ALTERITY AND LAW. THE INTER-AMERICAN JURISPRUDENTIAL CONSTRUCTION AND THE LEGAL DENSIFICATION OF THE CONDITION OF THE UNDOCUMENTED MIGRANTS

Alteridade e lei. A construção da jurisprudência interamericana e a densificação legal da condição de migrantes indocumentados

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The right to have rights. This powerful combination of words leads to a remarkable concept that law may have a deeper meaning: a meaning that can bring justice and law closer together. However, since the end of the 20th century, there is a lack of hope about the possibilities that law may have in promoting the expansion of human rights when one recalls the images of human beings dying, not only inside trucks, trains and airplanes, but also by the beaches around the globe.

The end of World War II can be seen as a turn point on the idea of human rights as one of the pillars of the new international society that emerged soon after this conflict. As pointed out, not only by the United Nations Charter in its preamble and first article, but also by the Universal Declaration of Human Rights, the logic after World War II was to establish a new international reality in which peace and security[1] were the centre of this new momentum. However, peace and security would only last if they are based on justice and law, especially the human rights, because

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[1] *United Nations Charter*, Article I.

as it was asserted on the preamble of the UN Charter, the aim of the new international society was to:

> …reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained and to promote social progress and better standards of life in larger freedom …

The right of all human beings to have rights was built not only by State-nations but by peoples.[2] These rights were not based on citizenship or nationality, but on the human condition. A point of inflexion was established through this distinction.

The Universal Declaration of Human Rights that was adopted by the United Nations General Assembly on 10th December 1948[3] in Paris had deepened the ideas presented on the UN Charter[4]. It founded in education the pillar of the respect of the rights nationally and internationally expressed in this legal document. After 1945, the individual became the centre of the new reality pursued. The articles I, II and VI of the UDHR are very important to express the logic of the international system created and wanted by the international community after the World War II:

> Article 1 – All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
> Article 2 – Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.
> Article 6 – Everyone has the right to recognition everywhere as a person before the law.

Although being understood by some international legal experts as not binding, the Universal Declaration of Human Rights served and serves

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[2] Preamble of the United Nations Charter: "We the Peoples of the United Nations…have resolved to combine our efforts to accomplish these aims accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations".

[3] *General Assembly Resolution*, 217 A (III).

[4] Preamble of the Universal Declaration of Human Rights: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…".

as the base for International Covenant on Civil and Political Rights,[5] and the International Covenant on Economic, Social and Cultural Rights.[6] By stressing the idea of human rights detached from the concepts of citizenship or nationality, the exercise of these rights, expressed in the UDHR, was theoretically possible in all parts of the world, but that was not the reality.

The theme of human being in movement in the beginning of the 21st century took a new dimension. If economic, political, social and environemental aspects were the reasons for the denial of human rights to non nationals, after the beginning of the new millennium marked by the terrorist attacks against the World Trade Center in New York City the perception of the migratory flux changed. The idea of human security developed by the United Nations during the 90's of the 20th century was replaced by the idea of security linked to the 'war on terror' and as a though consequence, the idea of the 'other', the concept of alterity as instigating and important was replaced by fear, terror and denial. As a human science, law perceived this slowly process being put in practice. Instead of the possibility of being the motor of change, law became a tool to shrink rights for human beings in movement.

The perspective of the multilateralism, the world conferences of human rights and the treaties issued of those conferences[7] during the 90's of the last century were the symbols of a process of retaking the pillars of a world dreamt after the World War II. The end of the logic of a bipolar system allowed the idea of a world characterized by the respect of diversity, human dignity and cooperation. In order to persist, this promising world would have as one of its pillars the human security. This concept that was introduced for the first time on the Human Development Report of 1994 of the United Nations Development Programme (UNDP) has its bases on the protection and empowerment of the people. In the Report of 1994, the concept is:[8]

> Human security is people-centred. It is concerned with how people live and

[5] *General Assembly Resolution* 2200A (XXI) of 16 December 1966. The entry into force 23 March 1976, article 49.

[6] *General Assembly Resolution* 2200A (XXI) of 16 December 1966. The entry into force was on 3 January 197, article 27.

[7] Such as World Summit for Children 1990, Rio – 92 on Environment and Development, Cairo – 1994 on Population and Development, Vienna -1993 on Human Rights, Beijing – 1995 on Women, Rome – 1998 on International Criminal Court (the Statute), Durban – 2001 on Racism, Racial Discrimination, Xenophobia and related Intolerance among others.

[8] *Human Development Report*, p. 23.

> breathe in a society, how freely they exercise their many choices, how much access they have to market and social opportunities – and whether they live in conflict or in peace.(…) It means, first, safety from such chronic threats as hunger, disease and repression. And second, it means protection from sudden and hurtful disruptions in the patterns of daily life – whether in homes, in jobs or in communities. Such threats can exist at all levels of national income and development. The loss of human security can be a slow, silent process – or abrupt, loud emergency. It can be human-made – due to wrong policy choices. It can stem from the forces of nature. Or it can be a combination of both – as is often the case when environmental degradation leads to a natural disaster, followed by human tragedy.

The idea of a globalized world not only transformed mankind's perception of time, but also changed the idea of space because it was said that the frontiers would disappear and the world would be an immense space of prosperity and development. The complexity of the reality reached the relations among States and between these and other relevant actors. The social, political and economical demands led the States, the international organizations and other political actors to find ways to respond to this new reality with new tools. However, terrorist attacks transformed this scenario. The feeling of living in wartime took place and the way to deal with terror was to use inappropriate tools to manage a complex reality presented in the 21st century. The idea of state of exception was used to question and to put aside the concepts of democracy, human rights, respect of diversity, due process of law, torture etc.

The physical and legal barriers were built with the aim of protecting populations from fear and from the terror of an immaterial enemy that emerged among communities. The very first chosen ones in this ambiance of mistrust and terror were the `others`, the non nationals, for example. The nationality was the shell to the idea of security. The foreigners were perceived in a different way and the undocumented migrants were seen as possible threats to the national security. If some decades ago the legal barriers against undocumented migrants were based on economic aspects, in the beginning of the 21st century these barriers were characterized by the linkage between irregular migration to political and secure aspects. The migration laws changed in several parts of the world. In order to answer some questions about the national or international legal aspects of those changes, the national or regional legal systems were demanded to scrutinize those changes or the effects of those changes.

On 17th September 2003, the Inter-American Court of Human Rights in the Advisory Opinion OC-18/03 answered the questions made by Mexico about the Juridical Condition and Rights of the Undocumented Migrants. This Court that is an autonomous judicial institution of the

Organization of American States (OAS) has the advisory function to respond to consultations submitted not only by agencies of the American States, but also by the Member States in issues regarding the interpretation of the Convention and other legal human rights instruments in the continent.[9] This paradigmatic Advisory Opinion was able not only to reunite during the oral and the written comments the requesting State, the participating States and the Inter-American Commission, but also, as *amici curiae*,[10] individuals, universities, institutions and non-governmental organizations[11] expressing the dimension of this jurisprudential debate.

In this Advisory Opinion, stressing the obligation that the American States have to ensure the principles of legal equality, non-discrimination and equal and effective protection of the law based on international legal documents about the protection of human rights, the United Mexican States asked clarification not only on the "[...] deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation to ensure…"[12] the referred principles, but also about the meaning of those principles in the "…in the context of the progressive development of international human rights law and its codification.". Besides this question, the United Mexican States questioned the "subordination or conditioning of the observance of the obligations imposed by international human rights law, including those of an *erga omnes* nature, with a view to attaining certain domestic policy objectives of an American State".[13]

In order to have a common sense about the concepts and meanings, the Court, in the glossary of this advisory opinion, based on the U.N International Convention on the Protection of the Rights of All Migrant

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[9] Any Member State of this regional organization independently of having ratified the Convention or accepted its adjudicatory function.

[10] It is the plural of the latin expression *amicus curiae*. It refers to someone who is not party in a case, but volunteers to offer information about a point of law or some aspect dealt in the case. *Amicus curiae* assists the Court if the latter using its discretionary power admits the information.

[11] Such as the Harvard Law School, the Working Group on Human Rights in the Americas of Harvard, Boston College Law Schools, the Global Justice Centre, Labor, Civil Rights and Immigrants´ Rights Organizations (in the United States of America), the Academy of Human Rights and International Humanitarian Law of the American University, Washington College of Law, the Human Rights Programme of the Universidad Iberoamericana de México, the Center for Legal and Social Studies (CELS), Ecumenical Service for the Support and Orientation of Immigrants and Refugees (CAREF), the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires, the Center for Justice and International Law (CEJIL), United Nations High Commissioner for Refugees (UNHCR), Jorge A. Bustamante, Juridical Research Institute, Universidad Nacional Autónoma de México (UNAM), Harvard Immigration and Refugee Clinic of Greater Boston Legal Services, Students of the Law Faculty of the Universidad Nacional Autónoma de México (UNAM), Delgado Law Firm among others.

[12] *Inter-american Court of Human Rights in the advisory opinion* OC-18/03, p. 02.

[13] *Ibidem*, p. 02.

Workers and Members of their Families of 18 December 1990 in its 5th article, explained that undocumented migrant worker or migrant worker in an irregular situation[14] is:

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

The ICHR indicates that migrant workers and their families "are considered non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article."[15]

Unanimously, the Court responded the Mexican consultation[16] clarifying that not only the "States have the general obligation to respect and ensure the fundamental rights", but also that "non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility". It added that "the principle of equality and non-discrimination…":

> …is fundamental for the safeguard of human rights in both international law and domestic law… forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.[17]

Focusing on the theme of migration, the Court underlined that not only "… the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.", but also:

> …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 migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature".[18]

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[14] *Ibidem*, p. 88.

[15] U.N. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 5th article.

[16] *Ibidem*, p. 111-112.

[17] It means peremptory norm. It is a compelling law.

[18] *Ibidem*, p. 106.

The ICHR once asked about the theme of labor relationship explained that:[19]

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

The former President of the Inter-American Court of Human Rights, Judge Antônio Augusto Cançado Trindade in his concurring opinion[20] contextualizing the theme of this advisory opinion stressed that

> The migrations and forced displacements, with the consequent uprootness of so many human beings, bring about traumas: suffering of the abandonment of home (at times with family separation or disruption), loss of the profession and of personal goods, arbitrarinesses and humiliations imposed by frontier authorities and security officers, loss of the mother tongue and of the cultural roots, cultural shock and permanent feeling of injustice. The so-called "globalization" of the economy has been accompanied by the persistence (and in various parts of the world of the aggravation) of the disparities within nations and in the relations among them, it being found, e.g., a remarkable contrast between the poverty of the countries of origin of the migrations (at times clandestine ones) and the incomparably greater resources of the countries sought by the migrants. (…) The "administrative fault" of indocumentation has been "criminalized" in intolerant and repressive societies, aggravating even further the social problems which they suffer. The drama of the refugees and the undocumented migrants can only be effectively dealt with amidst a spirit of true human solidarity towards the victimized. Definitively, only the firm determination of the reconstruction of the international community on the basis of human solidarity can lead to the overcoming of all those traumas.

[19] *Ibidem*, p.116.

[20] Concurring opinion of Judge Antonio Augusto Cançado Trindade to the *Inter-American Court of Human Rights in the advisory opinion* OC-18/03, p. 5-7.

Four years earlier, in the Advisory Opinion OC 16/99 also requested by the United Mexican States on "the right to information on consular Assistance in the Framework of the Guarantees of the Due Process of Law",[21] referring to the globalization and migration in his concurring opinion, the Judge Cançado Trindade said that:

> The action of protection, in the ambit of the International Law of Human Rights, does not seek to govern the relations between equals, but rather to protect those ostensibly weaker and more vulnerable. Such action of protection assumes growing importance in a world torn by distinctions betweens nationals and foreigners (including de jure discriminations, notably vis-à-vis migrants), in a "globalized" world in which the frontiers open themselves to capitals, inversions and services but not necessarily to the human beings. Foreigners under detention, in a social and juridical scene, in an environment of a different idiom that they do not know sufficiently, often experiment a condition of particular vulnerability, which the right to information on consular assistance, inserted into the conceptual universe of human rights, seeks to remedy. The Latin-American countries, with their recognized contribution to the theory and practice of international law, and nowadays all States Parties to the American Convention on Human Rights, have acted in support of the prevalence of this understanding, as exemplified by the arguments in this sense of the intervening States in the present advisory proceeding.

The vivid debate that this subjects brings to light had legal responses in two different levels on the two sides of the Atlantic. On the American continent, at a national level, the status of the undocumented migrant was changed. On the European continent, at a regional level, rules of deportation of illegal migrants[22] were voted at the European Parliament.

In the American continent, Mexico promoted a change in the legislation about the undocumented migrants. Four years after the OC 18, the Mexican Congress approved unanimously on 29th April 2008 and President Felipe Calderón promulgated it on 21st July 2008[23], a reform on the General Law on Population (*Ley General de Poblácion*).[24] The theme of undocumented migration was and still is a very important subject for this country, not only because it attracts thousands of migrants to its land, but also because it is used by thousands as a route to enter the United

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[21] Concurring opinion of Judge Antonio Augusto Cançado Trindade to the *Inter-American Court of Human Rights in the advisory opinion* OC-16/99, p. 8.

[22] Different nomenclature from the U.N International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (article 5).

[23] Available at: http://www.diputados.gob.mx/LeyesBiblio/ref/lgp/LGP_ref10_21jul08.doc. Accessed on: August 2008.

[24] This reform will entry into force on August 21st, 2008.

States of America, the country that receives the most remarkable number of migrants in the world.

Among many aspects, the two main points in this reform were the non criminalization of the irregular immigration that previously implied as a penalty 18 months to ten years in prison and the possibility of proceeding legally on migratory regularization previously based on non constant policies. This legislative alteration highlights the relevance of the jurisprudence of the Inter-American Court of Human Rights in the strengthening of the Human Rights.

In a regional level, another legal construction[25] was decided. In the European Parliament, the "return directive"[26] was approved on 18th June 2008 on first-reading plenary vote and it will begin to rule in 2010. The binomial is not only to establish a maximum period of custody of the deportees and to ban their re-entry in EU soil. This legal document intends to harmonize the regional legislation and procedures of expulsion of undocumented migrants due to the discrepancies among national legislations. It is part of regional effort to have one policy on asylum and immigration. In 2002, at the Seville European Council, the idea conceived was that immigration and asylum are subjects very complex to be dealt only in the national level.

This directive allows the expulsion of undocumented migrants to the countries where they had passed before entering in European Union's space with a prohibition of entering it during a period of five years not excluding of this procedure minors. The countries of the UE, like Spain, Cyprus, Portugal and France, which enclose more flexible legislations, will be able to keep them ruling, but countries with more restrictive laws will be obliged to adopt the patterns established by this directive.

Although there are guarantees of legal assistance and medical care for those included in the condition of expulsion, this directive is under a great controversy in and outside Europe due to the rupture it has to the legal and political European tradition and the possible deterioration of the conditions of deportation of undocumented migrants in the EU countries, which have more favorable legislations about this subject.

The same as many countries in the American continent which have expressed their opinions about the subject, the Brazilian government

[25]Available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2008-293+0+DOC+XML+V0//EN. Accessed on: August 2008.

[26] P6_TA(2008)0293.

through its Department of State[27] regretted the approval of the new immigration law stressing that:

> ... this decision which contributes to creating a negative perception of immigration and goes against a desired reduction of hindrances to the free circulation of individuals and of a broader and lasting coexistence among the peoples.

These two examples of legal construction reflect the depth and complexity of the theme: human beings in movement. In all debates, mankind is facing the idea of alterity. The end of the World War II was a moment of deep change in concepts and certainties. Humanity got a new and broad meaning around the world. At the same time, security was felt as responsibility of all human beings all the time through the centuries. However, more than fifty years later, peace and (human) security were replaced by terror and rejection. Law, which was previously used as an instrument to promote the rights, at the beginning of the 21st century it was used as a tool to restrain rights to the 'others'.

The Mexican Congress and the European Parliament tried to deal with a new reality. Definitely, this new reality requires other tools different from those already used. In this moment of perplexity, Economy and History have an important role because they can help to explain and understand the solutions constructed in the two sides of the Atlantic.

For centuries, the American continent received and still receives thousand and thousands of migrants making the alterity an element of the identity of this part of the world. The migrants were seen as additional members to the development. The boundaries of the possible were not still established. The reality was to be built. The idea of the 'other' was very positive because, in the collective imaginary, the foreigner was coming in order to add in skills, talents and diversity to enrich and to empower the society. No suspicions or fear were in priori the first reactions to non nationals. In a slow process, most recently, the countries of the American continent had to deal with the migratory flux. Instead of being poles of financial and human attraction, they started seeing their citizens going abroad in a permanent basis. Many times, this transfer of active force to other countries were accompanied by non respect of rights. This reality allowed many countries to finish with the idyllic perception that reciprocity of legal treatment was guaranteed. It was not a matter of benevolence, but the complexity of the new scenario of the end of the 20th century

[27] Press Release nr 314 - 18/06/2008. Distribution 22. European Union Directive on Immigration.

and of the beginning of the 21st century. Pragmatism started being put in place and questions started being raised about the conditions and the legal treatment to their nationals in foreign countries. This process was important to deepen the role and importance of the Courts in enlarging the perception of law.

In Europe, the perception is different. For longtime having an important migratory flux to various parts of the world, the fact of becoming an important pole of attraction is not experienced as on the other side of the Atlantic. For many Europeans, the foreigners who arrive in that continent nowadays are a concrete threat to them, not only because of the worldwide perception of the international civil violence and the idea of failure of the welfare state model, but also because of the fact that the acceptance of the alterity and the diversity is a long process that many parts of the world had already experienced. The uncertainty about the future transforms the other into an element of disequilibrium, therefore, in these circumstances, the possible legal response is the more restrictive legislation to deal with undocumented migrants. The debates taken at the European Parliament show that this theme is really complex and demands not only deeper normative, but also legal and jurisprudential discussions taking in mind international experiences to this relevant subject.

In this moment of inflexion one can not forget that, at the centre of the reality is the human being. Studying the paces taken by diverse jurisprudences in the consolidation of the international protection of any human being, no matter what legal condition he or she may enclose, Mankind will be getting closer to the world that the Universal Declaration of Human Rights projected and decided to build: where all Human beings are equal in their diversity, and have the right to have rights.

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