹²⁶ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 198.

¹²⁷ *Ibid*, p. 199, Box 6.1.

¹²⁸ International Labour Conference. (1999). *Migrant Workers- International Labour Conference*. Geneva: International Labour Office, Para. 70, p. 32.

¹²⁹ International Organization for Migration. (2011). *World Migration Report 2011: Communicating Effectively About Migration*. Geneva: International Organization for Migration, pp. 66 and 67.

¹³⁰ General Conference of the International Labour Organization. (2002). *Resolution concerning decent work and the informal economy*. Para. 3, p. 2.

¹³¹ International Labour Office. (2008). *Decent work and the transition to formalization : recent trends, policy debates and good practices. Report of the Tripartite Interregional Symposium on the informal economy*. International Labour Office. Geneva, p. 1.

¹³² International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 205.

Due to their working conditions -they are not “recognized, registered, regulated or protected under labour legislation and social protection”¹³³ - the employees usually have problems to claim their rights under national law, which leads them to inadequate wages, abusive working conditions, and moreover to non social benefits or social security protection. According to the ILO, “beyond traditional social security coverage, workers in the informal economy are without social protection in such areas as education, skill- building, training, health care and childcare, which are particularly important for women workers.”¹³⁴

As it happens in most of the cases, the employees accept informal jobs because they do not have another option, and usually the minorities, such as undocumented migrants are over represented in the informal economy. Actually, according to the International Organization for Migration, the fact that many undocumented migrant workers are employed in the informal sector “indicates that there is a clear link between irregular migration and this labour market”¹³⁵ And, as stated by the ILO, minorities and vulnerable groups such as migrant workers are “disproportionately represented” in this form of employment.¹³⁶ This leads to the conclusion that the informal economy has also a discriminatory component.

Moreover, in relation to undocumented migrants, their informal employment relation results in an even more abusive working condition. And as consequence of their fear of detention and deportation, as further analyzed in chapter 4.3, they create a dependable relationship with the employer, leading them to an extremely vulnerable situation. Thus, “informal and unregulated work activities need to be brought within the protection of labour laws so that the rights of all workers are protected”¹³⁷, and the undocumented migrant workers will have a better possibility to claim their rights.

3.4 The Situation of Undocumented Migrant Workers in Latin America

The situation where the population of a country with a lower level of development moves to the country, where the economic level is better, is a universal phenomenon. Even though intra-Latin American migration flows are smaller than migration flows towards developed nations; recently the numbers have been increasing significantly. According to Agustín Escobar Latapí & others, by 1990 intra-regional migrants in Latin America “comprised 2 million persons and, by 2000, they rose to 3 million”.¹³⁸ Neighboring-country labour migration in Latin America is therefore triggered significantly by low labour income or the complete lack of employment in the origin

¹³³ General Conference of the International Labour Organization. (2002). *Resolution concerning decent work and the informal economy*, Para. 9, p. 3.

¹³⁴ *Ibid.* Para.10, p. 3.

¹³⁵ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p.317

¹³⁶ International Labour Office. (2008). *Decent work and the transition to formalization : recent trends, policy debates and good practices*. Report of the Tripartite Interregional Symposium on the informal economy. International Labour Office. Geneva, p. 1.

¹³⁷ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 205.

¹³⁸ Latapí, Agustín Escobar; Pedraza, Laura; Massini, Mónica. (2010). *Background Paper WMR 2010: The Future of Migration Policies in the Americas*. Geneva: International Organization for Migration, p. 7

country. Moreover, violence and political insecurity also play an important role to human mobility.¹³⁹ Thus, in Latin America human mobility is characterized by “mixed migratory movements”¹⁴⁰, which means the existence of different migration status, i.e refugees, asylum seekers, documented or undocumented migrants, trafficked or smuggled migrants and stateless persons.

When it comes to the situation of undocumented migrant workers, discrimination and vulnerability are the major facts leading to human and labour rights violations, in which migrant workers are often facing situations of abuse and exploitation in the destination country. According to ILO, “the basic human rights of migrant in irregular status are therefore often violated, even though those rights are enshrined in international human rights instruments which have been ratified by most countries”¹⁴¹. The discrimination suffered by undocumented migrants at the workplace is revealed by their working conditions. Substandard working and living condition, such as forced labour, insalubrity, lower wages, long working hours are some of the problems faced by this group in Latin America. Furthermore, situations such as “confiscation of travel documents and non-payment of wages and other benefits” by the employer, “as well as potential inhumane treatment at the hands of the authorities if caught,” dominate quite often the lives of undocumented migrant workers.¹⁴²

The majority of undocumented migrant workers occupy semi-skilled or unskilled positions, often in the informal economy, under irregular conditions. In addition, the use of undocumented migrants in low-skilled sectors in countries of destination creates a dependence relationship and distortions in the labour market.¹⁴³ Moreover, many migrants live and work under these irregular conditions for many years.¹⁴⁴ Therefore, the illegal entry to the destination country and the irregular employment relations has emerged as a major concern by national and international communities.

In addition, many undocumented migrants face detention and deportation from the country, without having the proper juridical procedure. Quite the reverse, they are often being denied the access to justice and the due process of law in cases of deportation, both rights intrinsic in international and regional human rights standards. According to the ILO, another problematic issue in relation to the detention and deportation of undocumented migrants is the common practice of “administrative detention, rather than judicial processes”¹⁴⁵, which leads to the situation described of non access to justice and due process, leading to the mass deportation suffered by undocumented migrants. Furthermore, “in many countries an undocumented migrant

¹³⁹ *Ibid*, p. 11

¹⁴⁰ Mixed Migratory Movements was a term used by the “Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Latin America” in 2004.

¹⁴¹ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 100.

¹⁴² International Labour Conference. (1999). *Migrant Workers- International Labour Conference*. Geneva: International Labour Office, p.9.

¹⁴³ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 317.

¹⁴⁴ *Ibid*.

¹⁴⁵ International Labour Organization. (2010). *International labour migration. A rights-based approach*. Geneva: International Labour Organization, p. 101.

worker who is seized by the competent authorities does not have the opportunity or time to request payment of wages and benefits due or to lodge an appeal”.¹⁴⁶

The Inter-American Commission of Human Rights also notes that in addition to suffer constant discriminatory acts, migrants have been victims of acts of violence, such as murder and kidnapping.¹⁴⁷ Therefore, some of the most pressing challenges generated by human mobility in terms of human rights violations include: the discrimination against irregular migrants, the situations that arise in mixed migratory movements, the denial of judicial protection and due process of law in migration proceedings, and violence and gross human rights violations generated by non-state actors such as organized crime organizations, drug cartels, gangs or paramilitary groups.¹⁴⁸

Some examples of regional migration in Latin America are the migration flows from Guatemala to Mexico, from Haiti to the Dominican Republic, from Nicaragua to Costa Rica, and from Bolivia and Paraguay to Brazil. After this general overview of the current situation in Latin America towards undocumented migrant workers, the following chapter will bring the more specific situation in the case studied in this thesis, which is the Haitians in Dominican Republic.

¹⁴⁶ International Labour Conference. (2007). *Equality at Work: Tracking Challenges. Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: International Labour Organization, Para. 112, p. 33.

¹⁴⁷ The Inter-American Commission on Human Rights. (2010). *Annual Report of the Inter-American Commission on Human Rights 2010*. Washington, DC: General Secretariat Organization Of American States, Para. 18.

¹⁴⁸ Organization of American States. The Inter-American Commission on Human Rights. Rapporteurship on the Rights of Migrants. Mandate of the Rapporteurship on the Rights of Migrants. Last accessed on 29/05/2012. Organization of American States: <http://www.cidh.org/Migrantes/migrants.background.htm>

Chapter 4 – The Undocumented Haitian Migrant Workers in The Dominican Republic

4.1 Background Information on Haitians in The Dominican Republic

The Dominican Republic is both a sending and receiving State. The majority of migrants coming to the Dominican Republic are of Haitian origin. The two countries are located on the same island in the Caribbean Sea and have similar historical background, as exploitive colonies. The Dominican Republic was colonized by Spain and Haiti by France. Nowadays, both are developing countries. However “Dominican Republic is already a medium income country, while Haiti is a least developed country”.¹⁴⁹ According to UNDP report from 2011, Haiti has the lower human develop index¹⁵⁰ in the whole Latin America.¹⁵¹ Moreover, the recent earthquake in the country led the situation to become even worse, displacing around 1.5 million.¹⁵²

Before, many Haitians would irregularly migrate to the United States (US). However, as US enhance the border control and other policies to avoid these migrants, the migration flows switched to other Caribbean islands, such as The Dominican Republic.¹⁵³ Actually, the Dominican Republic hosts a great number of Haitian populations, who had in fact contributed to the economic growth of the Dominican Republic.¹⁵⁴ Thus, in addition to a population of 9,2 millions Dominicans, there are around 1.2 million undocumented migrants in this country, in which the majority comes from Haiti.¹⁵⁵ The problem is that when these migrants arrive in Dominican

¹⁴⁹ The delegation of the Dominican Republic in the Universal Periodic Review. (2010). *Report of the Working Group on the Universal Periodic Review : Dominican Republic*. United Nations General Assembly, Human Rights Council. Thirteenth session. Agenda item 6. Geneva: United Nations. A/HRC/13/3, Para 48.

¹⁵⁰ According to UNDP, Human Development Index (HDI) is defined as “A composite index measuring average achievement in three basic dimensions of human development—a long and healthy life, knowledge and a decent standard of living.” UNDP Human Development Report. (2011). Table 1 –Human Development Index and its Components. Available at: http://hdr.undp.org/en/media/HDR_2011_EN_Table1.pdf. (Last accessed on 30/05/2012).

¹⁵¹ UNDP Human Development Report. (2011). Table 1 –Human Development Index and its Components. Available at: http://hdr.undp.org/en/media/HDR_2011_EN_Table1.pdf. (Last accessed on 30/05/2012).

¹⁵² International Organization for Migration. (2011). *World Migration Report 2011: Communicating Effectively About Migration*. Geneva: International Organization for Migration, p. 64.

¹⁵³ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 213.

¹⁵⁴ The delegation of Haiti in the Universal Periodic Review. (2010). *Report of the Working Group on the Universal Periodic Review : Dominican Republic*. United Nations General Assembly, Human Rights Council. Thirteenth session. Agenda item 6. Geneva: United Nations. A/HRC/13/3, Para. 78.

¹⁵⁵ Figures from 2009 in: Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 6.

Republic, they find a country where many people live below the poverty line.¹⁵⁶ And, the fact that they are migrants and undocumented leads them to an even more state of vulnerability, as described in the next section.

4.2 General Overview on the Vulnerability of Haitians in The Dominican Republic

Even though the government of Dominican Republic states that there is no discrimination based on nationality or race in the country¹⁵⁷, many NGOs and international organizations have reported many abuses and violations based on this fact. For instance, in 2008, both the Special Rapporteur on racism and the independent expert on minority issues stated in a report that “there is a profound and entrenched problem of racism and discrimination in Dominican society, generally affecting Blacks and particularly such Dominicans of Haitian descent and Haitians.”¹⁵⁸ According to these specialists, racism and discrimination can be noticed by arbitrarily acts of mass expulsions and deportations “targeting those who are presumed to be “Haitians”, a determination that would be mainly based on skin colour...”¹⁵⁹ Moreover, CERD reported in 2008 complains stating that “migrants of Haitian origin, whether documented or undocumented, are allegedly detained and subject to collective deportations to Haiti without any guarantee of due process.”¹⁶⁰ And the problem of discrimination goes beyond in the aspect of deportation. Even the documented migrants with work permits and visas are expelled every year with no access to justice and due process, as a result of discrimination because of their race, skin colour and nationality.¹⁶¹

To secure the Dominican side of the border, the Dominican Republic created in 2006 a specialized trained corps to control the border with Haiti in 2006.¹⁶² The purpose of

¹⁵⁶ The delegation of the Dominican Republic in the Universal Periodic Review. (2010). *Report of the Working Group on the Universal Periodic Review : Dominican Republic*. United Nations General Assembly, Human Rights Council. Thirteenth session. Agenda item 6. Geneva: United Nations. A/HRC/13/3, Para 48.

¹⁵⁷ Human Rights Council. (2008) Seventh session. Agenda items 3 and 9. Annex: *Dominican Republic. Ministry of Foreign Affairs. Reply to the Diène-Mcdougall Report on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance in The Dominican Republic*. Santo Domingo. UN General Assembly: A/HRC/7/G/10. Para. 105.

¹⁵⁸ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall. Addendum. Mission to Dominican Republic. (2008). Human Rights Council. Seventh Session. UN General Assembly. A/HRC/7/19/Add. 5. A/HRC/7/23/Add.3. P. 2.

¹⁵⁹ *Ibid.* Para. 44.

¹⁶⁰ Committee on the Elimination of Racial Discrimination (CERD). Seventy-second session. (2008). *Consideration of Reports Submitted by States Parties Under Article 9 of The Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic*. CERD/C/DOM/CO/12. Para. 13.

¹⁶¹ World Vision International (WVI) in the Working Group on the Universal Periodic Review. (2009). *Summary Prepared By The Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1 :Dominican Republic*. United Nations General Assembly, Human Rights Council . Geneva: United Nations.A/HRC/WG.6/6/DOM/3, Para. 12

the “Specialized Border Security Corps (CESFRONT)”, according to the government, is to avoid the traffic of undocumented Haitian migrants to the country¹⁶³. However, Amnesty International (AI), in its submission to the Universal Periodic Review in 2009, reported its concern that these Security Corps has been “excessive or unlawful in the use of force”¹⁶⁴. Moreover, AI mentioned that “there have also been reports of Haitian migrants suffering ill-treatment, both physical and psychological, at the hands of migration officials and members of the security forces, including the CESFRONT, or being victims of extortion to be allowed to cross the border”¹⁶⁵.

The problems of discrimination in Dominican Republic towards Haitians are also extended to Haitian descent, since many of them are refused to get citizenship, and therefore do not have the full access to their rights. The SNU-RD¹⁶⁶ (the United Nations system in the Dominican Republic), in its submitted report to the Universal Periodic Review on Dominican Republic in 2009, stated that “22 per cent of children under the age of five had no birth certificate.”¹⁶⁷ Regarding this issue, the Dominican Republic stated on the same year in its National report to the Universal Periodic Review that the Law concerning the right to nationality has changed in 2007.¹⁶⁸ Thus, the government affirmed that the “Migration Act No. 258-04, JCE issued ruling No.02-2007 (...) established a birth registration system, known as the Immigration Registry, for children born in the Dominican Republic to non-resident women.”¹⁶⁹

However, the Special Rapporteur on racism and the independent expert on minority issues reported the opposite in its report in 2008, mentioning that “persons of Haitian descent are being denied the full enjoyment of their right to citizenship on a racially discriminatory basis.”¹⁷⁰ Until 2010, Dominican Republic entitled Dominican nationality under the legal principle of *jus soli*, which means that children born under the Dominican Republic territory Dominican citizens. Nevertheless, as affirmed by James Ferguson, “a loophole allows the authorities to deny the children of

¹⁶² Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 54.

¹⁶³ *Ibid.*

¹⁶⁴ Amnesty International. (2009). *Dominican Republic. Submission to the UN Universal Periodic Review. Sixth session of the UPR Working Group of the Human Rights Council*. AMR 27/002/2009. P. 4.

¹⁶⁵ *Ibid.*, p. 6.

¹⁶⁶ SNU-RD is the United Nations system in the Dominican Republic.

¹⁶⁷ The SNU-RD submitted report to the Universal Periodic Review on Dominican Republic in the Working Group on the Universal Periodic Review. (2009). *Compilation Prepared By The Office of The High Commissioner for Human Rights, in Accordance with Paragraph 15 (B) Of The Annex to Human Rights Council Resolution 5/1*. UN General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/2. Para. 15.

¹⁶⁸ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, para. 26.

¹⁶⁹ *Ibid.*

¹⁷⁰ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall. Addendum. Mission to Dominican Republic. (2008). Human Rights Council. Seventh Session. UN General Assembly. A/HRC/7/19/Add. 5. A/HRC/7/23/Add.3. Para. 108.

undocumented Haitians such citizenship, since they are judged to be ‘in transit’”, even though many of them have been living in Dominican Republic for many years.¹⁷¹ Thus, many Haitian migrants live under this irregular status in a prolonged time, transmitting their irregularity to their descents, based on this discriminatory gap of the law. Consequently, these children have restricted access to education, health and social services¹⁷², contributing to the perpetuation of poverty and inequality of the Haitian origin population in the country. Recently in 2010, the Dominican Republic adopted a new Constitution, in which the discrimination against undocumented Haitian migrants became even more evident. In this new legal text, it was added an extra exception to the Article related to the Right to Nationality, in which it clearly denies the right to nationality to children of illegal foreigners residents in the country.¹⁷³ This new law contradicts what the country affirmed in its National Report to the UPR, stating its consideration to the “accession to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW),”¹⁷⁴ since this Convention provides that “each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality.”¹⁷⁵ Thus, the lack of commitment of the State to protect their rights in combination with the situation of irregular status and the racist attitude of the country towards this group create “a climate of hostility” that the Haitian migrants and Dominicans of Haitian origin experience, “particularly from the political and economic elites who consider them as ‘traitors to the Dominican nation’ ”.¹⁷⁶

The Haitian government is also aware of the problems faced by Haitian migrants in Dominican Republic. According to the Universal Periodic Review’s report, from the UN, in 2009, Haiti is concern, among other problems, with the treatment received by Haitian migrants from “Dominican policemen, army officers and soldiers.”¹⁷⁷ Also, Haiti noted the above mention problem related to the deny of identity document and basic services to these migrants¹⁷⁸, documented or undocumented, becoming clear the

¹⁷¹ Ferguson, J. (2003). *Migration in the Caribbean: Haiti, the Dominican Republic and Beyond*. Minority Rights Group International, p. 21.

¹⁷² According to the Committee on the Rights of the Child (CRC), “children of Haitian immigrants and Haitian descendents have restricted access to education, health and social services to which all children on the territory of the Dominican Republic are equally entitled according to the Convention.” Committee on the Rights of the Child (CRC). (2008). Forty-seventh session. *Consideration of Reports Submitted by States Parties Under Article 44 of The Convention. Concluding observations: Dominican Republic*. CRC/C/DOM/CO/2. Para. 27.

¹⁷³ The Dominican Republic Constitution (2010), Article 18, Para. 3.

¹⁷⁴ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1. Para. 100.

¹⁷⁵ ICRMW, Article 29.

¹⁷⁶ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall. Addendum. Mission to Dominican Republic. (2008). Human Rights Council. Seventh Session. UN General Assembly. A/HRC/7/19/Add. 5. A/HRC/7/23/Add.3. Para. 50.

¹⁷⁷ The delegation of Haiti in the Universal Periodic Review. (2010). *Report of the Working Group on the Universal Periodic Review : Dominican Republic*. United Nations General Assembly, Human Rights Council. Thirteenth session. Agenda item 6. Geneva: United Nations. A/HRC/13/3, Para. 78.

¹⁷⁸ *Ibid*.

discrimination that the Haitian migrants generally experience in the Dominican Republic.

4.3 The Labour Rights Violations and the Discrimination Against Haitian Migrants in The Dominican Republic

There are various labour rights violations faced by Haitians in the workplace in Dominican Republic, such as “long working hour, low wages and the lack of employment security.”¹⁷⁹ The majority of these workers migrate to work as a cheap labour in lower qualified jobs, such as in the agriculture and civil construction sectors, as temporary or permanent migrants.¹⁸⁰ In both cases, the undocumented migrants come either on their own or through the “*buscones*”¹⁸¹ (intermediates between the farm owner and the Haitians).

The *buscones*' job is “to persuade Haitians to cross the border with promises of good pay”¹⁸², to work as cheap labour in Dominican Republic. Usually these intermediates transport the Haitians in an illegal way, trafficking or smuggling them to Dominican Republic.¹⁸³ In fact, according to IOM, smuggling groups take advantage of the instable situation in Haiti and of the demand for cheap labour in Dominican Republic by bringing in irregular migrants from Haiti.¹⁸⁴ In relation to this, CERD also reported in 2008 that it was “concerned at reports of Haitians being trafficked to the Dominican Republic owing to the high demand for cheap labour in the sugar cane, tourism and construction sectors.”¹⁸⁵ Furthermore, there is segregation when it comes to the labour opportunities, reserving to the Haitian migrants the unqualified or semi qualified jobs in the sectors mentioned, whereas the Dominicans work in better

¹⁷⁹ Opinion of the Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, and the Global Justice Center: IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights.

¹⁸⁰ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 91.

¹⁸¹ According to Maureen Achieng, *Buscones* “is the Spanish term used to refer to contractors hired by sugar corporations in the Dominican Republic”. Maureen Achieng in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 350, Footnote 25.

¹⁸² James Ferguson in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 314.

¹⁸³ Wooding, B., & Moseley-Williams, R. (2004). *Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana*. Santo Domingo: Cooperación Internacional para el Desarrollo (CID) y el Servicio Jesuita a Refugiados y Migrantes (SJR), p. 42.

¹⁸⁴ International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 213.

¹⁸⁵ Committee on the Elimination of Racial Discrimination (CERD). Seventy-second session. (2008). *Consideration of Reports Submitted by States Parties Under Article 9 of The Convention. Concluding observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic*. CERD/C/DOM/CO/12. Para. 17.

positions, earning therefore better wages.¹⁸⁶ However, many reports and statements also show that even working on the same position, the Haitians receives lower wages than the Dominicans, and the situation just come to the worse when this Haitians are in an undocumented status in the country.

In the *Bateyes* (communities for sugar plantation workers), the violations of labour rights are an alarmed situation. These communities are excluded from the society, being isolated in the countryside, with almost no presence of the State, resulting in conditions of extreme poverty.¹⁸⁷ The Special Rapporteur on racism and the independent expert on minority issues affirm that the workers in the *bateyes* “live in pitiable conditions and can find work only in dangerous and degrading jobs for substandard pay and without contracts.”¹⁸⁸ The hiring and working conditions of Haitian workers in this sector is therefore of major concern for the international community. In relation to this, the ILO Committee of Experts, in 2006, noted: “the uncertainty related to the legal status of these workers placed them in a situation of vulnerability which facilitated abuses”.¹⁸⁹ Even though the sugar cane industry has declined since the late 1990’s, the *bateyes* are still home to many of this Haitian migrants living in the country.¹⁹⁰

According to the REDH-JV¹⁹¹ (a civil society organization based in Dominican Republic) in its submitted report to the Universal Periodic Review from 2009, “the majority of the *bateyes* are composed by a population of afro descents, Dominicans of Haitian origin and Haitian migrants”.¹⁹² This illustrates the discrimination and segregation of Haitians and Dominicans of Haitian origin in relation to work opportunities and life conditions in the Dominican Republic. Moreover, their vulnerability in the workplace is also in relation to their fear of being detained and deported by the migration officers. In this aspect, the Special Rapporteur on racism and the independent expert on minority issues also revealed in their report a corruption in this system, since many of these deportations are “arranged between employers and authorities to enable employers to avoid paying wages.”¹⁹³

Even though the government of Dominican Republic states that many undocumented Haitian workers, who sued their employer, entitled “the right to written contracts and

¹⁸⁶ Wooding , B., & Moseley-Williams, R. (2004). *Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana*. Santo Domingo: Cooperación Internacional para el Desarrollo (CID) y el Servicio Jesuita a Refugiados y Migrantes (SJR), p.59.

¹⁸⁷ Working Group on the Universal Periodic Review , 2009, A/HRC/WG.6/6/DOM/2, Para. 32.

¹⁸⁸ *Ibid*, Para. 34.

¹⁸⁹ *Ibid*.

¹⁹⁰ James Ferguson in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 324.

¹⁹¹ REDH-JV in Spanish: *Red de Encuentro Dominicano Haitiano Jacques Viau*.

¹⁹² REDH-JV in the Working Group on the Universal Periodic Review . (2009). *Summary Prepared By The Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1 :Dominican Republic*. United Nations General Assembly, Human Rights Council . Geneva: United Nations.A/HRC/WG.6/6/DOM/3. Para. 32, my translation.

¹⁹³ Report of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Doudou Diène, and the independent expert on minority issues, Gay McDougall. Addendum. Mission to Dominican Republic. (2008). Human Rights Council. Seventh Session. UN General Assembly. A/HRC/7/19/Add. 5. A/HRC/7/23/Add.3. Para. 79.

employment benefits”¹⁹⁴, most of these workers employed in various farms and construction works does not claim their rights “for fear of being sacked or deported”.¹⁹⁵ Moreover, the World Vision International (WVI)¹⁹⁶ in its submitted report to the Universal Periodic Review stated that most of these workers are working under “low-paid and often hazardous work”.¹⁹⁷

Although there is a hostile attitude towards Haitian migrants in Dominican Republic, in reality the country has benefited from their cheap labour, which is considered to be “essential to the Dominican economy”.¹⁹⁸ According to James Ferguson, “some economists have argued that the success of the country’s economy in the 1990s, with its high growth rates and increased foreign investment, was largely due to a reservoir of cheap labour.”¹⁹⁹

In sum, the discrimination and abusive conditions suffered by the Haitian migrants in the workplace in Dominican Republic happen mostly in three areas, as it follows:

- 1- Many of the human rights violations are a consequence of the vulnerability these workers are found, since they do not have in many cases a written employment contract. Thus, the informal employment contributes to the employer to avoid the labour rights obligations towards these employees. Moreover, the informal work makes it harder for the employee to claim his/her rights in a juridical court.²⁰⁰
- 2- The vulnerability of being undocumented migrant workers is extended to the fear of arrest and deportation faced by this group. There are several reports in relation to this, in which some states that when the Haitian workers complain about their work conditions to the employer, the employer makes use of their irregular status in the country with threats that they will report them to the migration officers. And in case these workers are arrested and deported, many of them ended up not receiving any payment for their work, not having access to legal aid and the due process of law. These facts results the Haitians to fear participation in labour unions and other organized groups that are there to defend and protect the workers’ rights.²⁰¹

¹⁹⁴ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 70.

¹⁹⁵ *Ibid.*

¹⁹⁶ World Vision International (WVI) is a civil society based in the United States.

¹⁹⁷ World Vision International (WVI) in the Working Group on the Universal Periodic Review. (2009). *Summary Prepared By The Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15 (C) of the Annex to Human Rights Council Resolution 5/1 :Dominican Republic*. United Nations General Assembly, Human Rights Council . Geneva: United Nations.A/HRC/WG.6/6/DOM/3, Para. 30.

¹⁹⁸ Ferguson, J. (2003). *Migration in the Caribbean: Haiti, the Dominican Republic and Beyond*. Minority Rights Group International, p. 9

¹⁹⁹ *Ibid*, p. 17.

²⁰⁰ Wooding , B., & Moseley-Williams, R. (2004). *Inmigrantes haitianos y dominicanos de ascendencia haitiana en la República Dominicana*. Santo Domingo: Cooperación Internacional para el Desarrollo (CID) y el Servicio Jesuita a Refugiados y Migrantes (SJR), p.61.

²⁰¹ *Ibid*.

- 3- Finally, the discrimination at the work place is also revealed by not allowing the Haitian workers to access the better-qualified and paid jobs. This denial of equal opportunities to the Haitians is also a consequence of the discrimination for racism against the Black population, a very common behavior in Dominican society.²⁰²

Therefore, the discrimination against Haitians in Dominican Republic are in relation to race, social class and gender, which are part of a problem in an unequal society in which democracy and the rule of law are still not consolidate. Unfortunately, these aspects are encountered in the whole Latin America, in a lower or higher degree, which leads one to the conclusion that democracy, the rule of law and the protection of human rights (basic principles of the OAS) are the first and essential principles, which must be enforced in the region.

4.4 The Responsibility of the Receiving State on Undocumented Migrant workers – Focus on The Dominican Republic

In social, legal and policy aspects, low-skilled migrants, who are mostly undocumented, are considered the most serious challenge to migration policy on the American continent.²⁰³ According to Augustín Escobar Latapí & others, “the combination of minimal skills and unauthorized status makes these migrants a particular concern for origin and destination societies”²⁰⁴. They are the most vulnerable migrants, which also contributes to their employment in the informal sector in the destination countries. In this section, the responsibility of the receiving States towards these undocumented migrant workers will be analyzed, focusing on the responsibility of Dominican Republic (receiving country) in relation to undocumented Haitian migrant workers. However, let us first analyze the principle of state sovereignty, which enables the receiving State to regulate laws and control borders.

The Treaty of Westphalia, from 1648, provided the traditional concept of state sovereignty, in which it is defined as “the constitutive ideas of the State as sovereign in its own territory, and of non-intervention by one State in the affairs of the others.”²⁰⁵ It is therefore a well-established principle in international law that States have the sovereign right on their territory, which entitles them to control borders and regulate migration policies. In other words, States are able to prohibit the entrance of aliens, to enact different legislation towards migrants and to authorize deportations. In this regard, as mentioned in the previous chapter, the Dominican Republic, for instance, created the specialized trained corps (CESFRONT) to control its border with Haiti in 2006,²⁰⁶ which is aimed at national protection and combating the trafficking

²⁰² *Ibid*, p. 62

²⁰³ Latapí, Augustín Escobar; Pedraza, Laura; Massini, Mónica. (2010). *Background Paper WMR 2010: The Future of Migration Policies in the Americas*. Geneva: International Organization for Migration, p. 11

²⁰⁴ *Ibid*.

²⁰⁵ Shaw, Martin. (2000). *Theory of the Global State: Globality as Unfinished Revolution*. New York: Crambridge University Press, p. 30.

practices of undocumented Haitians to the country.²⁰⁷ However, recently international law has been taking human rights norms into consideration, challenging state sovereignty. According to Martti Koskenniemi, international human rights law has developed a new concept of global governance: a system ruled “ by preferences and norms, regimes and practices that have no localizable centre or ethos and constantly penetrate and define what the ‘sovereignty’ of our states is allowed to mean, what room for action there is for public power.”²⁰⁸

Therefore, States have the sovereign right to protect their borders from aliens and determine their own migration policies²⁰⁹. However, “such laws and regulations shall not be incompatible with the international legal obligations of that State, including those in the field of human rights”.²¹⁰ According to the Global Commission on International Migration, “States, exercising their sovereign right to determine who enters and remains on their territory, should fulfill their responsibility and obligation to protect the rights of migrants...”²¹¹

In relation to undocumented migrant workers, receiving States are entitled to establish some distinctive policies between nationals, migrants in a regular status and undocumented migrants. According to the Inter-American Commission on Human Rights, “States may establish distinctions in the enjoyment of certain benefits between its citizens, aliens (with regular status) and aliens whose situation is irregular states”.²¹² However, in making such distinctions, States are prohibited from establishing laws and regulations that would affect “the enjoyment and exercise of the substantive rights embodied in international instruments”.

With the aim of protecting the substantive rights of undocumented migrants, the Global Commission on International Migration recommends receiving States to consider the following issues in order to address policies on international migration:

- “ the role of international migration in relation to economic growth and development;
- family reunion, asylum, refugee protection and resettlement;
- the prevention of irregular migration and the promotion of regular migration;
- integration, including the rights and obligations of migrants, citizens and the state,

²⁰⁶ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 54

²⁰⁷ *Ibid.*

²⁰⁸ Koskenniemi, Martti. What use for sovereignty today, p. 2.

²⁰⁹ ILO Multilateral Framework on Labour Migration, p. vi.

²¹⁰ The United Nations Declaration on the Human Rights of Individuals who are not Nationals of the Country in Which They Live (1985), Article 2 (1).

²¹¹ Global Commission on International Migration (GCIM). (2005). *Migration in an Interconnected World : New Directions for Action*, Geneva, Switzerland, p. 80.

²¹² Opinion of the Inter-American Commission on Human Rights: IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers* . Inter-American Court of Human Rights, p. 23.

- the protection of migrant rights”.²¹³

With regard to this perspective, the Dominican Republic stated in the Universal Period Review of 2009 that it “does not encourage, benefit from or remain indifferent to the irregular migratory flow to the country”.²¹⁴ When it comes to the responsibility of the receiving State to protect undocumented migrant workers from abuses and violations, the Dominican Republic started to apply “The General Directorate on Migration” in 2009, which consists of “a zero-tolerance policy in all cases where inspectors mistreat illegal migrants or violate their rights.”²¹⁵ According to Berta Fernández-Alfaro and Gerard Pascua, the new Dominican Immigration Law aims to: “regulate the entry, exit, and stay of foreign nationals; manage the immigration, emigration, and return of Dominican nationals; ensure that immigration is planned to consider the human resource needs of the country; (...)”²¹⁶ Moreover, this law aspires to create effective mechanisms to regularize the situations of regular and irregular Haitian migrant workers in the country. In fact, Amnesty International stated in the Report of the Human Rights Council in 2011 that the government of the Dominican Republic “is committed to including specific measures to protect the status of persons of Haitian origin and further action to protect the rights of migrants.”²¹⁷

However, even though the Dominican Republic affirms that its domestic policy discourages illegal immigration, in practice, as illustrated through many reports in this Chapter, it continues to enable Dominican employers to exploit undocumented migrant workers. Recently, the Dominican Republic has been facing a high unemployment rate and the incoming flow of undocumented Haitian migrants “constitutes the severest of the socio-economic challenges confronting the national authorities and Dominican society.”²¹⁸ The country has not been able to safeguard the Haitian workers rights and guarantee them a dignified, or at least decent life. In response to this discriminative accusation, the Dominican Republic states that in fact the country cannot offer these benefits satisfactorily even for Dominicans, affirming that this is a problem “of the economic impossibility of sharing out what does not exist in a developing country, where 54.5 per cent of the population live below the poverty line.”²¹⁹

²¹³ Global Commission on International Migration (GCIM). (2005). *Migration in an Interconnected World: New Directions for Action*, Geneva, Switzerland, p. 67.

²¹⁴ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 52.

²¹⁵ *Ibid*, Para. 14.

²¹⁶ Berta Fernández-Alfaro and Gerard Pascua in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 79.

²¹⁷ Amnesty International in: Human Rights Council. (2011). Thirteenth session. Agenda item 1. Organizational and procedural matters. *Report of the Human Rights Council on its thirteenth session*. Vice-President and Rapporteur: Mr. Hisham Badr. UN General Assembly. A/HRC/13/56. Para. 342

²¹⁸ Working Group on the Universal Periodic Review. Sixth session. (2009). *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Dominican Republic*. United Nations General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/1, Para. 74.

²¹⁹ *Ibid*, Para. 102.

The SNU-RD, in its submitted report to the Universal Periodic Review on Dominican Republic in 2009, stated that “poverty, extreme-poverty and inequality particularly affect migrants of Haitian origin”.²²⁰ Moreover, the fact that many sectors of the Dominican economy are dependent on cheap Haitian labor,²²¹ demonstrates the reason for the extreme poverty faced by this group and also the discriminatory impact on the labour market. For this reason, it is important that the receiving States establish effective policies towards informal economy, in which, as stated in chapter 3, undocumented migrant workers are over represented. And to an effective policy towards this issue, the role of inspectors is extremely relevant to control abuses and human rights violation in the country of destination. However, “the viability of such monitoring and inspections also gives rise to particular difficulties in some sectors (...) such as in agriculture (...) where irregular employment is not easily detected due to the place of work covering a large area where migrants are most prone to be subject to exploitative conditions.”²²²

Furthermore, to fulfill the rights established in international human rights law, the Dominican Republic, as a receiving State, should, among others: “support explicitly the recommendations to investigate all reports of human rights violations and suspend persons suspected of such violations from active duty, to establish an independent body to deal with complaints of abuse by police and to ratify the Convention against Torture and the Convention on Enforced Disappearances”.²²³

Therefore, as Haitian migrants work in all sectors, the challenge facing the Dominican Republic government now is to implement regulations towards migration policies. Thus, an affirmative action must be taken to deal with the irregular status of Haitian migrants in the country, recognizing their labour and fundamental rights so that they do not become an instrument of abusive practices nor a problem to the Dominican society.

²²⁰ The SNU-RD submitted report to the Universal Periodic Review on Dominican Republic in: Working Group on the Universal Periodic Review . (2009). *Compilation Prepared By The Office of The High Commissioner for Human Rights, in Accordance with Paragraph 15 (B) Of The Annex to Human Rights Council Resolution 5/1*. UN General Assembly, Human Rights Council. Geneva: United Nations. A/HRC/WG.6/6/DOM/2. Para. 37

²²¹ James Ferguson in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 311.

²²² International Organization for Migration. (2008). *World Migration 2008: Managing Labour Mobility in the Evolving Global Economy*. Geneva: International Organization for Migration, p. 317.

²²³ Amnesty International in: Human Rights Council. (2011). Thirteenth session. Agenda item 1. Organizational and procedural matters. *Report of the Human Rights Council on its thirteenth session*. Vice-President and Rapporteur: Mr. Hisham Badr. UN General Assembly. A/HRC/13/56. Para. 342.

Chapter 5 – The Protection of Undocumented Migrant Workers Under the Inter-American System of Human Rights

The Inter-American System on Human Rights has been implemented and monitored human rights issues within case reports, provisional measures, advisory opinions and judgment on legal cases through its two main bodies, the IACHR and the IACtHR. In relation to migrant workers, as described in chapter 2 the Commission created the ‘Rapporteurship on Migrant Workers and Members of their Families’ in 1996²²⁴. Recently, the Inter-American Court of Human Rights is playing an important role towards the implementation of human and labour rights on undocumented migrant workers, especially through its provisional measures and advisory opinions. In this section, the role of the Inter-American System of Human Rights in the protection of undocumented migrant workers rights in Latin America will be then discussed.

5.1 The impact of the Inter-American System on the protection of undocumented migrant workers rights in Latin America

Until the end of 1990s, the Inter-American System’s instruments were quite limited in relation to economic and social rights.²²⁵ In fact, in the American Convention on Human Rights there is only one article providing these rights, which demands from the States Parties “to achieve progressively (...) the full realization of rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of Organization of American States as amended by the Protocol of Buenos Aires.”²²⁶ As it is noticeable, the article does not list any specific economic or social rights, establishing only a general provision referring to the standards of the Protocol of Buenos Aires.²²⁷ However, as mentioned before,²²⁸ in 1999 the OAS General Assembly adopted the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as “Protocol of San Salvador”, which provides in detail those rights established in the American Convention.²²⁹ In relation to labour rights, the Protocol states for instance the “right to

²²⁴ *Ibid.*

²²⁵ Quiroja, Cecilia M., & Rojas, Claudio N. (2007). *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*. Santiago: Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, p. 31

²²⁶ American Convention on Human Rights, Article 26.

²²⁷ Quiroja, Cecilia M., & Rojas, Claudio N. (2007). *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*. Santiago: Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, p.31

²²⁸ Reference to chapter 2.2.

²²⁹ Quiroja, Cecilia M., & Rojas, Claudio N. (2007). *Sistema Interamericano de Derechos Humanos: Introducción a sus Mecanismos de Protección*. Santiago: Universidad de Chile, Facultad de Derecho, Centro de Derechos Humanos, p.31.

work” (Article 6) and the “right to just, equitable, and satisfactory conditions of work” (Article 7), in which, as stated previously,²³⁰ does not make any distinction towards the status of the worker, i.e national, documented or undocumented migrant worker.

Moreover, in relation to migrant workers rights, recognizing the increase of migratory movements in the region and the special need of protection required to this group, the Inter-American Commission on Human Rights created in 1996 the Special Rapporteur on the Rights of Migrant Workers and Their Families. Thus, it is quite recent that the Inter-American System on Human Rights is shifting its role towards labour and human rights of migrant workers. However, it was only in 2003 that this shift had its major impact, with a jurisprudence of the Court regarding the situation of undocumented migrant workers, known as the Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*. This advisory opinion was requested from the IACtHR by the Mexican government in 2002, regarding “the denial of fundamental workplace rights to unauthorized workers in the Americas.”²³¹ In its request to the IACtHR, Mexico stated its concern about “the incompatibility with the OAS human rights system of the interpretations, practices and enactment of laws by some States in the region”, which Mexico considered deprived undocumented migrant workers of the enjoyment of labor rights, based on discrimination towards the migrant status.²³² According to Sarah Cleveland, “this request appeared to be a response to the decision of the US Supreme Court in *Hoffman Plastics Compunds v. NLRB*”²³³. In this case, “the United States Supreme Court did not impose a fine on the employer who violated the labor rights of an irregular migrant worker and did not order any compensation for the worker.”²³⁴

Furthermore, the State of Mexico noted in its request to the IACtHR that: “migrant workers, as all other persons, must be ensured the enjoyment and exercise of human rights in the State where they reside. However, their vulnerability makes them an easy target for violations of their human rights, based, above all, on criteria of discrimination and, consequently, places them in a situation of inequality before the law as regards the effective enjoyment and exercise of these rights”²³⁵. In analyzing Mexico’s request during the public hearings, the IACtHR also considered the opinions of several human rights law bodies, institutions, Law Firms, NGOs and

²³⁰ Reference to chapter 2.2.

²³¹ Cleveland, S. H. (2005). Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03. *The American Journal of International Law*, p. 460.

²³² IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, p. 1

²³³ Cleveland, S. H. (2005). Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03. *The American Journal of International Law*, p. 460. Moreover, NLRB refers to the National Labor Relations Board of the U.S.

²³⁴ The Delgado Law Firm in IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, p. 34.

²³⁵ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, p. 2

individuals, as well as the participating States and the Inter-American Commission on Human Rights.²³⁶

Thus, in September 2003, the IACtHR published its Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants*, also known as OC 18/03, an important jurisprudence to ensure and protect the rights of undocumented migrant workers in the Americas. In this advisory opinion, the Court affirmed the fact that “undocumented workers are often exploited as cheap labor”²³⁷, with often no access to labor rights, and moreover, with no access to justice to claim their violated rights.²³⁸ Therefore, the IACtHR stated in its opinion that the States are not allowed to “protect its national production, (...) by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them...”²³⁹

In sum, the IACtHR provided the following conclusions in its advisory opinion:²⁴⁰

1) The general obligation of States to respect and ensure fundamental human rights to all individuals.²⁴¹

The Court refers to Regional and International Human Rights Instruments in its reasoning, such as Article 1 of the American Convention and Article 2 of the ICCPR, in which it is stated that the respect and guarantees of human rights should be based on “the fundamental nature of the principle of equality and non-discrimination”.²⁴² Moreover, States should provide effective remedies to ensure the enjoyment of human rights by all individuals under their sovereignty.²⁴³ It is important to note here that in case the State does not comply with the obligations under the principle of equality and non-discrimination, this non-compliance “gives rise to international responsibility”.²⁴⁴

2) The application of the principle of equality and non-discrimination to migrants.

The principles of non-discrimination and equality are basic principles inherent in several international instruments.²⁴⁵ In regards to the concepts of discrimination and distinction, the IACtHR stated that distinction is used “to indicate what is admissible, because it is reasonable, proportionate and objective”; whereas the term “discrimination” refers “to what is inadmissible, because it violates human rights”.²⁴⁶ When it comes to the procedures, mechanisms and regulations of the States to control the entrance and departure of undocumented migrants, the Court provides that States

²³⁶ *Ibid*, p. 5-10.

²³⁷ Sensiba, Anais, & Yavrom, Shaun. *Employment Rights are Human Rights. Stories of Undocumented Workers: The Denial of Employment Rights due to Immigration Status* (2nd ed.). Washington, D.C.: International Human Rights Law Clinic, American University, Washington College of Law, p. 6

²³⁸ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 159.

²³⁹ *Ibid*, Para. 170.

²⁴⁰ *Ibid*, pp. 113 and 114.

²⁴¹ *Ibid*, p. 113, Para. 1.

²⁴² *Ibid*, Para. 70 a) and b).

²⁴³ *Ibid*, Para. 70 b), 3 c).

²⁴⁴ *Ibid*, p. 113, Para. 2

²⁴⁵ *Ibid*, Para. 86.

²⁴⁶ *Ibid*. Para. 84

are allowed to make such distinctions, “but only if always be applied with strict regard for the guarantees of due process and respect for human dignity.” Regarding this reasoning, the IACtHR makes a reference to its Advisory Opinion on the Legal Status and Human Rights of the Child²⁴⁷, stating that “[n]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things”.²⁴⁸ Therefore, the principles of equality and non-discrimination are violated if the distinctive norms, regulations or mechanisms have “no reasonable and objective justification, which must be assessed in relation to the aim and effects of the measure under consideration.”²⁴⁹

In this advisory opinion, the Court then stated that the principle of equality and non-discrimination are also applicable to undocumented migrants, requiring that States entitle undocumented migrant workers to labour and human rights.

3) The rights entitled to undocumented migrant workers.

The Court considered that States are not allowed to deny the labour and human rights of undocumented migrants based on the principles of equality and of non-discrimination. Following this reasoning, the Court stated that “a person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination.”²⁵⁰ Thus, when migrants are employed, they are entitled to labour rights, which must be recognized independently of the status of the migrant worker, i.e. documented or undocumented. The Court moreover declares that the State and the employer are not obliged to establish an “employment relationship” with undocumented migrants²⁵¹. However, if these migrants are employed, they are immediately entitled to labour rights, without any discrimination based on their status.²⁵²

The Court entitles undocumented migrant workers to fundamental labour rights provided by other international human and labour rights instruments, and moreover, establishes additional rights previously granted only to documented migrants and citizens of the receiving country, thus recognizing the following rights: “the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, (...) freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security,

²⁴⁷ Advisory Opinion OC-17/02 of August 28, 2002

²⁴⁸ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 91.

²⁴⁹ *The ECHR, Case “relating to certain aspects of the laws on the use of languages in education in Belgium” v. Belgium, Judgment of 23 July 1968, Series A 1968, para. 10*, in IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 90.

²⁵⁰ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 133.

²⁵¹ *Ibid*, Para. 135.

²⁵² *Ibid*, Para. 136.

judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation.”²⁵³ The Court additionally notes that the protection of these rights for migrant workers is essential “based on the principle of the inalienable nature of such rights, (...) and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration.”²⁵⁴ In establishing these rights, the Court emphasizes their applicability to all individuals, stating that these are rights that “all workers possess, irrespective of their migratory status”.²⁵⁵ In a similar vein, according to Sensiba & Yavrom, the ILO issued a decision²⁵⁶ in 2004 “upholding the right of undocumented workers to freely associate and finding that the withholding of a remedy for violation is the equivalent to denying the right itself.”²⁵⁷

4. “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.”²⁵⁸

The conclusion of the Court that undocumented migrant workers are entitled to fundamental labour rights arises from the interpretation of the principle of equality and nondiscrimination as a *jus cogens* principle. The IACtHR found that the fundamental principle of non-discrimination, equality before the law, and equal protection before the law “encompass all States, precisely because this principle, which belongs to the realm of *jus cogens* and is of a peremptory character, entails obligations *erga omnes* of protection that bind all States and give rise to effects with regard to third parties, including individuals.”²⁵⁹ Regarding the *erga omnes* aspect of these principles, the Court provides: “States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.”²⁶⁰ Thus, the *erga omnes* obligation for States to protect these principles, which is stated in this advisory opinion, means that the States have an obligation to ensure the protection of the human rights of societally discriminated groups, such as undocumented migrants, in which the State must ensure this protection also in relation to third parties that are violating labour and human rights.²⁶¹

²⁵³ *Ibid*, Para. 157, 158.

²⁵⁴ *Ibid*, Para. 157.

²⁵⁵ *Ibid*, Para. 157.

²⁵⁶ ILO case no. 2227.

²⁵⁷ Sensiba, Anais, & Yavrom, Shaun. *Employment Rights are Human Rights. Stories of Undocumented Workers: The Denial of Employment Rights due to Immigration Status* (2nd ed.). Washington, D.C.: International Human Rights Law Clinic, American University, Washington College of Law, p. 7.

²⁵⁸ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights. Decision of the Court, Para. 5.

²⁵⁹ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 110.

²⁶⁰ *Ibid*, Para. 104.

²⁶¹ *Ibid*, Para. 107.

In addition, regarding the *jus cogens* character, the Court stated that these principles are applicable to all States, extending then the obligations incorporated in the American Convention and its Optional Protocols to all OAS Member States that have signed either “the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil and Political Rights”²⁶². In fact, the reference to *jus cogens* made by the Court in regard to these principles may have been “instrumental” in extending human rights to undocumented migrant workers in the United States, since the latter “is not a party to the Inter-American Convention on Human Rights”.²⁶³

Therefore, this advisory opinion provides a *jus cogens* character of the principle of non-discrimination and equality before the law, “because of its fundamental principle that permeates all laws”,²⁶⁴ demanding an obligation *erga omnes* to the States in protecting and ensuring the rights of undocumented migrant workers. Consequently, according to the conclusion of the Court, the provisions stated in the human rights instruments in relation to labour rights should be ensured equally to national and non-nationals independently of their status. The president of this advisory opinion, Judge Antonio Cançado Trindade, refers to the importance of these principles to have *jus cogens* character and *erga omnes* obligations, which seeks “to secure the full practical application of these principles”, to the benefit of all human beings in his concurring opinion.²⁶⁵ Moreover, the judge affirms that the Law is an emanation of “human conscience”, which stands above “the will of the States” in establishing international law, and “the *opinio juris communis* of all the subjects of international law (the States, the international organizations, and the human beings)”.²⁶⁶

5) “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”²⁶⁷.

With regards to the right to due process of law provided by this advisory opinion to undocumented migrant workers, the Court makes a reference to its Advisory Opinion OC-16/99 on *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law* stating that the “due process of law is a right that must be ensured to all persons, irrespective of their migratory status”²⁶⁸ and “should be recognized within the framework of the minimum guarantees”²⁶⁹. The Court emphasizes that the due process of law affects rights and obligations of “civil, labor, fiscal or any other legal scope”.²⁷⁰ Moreover, the Court concludes that “the

²⁶² *Ibid*, Para. 60.

²⁶³ Bianchi, A. (2008). Human Rights and the Magic of Jus Cogens. *The European Journal of International Law*, Vol. 19, p. 506.

²⁶⁴ *Ibid*, Para. 101

²⁶⁵ *Ibid*, Concurring opinion of Judge A.A Cancado Trindade, Para. 86.

²⁶⁶ *Ibid*, Para. 87.

²⁶⁷ *Ibid*, Decision of the Court, Para. 7.

²⁶⁸ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 121.

²⁶⁹ *Ibid*, Para. 122.

²⁷⁰ *Ibid*, Para. 123.

broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.’²⁷¹ Therefore, States must guarantee effective access to justice when the labour rights of migrants, documented or undocumented, are infringed, ensuring that such rights are recognized and guaranteed in practice.

Finally, it is important to mention that this advisory opinion is not legally binding on States, however, it permits both a legal reflection and change in domestic legislation, aiming to establish the rights of all workers to fair wages, safe working conditions and freedom from exploitation as fundamental labour rights. As migration flows are increasing in the region, the need for affirmative action to protect the rights of migrant workers is also increasing. Changes to migration law and policies are an international demand for States to recognize the individual and universal rights of migrants independently of their regular or irregular status in the receiving State. A serious effort at local and regional levels to protect and implement these fundamental human and labour rights granted by the IACtHR to undocumented migrant workers is thus necessary. It remains to be seen how this advisory opinion will affect undocumented migrant workers in Latin America. To date, there is only one judgment in Latin America published by the IACtHR in which this advisory opinion is mentioned in relation to undocumented migrants.²⁷² In the following chapter, the impact of this advisory opinion as well as the impact of other jurisprudences of the Inter-American Court of Human Rights regarding the situation of undocumented Haitian migrants in the Dominican Republic will be analyzed.

²⁷¹ *Ibid*, Concluding Opinion of the Court, Para. 7

²⁷² IACtHR, Case of Vélez Lóor v. Panama. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218.

Chapter 6- The Impact of the Inter-American System of Human Rights on the Protection of Undocumented Haitian Migrant Workers in The Dominican Republic

As stated in the previous chapter, the Inter-American System of Human Rights is making an on going progress on the protection and implementation on labour and human rights of undocumented migrants in Latin America. The Advisory Opinion on the *Juridical Condition and Rights of the Undocumented Migrants* is, up to date, the most important jurisprudence of the Inter-American Court of Human Rights in relation to undocumented migrants workers. Moreover, the decision on the case of *Vélez Looz V. Panama* indicates the IACtHR's commitment with the principle of non-discrimination to this group,²⁷³ confirming that the principle of "equality before the law equal protection before the law and non-discrimination (...) belongs to *jus cogens*".²⁷⁴

Regarding the situation of undocumented Haitian migrant workers in Dominican Republic, this advisory opinion is of extremely relevance to guarantee and protect their labour and human rights. As judge Antonio Cancado Trindade stated, "...the Court has highlighted the "unbreakable link" between the *erga omnes* obligations of protection and the *jus cogens* nature of the basic principle of equality and nondiscrimination, which imposes upon the States the special duty of taking such steps as may be necessary to ensure protection of human rights..."²⁷⁵

In Dominican Republic, "undocumented migrant workers have no rights whatsoever and are vulnerable to many forms of mistreatment".²⁷⁶ According to one of the opinions stated in the advisory opinion, "the greatest obstacle to the protection of the rights of migrant workers in the Dominican Republic is the difficulty that Haitians face in establishing legal residence there."²⁷⁷ The Dominican Law then makes a distinction between undocumented migrants and documented migrants and Dominican citizens when establishing provisions to protect civil, economic, social

²⁷³ IACtHR, Case of *Vélez Looz v. Panama*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2010 Series C No. 218, Para. 99.

²⁷⁴ *Ibid*, Para. 248.

²⁷⁵ Separate Opinion of Judge Antonio Cancado Trindade, Para. 29 in IACtHR Case of the "Mapiripán Massacre" v. Colombia. Judgment of September 15, 2005.

²⁷⁶ Ferguson, J. (2003). *Migration in the Caribbean: Haiti, the Dominican Republic and Beyond*. Minority Rights Group International, p. 17.

²⁷⁷ Opinion of the Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, and the Global Justice Center: IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights.

and cultural rights, reserving to undocumented migrant workers only the protection of basic labor rights.²⁷⁸ However, as mentioned before, the principles of non-discrimination and equality before law obtained the status of norms *jus cogens* with an *erga omnes* effect. Thus, since Dominican Republic is a member of the OAS, undocumented migrant workers are not only entitled to basic labour rights, but also to “freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation”²⁷⁹, ensuring then the same labour rights as the other workers of the State of employment. In addition, undocumented aliens are also entitled of individual rights set by the Protocol of San Salvador, which comprises social, economic and cultural rights.²⁸⁰

Even though the IACtHR did not deliver up to date any specific judgment regarding labour rights of undocumented Haitian migrant worker in Dominican Republic, the Court is playing an important role towards the protection against discrimination and massive expulsions of undocumented Haitians in the country through its provisional measures. Moreover, the Court ruled a decision regarding the right to nationality in *Yean and Bosico v. Dominican Republic* case, in 2005. In the following sections, it will be then analyzed the provisional measures in the case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, followed by an analysis on the case of *Yean and Bosico v. Dominican Republic*.

6.1 – Provisional Measures- Haitians and Dominicans of Haitian Origin in The Dominican Republic Case

Dominican Republic has recognized the jurisdiction of the Court since March 1999.²⁸¹ Moreover, as mentioned in the chapter 2 of this thesis, Dominican Republic is a State Party of the American Convention. Thus, according to the Article 63(2) of the American Convention, in cases of “extreme gravity and urgency, and when necessary to avoid irreparable damage to persons”, the Court may, in matters not yet submitted to its consideration, implement provisional measures as it considers necessary, at the request of the Commission.²⁸²

In the case of Haitians and Dominicans of Haitian Origin in the Dominican Republic, the IACHR submitted a request to the IACtHR on May, 30 2000 for provisional measures related to the protection of Haitians and Dominicans of Haitian origin, who were at risk of being collectively expelled from the Dominican Republic. The case first started in the Commission (IACHR), after receiving a complaint accusing Dominican Republic of “massive expulsions” of Haitians and Dominicans of Haitian

²⁷⁸ *Ibid.*

²⁷⁹ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights, Para. 157, 158.

²⁸⁰ *Ibid.*, Para. 31 and 60.

²⁸¹ Organization of American States. Inter-American Commission on Human Rights. B-32: American Convention on Human Rights "Pact of San Jose, Costa Rica". Last accessed on 29/05/2012: <http://www.cidh.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm>

²⁸² Article 63(2) of the American Convention on Human Rights.

origin, on November 12, 1999.²⁸³ At that time, the Commission requested to Dominican Republic to adopt precautionary measures and to “stop the massive expulsions and that, in the event that they would continue to be made, this be done satisfying the requirements of the due process.”²⁸⁴ However, Dominican Republic rejected such precautionary measures, not changing its practice or policy related to deportations and expulsions.²⁸⁵

That led the IACHR to request the IACtHR to rule provisional measures, aiming the protection of human rights and due process of law of these victims of deportation. In the request, the Commission pointed out the following fact: “the victims are subjected to “collective” deportations and expulsions from the Dominican Republic, without any legal proceeding that permits adequate identification of their nationality, their migratory status or their family ties. They are separated from their families, without any notice; they are not allowed to take their belongings or the salary they have earned and, in many cases, their children are left abandoned.”²⁸⁶ Moreover, the IACHR also claimed that the authorities were using excessive force against the aliens in carrying out the expulsions, such as verbal abuse and physical violence.²⁸⁷ The Commission also stated the existence of four groups within these deportations: “Haitians without documents, Haitians with documents, Dominicans of Haitian origin without documents and Dominicans of Haitian origin with documents”.²⁸⁸ According to James Ferguson, the ongoing deportation of the Haitian migrants, including Dominican-Haitians, confirms “the marginalization faced by those of Haitian descent, irrespective of their place of birth”.²⁸⁹

In addition, an Addendum to the request was also submitted by the IACHR on 13th of June 2000, listing the names of some of the victims of the collective expulsions.²⁹⁰ The IACHR requested the Court then to include in its decision the immediate repatriation of the listed victims and their protection from detention and deportation motivated by race or national origin in Dominican Republic.²⁹¹ In addition, the Commission requested the Court to adopt provisional measures requiring Dominican

²⁸³ IACtHR Order of The Inter-American Court Of Human Rights of August 18, 2000 Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of The Dominican Republic. Case of Haitian and Haitian-Origin Dominican Persons in The Dominican Republic, Para 2, a).

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*, Para 2, b) and 2, c).

²⁸⁶ Organization of American States. (2001). *Annual Report of The Inter-American Court of Human Rights 2000*. San Jose, Costa Rica: Organization of American States (OAS), p. 35.

²⁸⁷ IACtHR Order of The Inter-American Court Of Human Rights of August 18, 2000 Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of The Dominican Republic. Case of Haitian and Haitian-Origin Dominican Persons in The Dominican Republic, Para 2, e).

²⁸⁸ Organization of American States. (2001). *Annual Report of The Inter-American Court of Human Rights 2000*. San Jose, Costa Rica: Organization of American States (OAS), p. 35.

²⁸⁹ James Ferguson in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 336.

²⁹⁰ IACtHR Order Of The Inter-American Court Of Human Rights Of August 7, 2000, Request For Provisional Measures In Favor Of Haitian And Haitian-Origin Dominican Persons In The Dominican Republic, Para. 2

²⁹¹ IACtHR Order of The Inter-American Court Of Human Rights of August 18, 2000 Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of The Dominican Republic. Case of Haitian and Haitian-Origin Dominican Persons in The Dominican Republic, Para. 3.

Republic to suspend collective expulsions and to establish the due process of law for all individuals facing deportation.²⁹²

The Court then, “called on the State of the Dominican Republic and the Inter-American Commission for a public hearing to provide the Court with detailed information on the situation of the members of the border communities or “*bateyes*” who could be forcibly repatriated, deported or expelled.”²⁹³ The Dominican Republic stated then that, as a sovereign state, it possesses the authority to control its borders and to deport foreigners non documented from the country. Even though the Court recognizes that States have the authority based on their sovereignty of controlling their borders from aliens, on the same way that it has the authority to deport undocumented migrants from their territory, such laws and regulations of the States must be in accordance with human rights norms established in the American Convention on Human Rights. And in fact, the information provided by the testimonies before the Court stated cases of individual human rights violations when those were in the process of deportation or expulsion.²⁹⁴

The IACtHR established then that “it is not feasible to order provisional measures without specific names, for protecting generically those in a given situation or those who are affected by certain measures”.²⁹⁵ However, towards the listed victims of this case, the Court issued provisional measures in its Orders of August 18 and November 12, 2000, calling on the Dominican Republic to take, in sum, the following steps: to implement all necessary measures to protect the lives and physical integrity of the named victims, as well as the witnesses who testified before the Court; to permit the return of the individually named victims who had been expelled; and to submit detailed information on the situation of the members of the border communities or *bateyes* which may be subject to forced expulsions from the country.²⁹⁶

In a concurring opinion, judge Antonio Cançado Trindade mentioned the relevance of these provisional measures, since they are not only related to violations of “the right to life and physical integrity”, but also be extended to protect “the rights to personal liberty, to the special protection of the children in the family, and to circulation and residence (Articles 7, 19 and 22 of the Convention).” Therefore, even though the ruling of the Court was only provisional and did not cover the entire community suffering from mass expulsions; the decision was addressed as a victory by several human rights organizations,²⁹⁷ making a considerable progress on the jurisdiction regarding the protection of Haitians in Dominican Republic. In addition, these provisional measures were re-stated by the IACtHR in several other cases (the last one dated from February, 29 2012) related to the matter of Haitians and Dominicans

²⁹² *Ibid*, Para. 2.

²⁹³ Organization of American States. (2001). *Annual Report of The Inter-American Court of Human Rights 2000*. San Jose, Costa Rica: Organization of American States (OAS), p.15.

²⁹⁴ IACtHR Order of The Inter-American Court Of Human Rights of August 18, 2000 Provisional Measures Requested by the Inter-American Commission on Human Rights in the matter of The Dominican Republic. Case of Haitian and Haitian-Origin Dominican Persons in The Dominican Republic, Para. 13

²⁹⁵ *Ibid*, Para. 8, p. 10.

²⁹⁶ *Ibid*, Decision, Para. 1-12.

²⁹⁷ James Ferguson in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 336.

of Haitian Origin in the Dominican Republic, benefiting other named victims.²⁹⁸

6.2 - Case of Yean and Bosico v. The Dominican Republic

Another issue regarding discrimination towards Haitians in Dominican Republic is the fact that Dominican authorities refuse to deliver birth certificates to borne children of Haitian origin. As stated in chapter 4, thousands of undocumented Haitian workers are living in the Dominican Republic for many years and, as a consequence many children were born under the Dominican territory. This situation of permanent irregular status are then also transmitted to the children, “who cannot obtain Dominican nationality because, according to the restrictive interpretation that Dominican Authorities give to article 11 of the Constitution, they are children of ‘foreigners in transit.’”²⁹⁹ Towards this aspect, the Court considered in the case of Yean and Bosico v. Dominican Republic the following opinion of the IACHR in its 1999 Report on the Situation of Human Rights in the Dominican Republic: “It is not possible to consider that people are in transit when they have lived for many years in a country where they have developed innumerable connections of all kinds.”³⁰⁰

In the aforementioned case, from September 2005, the children Dilcia Yean and Violeta Bosico were denied the right to nationality in Dominican Republic, since their parents were undocumented migrants, considered the to be “in transit” by the authorities. As mentioned in chapter 4, Dominican Republic until 2010 based the right to nationality on the *jus soli* principle, which means that “persons born in the territory of the Dominican Republic’ are Dominican citizens”.³⁰¹ However, this rule was not being applicable to Haitian descents, and that was the case of these children. The Court considered in this case that the discriminatory application of nationality and birth registration unable these children to access their right to nationality, and consequently limiting them to other rights, such as the right to education, right to health and equal protection of the law.³⁰²

²⁹⁸ See Provisional Measures: I/A Court H.R. Matter of Haitians and Dominicans of Haitian Origin in the Dominican Republic. Order of the Inter-American Court of Human Rights. Available at: Inter-American Court of Human Rights. Last Accessed on 30/05/2012: http://www.corteidh.or.cr/pais.cfm?id_Pais=23&CFID=446055&CFTOKEN=17722403

²⁹⁹ IACtHR Case of Yean and Bosico v. Dominican Republic, Inter-American Court of Human Rights, judgment of September 8,2005, Series C No. 130, Para. 153.

³⁰⁰ IACtHR Case of Yean and Bosico v. Dominican Republic, Inter-American Court of Human Rights, judgment of September 8,2005, Series C No. 130, Para. 153.

³⁰¹ Ferguson, J. (2003). *Migration in the Caribbean: Haiti, the Dominican Republic and Beyond*. Minority Rights Group International, p. 21.

³⁰² Ryszard Cholewinski, Jillyanne Redpath, Sophie Nonnenmacher and John Packer in Lesser, T., Fernandez-Alfaro, B., Cowie, L., & Bruni, N. (2006). *Intra-Caribbean migration and the Conflict Nexus*. Ottawa: Human Rights Internet, p. 34.

In addition, following its reasoning on the aforementioned Advisory Opinion on the Juridical Status and Rights of Undocumented Migrants³⁰³, the Court stated that “the obligation to respect and ensure the principle of the right to equal protection and non-discrimination is irrespective of the migratory status of a person in a State. In other words, States have the obligation to ensure this fundamental principle to its citizens and to any foreigner who is on its territory, without any discrimination based on regular or irregular residence, nationality, race, gender or any other cause.”³⁰⁴

Therefore, the IACtHR declared in this case that Dominican Republic had violated the following articles of the American Convention: article 20 (Right to Nationality), article 19 (Rights of the Child) and article 1(1) (Obligation to Respect Rights). Moreover, the Court considered that the violation of the right to nationality and the rights of the child also results in the violation of the right to juridical personality (article 3), to a name (article 18) and to equal protection (article 24) under the American Convention.³⁰⁵

As noticed from this case law, the irregular status of the Haitian migrant also affects their children, even those born in the Dominican Republic, leading them to a situation of extreme vulnerability, subjected to several human rights violation. The way that the law regarding the right to nationality was applied in the Dominican Republic contributes then to the permanent irregular status of Haitian migrants and Dominicans of Haitian descent in the country. And the problem is just going to perpetuate with the new Constitutional Law from 2010, as described in chapter 4.2. However, even though the Dominican Republic is not complying up to date with the decision of the IACtHR in the case of *Yean and Bosico v. Dominican Republic*, this case is still considered an extremely important jurisprudence, as it entitles the Haitian descents borne in the Dominican Republic territory the right to Dominican citizenship.

³⁰³ IACtHR. (2003, September 17). Advisory opinion on the Juridical Status and Rights of Undocumented Migrant Workers. *Advisory Opinion OC-18/03 on the Juridical Status and Rights of Undocumented Migrant Workers*. Inter-American Court of Human Rights.

³⁰⁴ IACtHR Case of *Yean and Bosico v. Dominican Republic*, Inter-American Court of Human Rights, judgment of September 8, 2005, Series C No. 130, Para. 155.

³⁰⁵ Separate Opinion of Judge A.A. Cançado Trindade, Para. 14. In *Yean and Bosico v. Dominican Republic*.

Chapter 7- Conclusion and Recommendations

This thesis was designed to answer three research questions concerning the discrimination against undocumented migrant workers in Latin America, with a focus on Haitian migrants in Dominican Republic.

Addressing to the first question, the Legal instruments for the protection of the undocumented migrant workers rights is very extensive. Provisions to protect this group against discriminatory treatments are established in various international human rights treaties, as well as in the ILO instruments. In relation to undocumented migrant workers, in Latin America there is, besides those universal instruments, a regional system. The Inter-American System on Human Rights states throughout its bodies and instruments provisions to safeguard and implement the human and labour rights to all the individuals under the State parties' territory.

Regarding the second question, in sum, the discrimination and abusive conditions suffered by the undocumented migrant workers at the workplace in the destination country can be exemplified with the case of undocumented Haitians in Dominican Republic. The human and labour rights violations faced by undocumented Haitian migrant workers in Dominican Republic are a consequence of the vulnerability of these workers to abusive treatment, since they find themselves in a very dependable situation with the employer. This employment relation results, in one hand, to the employer to avoid labour rights obligations towards undocumented migrants, and on the other hand, makes it harder for the employee to claim his/her rights in a juridical court. Moreover, this group faces constantly acts of deportation and massive expulsion, not having access to legal aid and the due process of law. Finally, the discrimination towards undocumented migrant workers at the workplace is also revealed by the denial of equal opportunities to the Haitians to achieve better work positions. Further, as the irregular status is also transmitted to the migrant's children, due a discriminatory interpretation of the Haitian Constitutional Law, these abusive conditions suffered by these migrants perpetuates throughout many years.

Concerning the third question, as mentioned in this study, the most important advance of this Inter-America system of human rights towards undocumented migrants was the advisory opinion on the Juridical Conditions and Rights of the Undocumented Migrants. The *jus cogens* character on the principles of non-discrimination and equality before the law and the *erga omnes* obligation for States to respect and ensure the promotion and protection of these norms stated in this advisory opinion was extremely significant to extend human and labour rights obligations to undocumented migrants to all member States of the OAS. In relation to the Haitians in Dominican Republic, the most important jurisprudences of the Inter-American Court of Human Rights are:

- The provisional measures in the case Haitians and Dominicans of Haitian Origin in the Dominican Republic, in which these provisional measures was not only related to violations of the right to life and physical integrity, but also

related to the protection of the rights to personal liberty, to the special protection of the children in the family, and to circulation and residence;

- The case of *Yean and Bosico v. Dominican Republic*, in which the Yean and Bosico children were entitled of Dominican citizenship, is considered to be an extremely important jurisprudence to entitle other Haitian descent borne in the Dominican Republic territory the right to Dominican citizenship.

In addition, based on the facts and the analysis described throughout the chapters, this thesis establishes the following recommendations to Dominican Republic:

- To promote the democracy, the rule of law and the protection of Human Rights in general,
- To ensure that non-citizens are not subject to collective expulsion and have the equal access to effective remedies. Moreover, in case of deportation, the State should guarantee the due process of law,
- To adopt measures to combat racism and discrimination towards Haitians and Haitians descents,
- To guarantee the right to birth certification to all children borne in Dominican Republic,
- To ensure that labour inspectors are accessing all areas in the country, including the agricultural area, which is more likely to labour and human rights abuses of undocumented Haitian worker,
- To effectively combat Human Trafficking,
- To ensure the undocumented migrant worker the right to participate in labour unions,
- And Finally, to ratify the UN Migration Convention (ICRMW)

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