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Undocumented migrant workers: legal status in the Inter-American Human Rights System

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Abstract

This study investigated the status of undocumented migrant workers in Brazil in face of the Inter-American Human Rights System (IAHRS). The guiding question was: is the legal protection of undocumented migrant workers in Brazil compatible with the obligations imposed on the State for its integration into the Inter-American Human Rights System? First, the international legal context regarding the study object was analyzed; then, undocumented migrants were investigated in the national context, emphasizing the local legal system; finally, possible consequences for the current situation were listed, but also solutions to address the issue concerned. It is concluded that undocumented migrants do not have access to all labor rights in Brazil, and this may even lead to international accountability.

Key words Inter-American Human Rights System; Brazil; labor rights; vulnerability; undocumented migrants.

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Trabalhador migrante indocumentado: condição jurídica no Sistema Interamericano de Direitos Humanos

Resumo

Este estudo investigou a situação do trabalhador migrante indocumentado no Brasil em face do Sistema Interamericano de Direitos Humanos (SIDH). A pergunta norteadora foi: a proteção jurídica do trabalhador migrante indocumentado no Brasil é condizente com as obrigações impostas ao Estado para sua integração ao Sistema Interamericano de Direitos Humanos? Primeiro, analisou-se o contexto jurídico internacional relativo ao objeto de estudo; em seguida, investigou-se o migrante indocumentado no contexto nacional, com ênfase no ordenamento jurídico local; por fim, listaram-se possíveis consequências para a atual situação, mas também soluções para contornar o problema em questão. Conclui-se que os migrantes indocumentados não têm acesso a todos os direitos trabalhistas no Brasil, o que pode gerar, inclusive, uma responsabilização internacional.

Palavras-chave Sistema Interamericano de Direitos Humanos; Brasil. direitos trabalhistas; vulnerabilidade; Migrantes indocumentados.

Trabajador migrante indocumentado: condición jurídica en el Sistema Interamericano de Derechos Humanos

Resumen

Este estudio investigó la situación de trabajadores migrantes indocumentados en Brasil frente al Sistema Interamericano de Derechos Humanos (SIDH). La pregunta orientadora fue: ¿la protección jurídica del trabajador migrante indocumentado en Brasil es compatible con las obligaciones impuestas al Estado para su integración en el Sistema Interamericano de Derechos Humanos? En primer lugar, se analizó el contexto jurídico internacional en relación con el objeto de estudio; luego, los inmigrantes indocumentados fueron investigados en el contexto nacional, enfatizando el ordenamiento jurídico local; por fin, se enumeraron posibles consecuencias para la actual situación, pero también soluciones para eludir el problema en cuestión. Se concluye que los migrantes indocumentados no tienen acceso a todos los derechos laborales en Brasil, lo que puede generar, inclusive, una responsabilización internacional.

Palabras clave Sistema Interamericano de Derechos Humanos; Brasil; derechos laborales; vulnerabilidad; migrantes indocumentados.

Introduction

The legal status of migrants who arrive in Brazil in order to work is determined by a normative set consisting of both national and international legislations. Among the instruments in force in the domestic legal system, the Lei n. 13.445 (Lei de Migração, 2017) stands out, regulated by the Decreto n. 9.199 (2017); at the international level, the Decreto n. 678 (Convenção Americana sobre Direitos Humanos, 1992), which promulgated in Brazil the Pact of San José, Costa Rica, dated November 22, 1969, brought the country into the context of the Inter-American Human Rights System (IACHR), by establishing binding rules that cannot be ignored. All these standards have an impact on the lives of foreign workers.

The Brazilian immigration policy underwent a significant change with the advent of the Lei de Migração (2017), which repealed the Lei n. 6.815 (Estatuto do Estrangeiro, 1980). This normative change represented a break with the paradigm imposed by previous legislation and the individuals covered by it came to occupy a new position. From then on, the protective nature replaced the combative tone that had hitherto prevailed.

Although the aforementioned legal instrument is the basic rule governing migration in Brazil, international law is also responsible for this type of protection. The Convenção Americana sobre Direitos Humanos (1992) is one of the main international instruments to which Brazil is a signatory. For this reason, the State should comply with its provisions. This means that it should comply not only with the provisions of this convention, but also with observe the decisions and advisory opinions of the agencies related to the IAHRS. Since it is considered one of the dimensions of human rights, labor law, coupled with the vulnerable condition of migrants when arriving in another country to look for a job, becomes one of the themes addressed by the IACHR.

Given this context, answers to the following guiding question are sought:

- Is the legal protection of undocumented migrant workers in Brazil compatible with the obligations imposed on the State for its integration into the Inter-American Human Rights System?

This analysis is relevant insofar as the issue of migration has shown to be increasingly critical. Although, in Brazil, the total number of migrants is not so high, the number of foreigners arriving here has grown significantly in recent years. Only in the State of São Paulo, according to an evaluation conducted by the local government along with the Labor Public Prosecutor's Office (Ministério Público do Trabalho – MPT), in the year 2014, it was estimated that there were about 1 million immigrants without proper documentation (Terra, 2014). These data reveal the need to be prepared to deal with this growing flow of people, guaranteeing them dignified conditions upon arriving in the country and always managing to comply with the conditions imposed by the treaties to which the State is a party. For this to happen, the right to work has emerged as one of the fundamental pillars of the

migrant integration process and it has also been one of the main obstacles, generating major controversies.

While on the one hand labor is seen as one of the main factors responsible for migrant integration into the new country, on the other hand, the possibility of nationals losing their jobs due to competition with foreigners emerge. Such insecurity on the part of the population has caused episodes of discrimination and xenophobia involving these individuals. This makes them even more vulnerable, something which hampers the integration process. It is in this context that the State must play an important role to protect the rights of these people, especially as a guarantor of human dignity. To do this, the labor legislation constitutes a vital mechanism within the process, especially in Brazil, since its basic principle is the protection of hyposufficient individuals.

In order to clarify this theme, an analysis of the Brazilian legal system is conducted to address the migratory issue and, more specifically, focusing on undocumented migrant workers[1] and the way how the IAHRS deals with the theme, through its decisions and positions, in order to see if the Brazilian State complies with the guidelines imposed by it. To do this, an initial approach to the treatment of the issue by the IAHRS' agencies has been provided. Next, we investigate the way undocumented migrant workers are treated in Brazil. In addition to the country's legislation, especially the Lei de Migração (2017), the jurisprudence on the theme is also analyzed, as well as small sketches about how the Brazilian government and local society talk of this situation. Finally, the local and international contexts are compared in order to find an answer to the problem, in addition to some solutions and models to follow that are introduced, so that a number of effects and consequences of adopting – or not – certain attitudes are pointed out.

This way, we may define whether the Brazilian labor legal system complies with the rules and standards of the IACHR, in order to safeguard the rights that shall be guaranteed to undocumented migrants. This is needed not only due to the cogent nature of the Convenção Americana sobre Direitos Humanos (1992) and the other diktats from the IACHR, but also in order to insert the State into a process of globalization that is more harmonious and consistent with human rights, which even contradicts the recent stance adopted by Brazil when withdrawing from the United Nations' (UN's) Global Compact for Migration. The relevance of this correlation is emphasized, too, since not only the protection of migrant workers is sought, but also ensuring social balance by extending the protective measures

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1 According to the Corte Interamericana de Derechos Humanos (2003), an undocumented or irregular migrant worker is the 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." In this sense, the Convenção Internacional sobre a Proteção dos Direitos de Todos os Trabalhadores Migrantes e dos Membros das suas Famílias (1990) complements this concept in its Article 5, b, providing that "[migrant workers] are considered as non-documented or in an irregular situation if they do not comply with the conditions provided for in subparagraph (a) of the present article."

guaranteed to national workers to foreign ones, a protection which, if not provided, can give rise to a peculiar class of workers, with fewer rights, and this could unbalance the supply of manpower and bring profound consequences to the country's social order. Besides, by establishing a comparison between the aforementioned legislative sets, it is sought to conclude if persons from another country, although in a condition of vulnerability, in fact represent a threat to the jobs of Brazilians.

The Inter-American System of Human Rights and undocumented migrants

The global migratory crisis has been increasingly the subject of discussion by international and local agencies that aim to protect human rights. In 2018, the UN drafted the Global Compact for Migration, adopted by 164 States, with the intent of managing a phenomenon that already reaches millions of people around the world (Organização das Nações Unidas no Brasil [ONU Brasil], 2018). At the heart of the discussions there is the agenda of seeking to recognize the right to migrate as an essential need of human beings, as well as the alleged violations of other human rights arising from the migration process. These migrants try, in addition to other issues, such as insecurity, environmental disasters (Granado & Oliveira, 2017) and poor living conditions, achieving better working conditions or even a job, as unemployment plagues several countries around the world, thus migration consists in an exit so that a more dignified means of survival is sought (Torres, 2017).

International human rights protection systems are embedded in this context, given their role as monitors of these guarantees. At the regional level, Brazil is a party to the IAHRS, which consists of some autonomous and independent agencies, such as the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights. Both institutions work on the migration issue. While the IACHR, for instance, has a specific thematic rapporteurship on migrants, the Inter-American Court of Human Rights has already addressed the issue in its judgments.

The IACHR has a broad action on the subject of people's migration. It may publish specific or general reports and recommendations to member States of the Organization of American States (OAS), in addition to conduct on-site visits to monitor compliance with human rights in certain countries. Lastly, it may require the court in rather critical cases that involve repairs for rather serious damages.

Since 1990, specific rapporteurships have been created within the IACHR to deal with the protection of human rights related to certain groups of people, such as indigenous persons, women, etc. Thus, recognizing the vulnerability of those who leave their countries and migrate to a foreign territory, the Rapporteurship on Migrant Workers and Members of

their Families was created in 1996, which has already conducted 13 on-site visits, with an emphasis on the United States of America. America (USA), which has already received the commissions on 4 occasions. This shows the importance that the IACHR gave to the theme.

As a result of its activities, the rapporteurship published the *Informe de Progreso de la Relatoría sobre Trabajadores Migratorios y Miembros de sus Familias* (Comisión Interamericana de Derechos Humanos [CIDH], 1999), after beginning its work a few years before. This document mentions the position adopted by the participating States during the Second Summit of the Americas, enshrined in the Declaração de Santiago (1998), when it was claimed that States should guarantee compliance with the human and fundamental rights of individuals and migrants, especially foreign workers and their families.

As stated in the list of activities, the Rapporteurship on Migrant Workers and Members of their Families began to disclose, in the annual reports published by the IACHR, the actions promoted by the rapporteurship. It is worth highlighting the *Séptimo Informe de Progreso de la Relatoría Especial Sobre Trabajadores Migratorios y Miembros de sus Familias Correspondiente al Período entre enero y diciembre del 2005* (Corte Interamericana de Derechos Humanos, 2006). According to the document, protection is also a responsibility of the issuing State in relation to its nationals who migrate to another country in search of jobs and better conditions to provide for their family. This is so because, according to the Corte Interamericana de Derechos Humanos (2006), the amount of money sent by people living on foreign soil to their countries of origin represents a good percentage of national income, and this may be, in some cases, higher than the product of greater export.

Specifically with regard to undocumented migrants, the report also stresses the importance of the right to nationality by recommending that the States concerned facilitate the issuance of identification documents for those who are in an irregular status, in order to guarantee them not only this fundamental right, but the recognition of their legal personality. These rights, both to nationality and legal personality, are guaranteed by the Convenção Americana sobre Direitos Humanos (1992). Without them, other rights become impossible, making access to basic goods such as health, education, and housing difficult.

In addition to the annual reports, thematic and specific reports are published for some States. In all its reports, the concern with the migrants' rights, especially the undocumented, is clear and it has gained more and more prominence within the IACHR. As a proof of this, the Rapporteurship on Migrant Workers and Members of their Families, which until then had dealt with a rather specific issue within the context of migration, was renamed as Rapporteurship on the Rights of Migrants, embracing a much broader concept as a result of the delicate moment that not only the American continent, but the whole world, began to experience in the midst of a global migratory crisis.

The rapporteur has another key activity: the holding of hearings to deal with issues concerning migrants. As highlights, we may to cite the hearings during the 150th Period of

Sessions, held in March 2014 (Corte Interamericana de Derechos Humanos, 2014a), which addressed the "Human Rights Situation of Haitian Migrant Workers and their Families in the Dominican Republic;" at the 119th Period of Sessions, which dealt with the "Situation of Migrant Workers in the Hemisphere" (Corte Interamericana de Derechos Humanos, 2004); and during the 129th Period of Sessions, which addressed the "Human Rights of Migrant, Refugee, and Displaced Workers in the Americas" (Corte Interamericana de Derechos Humanos, 2007).

Finally, the IACHR's position in its latest thematic report, *Movilidad Humana, Estándares Interamericanos* (Corte Interamericana de Derechos Humanos, 2015), stands out. In it, the IACHR reaffirms its view that irregular migrants are more vulnerable than those with regularized documentation, subject to greater threats of violation of their human rights. It is also worth noticing that non-compliance with migratory standards does not characterize the migrant person as a criminal, since such standards are administrative rules and not criminal laws. Whence, the exceptional nature of arresting an undocumented migrant is reaffirmed, which should be applied only as the last resort, when there is no satisfactory means of managing a situation anymore, so that a person's free interaction in society poses risks to her/his safety or others'.

In turn, regarding the Inter-American Court of Human Rights, which is also an autonomous body that is a party to the IACHR, it is worth highlighting, among its functions, the capacity to exercise two types of jurisdiction: the contentious and the advisory. Although the first is the only one with binding powers, capable of judging concrete cases in which the convention is violated and punishing offenders, the second has been responsible for drafting advisory opinions of great importance to migration as a theme.

It is likely that the most significant of them was the position of the Corte Interamericana de Derechos Humanos (2003), addressing the theme *Condición jurídica y derechos de los migrantes indocumentados.* The request was made by Mexico and it sought to clarify points concerning the treatment of migrant workers, in the light of international human rights law, in face of the approach that certain domestic legal systems have given to the subject. The advisory opinion also dealt with the issue of work involving these people, above all by means of the vote of the Brazilian judge Antônio Augusto Cançado Trindade.

Other advisory opinions have already addressed the issue of undocumented migrants, such as the *Opinión Consultiva OC-16/99* (Corte Interamericana de Derechos Humanos, 1999) and, more recently, the *Opinión Consultiva OC-21/14* (Corte Interamericana de Derechos Humanos, 2014b). However, the first advisory opinion shows up, to date, as the most important among those addressing this subject, and it is also mentioned in Resolution No. 2005/47 published by the UN Commission on Human Rights (Office of the High Commissioner for Human Rights [OHCHR], 2005). The central point to be clarified is:

- What is the behavior to be adopted by the States towards undocumented migrant workers? That is, if a State takes away one or more labor rights of an irregular migrant, would it be violating the human rights guaranteed by the aforementioned compacts?

Among the points addressed by the advisory opinion, the need for States parties to comply with the Convenção Americana sobre Direitos Humanos (1992) stands out, and they are obliged to comply with the provisions of that document, either the positive or negative obligations. Regarding possible conflicts with domestic law, the court clarified that local legislation cannot be used to support non-compliance with rules contained in the Convenção Americana sobre Direitos Humanos (1992, § 165).

It also dealt with the application of the principles of equality and non-discrimination (Convenção Americana sobre Direitos Humanos, 1992, §§ 82-96). The advisory opinion has defined that these principles constitute a universal obligation, since they are present in a large number of treaties, attributing to them the characteristic of *jus cogens*. Thus, such precepts must be observed both in the public and private spheres, and the State must work as a guarantor of this application (*Drittwirkung Theory*). At a rather complex point on the theme, it has established an exception to these principles, highlighting that distinctions may occur, when a different treatment shows to be pertinent, through what it named as "objective and reasonable justification."

Thus, it is inferred from the court's position that the migrant worker, regardless of her/his legal status in the country where she/he is living, when engaging in a paid activity (or it must be this way) for the benefit of others, establishes an employment relationship with her/his employer, characterized by rights and duties between both of them. Labor rights derive from the existing employment relationship and they have no connection to the migrant worker's circumstances. Thereby, the aim is fighting against the less favorable working conditions that may be imposed on these individuals in comparison to other workers (Corte Interamericana de Derechos Humanos, 2003). Finally, it is worth stressing the court's position as for the conflict between domestic law provisions and those contained in the treaties, when, due to its special protective nature, a domestic labor standard provides for a more beneficial condition to workers, it must prevail over any international provision (*pro homine principle*).

In turn, regarding the *Opinión Consultiva OC-16/99* (Corte Interamericana de Derechos Humanos, 1999) and the *Opinión Consultiva OC-21/14* (Corte Interamericana de Derechos Humanos, 2014b), published by the same agency, both do not specifically address the migrant worker in an irregular status. In the first, the court takes a major step by recognizing migrants' vulnerability, declaring the right to consular information as a significant tool to fight against discrimination. The various levels of migrants' vulnerability are recognized, as in the case of undocumented migrants, who undergo a special precarious condition. So, there would be a need to define new strategies to address this problem, establishing the

migrants as the focus of attention for migration policies and guaranteeing the significance that should be attributed to this relation – the new configuration might allow a better understanding of the vulnerability situations which these persons are in, revealing various possibilities of protection for them, something which is consistent in the midst of a complex circumstance (Jubilut & Lopes, 2017).

While the regular migrants usually enjoy more rights, the undocumented ones face adverse situations before the legal system to which they are submitted. This leads them to be exposed to other risks, such as unfavorable working conditions, often involving work in conditions analogous to slavery, or, when it comes to migrant children, child labor, which was the theme of the advisory opinion issued in the *Opinión Consultiva OC-21/14* (Corte Interamericana de Derechos Humanos, 2014b).

This document addresses the various forms of vulnerability to which children are subject in the migration context. Among the possible forms of exploitation to which migrants are exposed, child labor is one of the major concerns for international society. The International Labor Organization (ILO), through its General Director, Guy Ryder, drew attention to this issue, by considering that the difficulties faced by migrant and refugee children make them susceptible to child labor (Empresa Brasil de Comunicação [EBC], 2017). According to him, every child has the right to protection against child labor, and eradicating it is one of the objectives proposed for the Sustainable Development Goals (Organização das Nações Unidas [ONU], 2015).

The very claimants wishing to see the latter advisory opinion have recognized, in the request's text, the vulnerability at stake, attributing to children an even more fragile condition in relation to migrants as a whole. These circumstances oblige the State itself to treat these persons in a differential way, always seeking to guarantee compliance with the fundamental rights of these individuals, which, in this case, besides having the migratory status as a triggering element of a vulnerability condition, also illustrate through age a factor that generates even more responsibility on the part of the public power as guarantor of protection. The postulation was not intended to (de)characterize a situation, but rather to discuss means that could be used to avoid improper conduct by States.

According to the Inter-American Court of Human Rights, these rights must reflect obligations not only for the State, but for the society as a whole and for the family (Convenção Americana sobre Direitos Humanos, 1992, § 56). Consequently, the occurrence of child labor, today, evidences a failure on the part of the whole society, especially those who are directly and indirectly related to the activity or its product. In doing so, the court sees that all protection, as well as the guarantees of these children's growth, must be provided in a comprehensive manner, disregarding any migratory status.

The court also drew attention to the case of unaccompanied children, i.e. those who migrate without the company of their parents or guardians (Convenção Americana sobre

Direitos Humanos, 1992, § 89). The advisory opinion paid special attention to this point, recognizing a situation more vulnerable than those mentioned above. In doing so, it assigns States the duty of special protection to this group, and they should create exceptional and effective mechanisms to combat such threats.

So, analyzing the 3 advisory opinions, we may notice the way how the Inter-American Court of Human Rights has positioned over the last 2 decades on the theme. When addressing the issue of migrant vulnerability, since the *Opinión Consultiva OC-16/99* (Corte Interamericana de Derechos Humanos, 1999) it is possible to trace a key milestone in the agencies' legal construction. The protection afforded to the group of persons moving internationally, especially those who are undocumented, must be capable to combat the threats to these individuals during and after such displacement. It is necessary to disregard their possible irregular migratory condition so that States can act in accordance with the Convenção Americana sobre Direitos Humanos (1992), thus fulfilling their obligations to guarantee and respect human rights. With this, it is clear the court's position that this circumstance should not constitute an obstacle to the individuals' enjoyment of labor rights.

The legal approach and the Brazilian legal system's position

The migrant who arrives in Brazil is protected by the national legal system. In addition to the international human rights standards ratified by the Brazilian State, the individual is protected by local legislation. However, besides the rights that this legislative set grants, there are also duties and obligations that she/he should observe. Yet, despite some segregation that may exist in the treatment between a foreigner and a national person, the rule is that equality prevails between them. This approach reveals many details that need to be examined with due attention.

Due to the Brazilian legal system's framing, in which the Federal Constitution is the legal norm hierarchically above all others, it is necessary to begin this analysis based on the approach to the theme provided by the Constituição da República Federativa do Brasil (CF, 1988), which certifies that everyone is equal before the law, without any distinction, guaranteeing the nationals or resident foreigners protection of fundamental rights. In this way, all the rights and individual guarantees granted to Brazilians must also be guaranteed to migrants, including the workers' social rights listed in Article 7 of the CF (1988), encompassing human rights at this level.

According to Delgado (2007), the sphere in which human rights are situated is directly related to the systematics of the labor legal rationale, since the individual, when entering the society, which is governed by the capitalist socioeconomic model, possibly is regulated, in some way, by labor law, as labor relations constitute most of the interactions existing in the current economic model. So to speak, the realization of fundamental rights

is not experienced unless a dignified condition of survival is achieved by deploying the essential rights of human beings. And the mechanism that guarantees this realization to a greater number of people, today, is work, by means of its most varied conceptions, which are governed by labor law.

The human rights recognized in treaties by the Brazilian State, when internalized by the national legal system, assume the nature of constitutional provisions, which makes them binding rules (Massaú, 2017). Such a characteristic denotes even more the importance of these rights, since, being elevated to the category of constitutional legal norms, they are at a higher level in the Brazilian legal framework and they get dressed with greater effectiveness and relevance[2] .

This is the case of undocumented migrant workers, who, despite their irregular migratory status, submit to a labor relationship that makes them subject to rights in all spheres. It is also necessary to analyze the treatment given to this group of persons by infraconstitutional legislations: in this case, due to the nature of the theme, only the Union can enact laws, as recently happened with the Lei de Migração (2017) – CF (1988, Article 22, XV).

The new Brazilian Migration Law

The Lei n. 13.445 (2017) repealed the Lei n. 818 (1949), which dealt with acquisition, loss, and reacquisition of nationality and loss of political rights, and the Estatuto do Estrangeiro (1980), which was the subject of much criticism – derived from the dictatorial period, the latter predominantly had discriminating nationalist ideas (Kenicke, 2016), besides purposes incompatible with those brought by the CF (1988) and the human rights treaties to which Brazil is a party[3] . Among other contradictions of the repealed legal acts, the prohibition of foreigners in organizing or participating in marches and in exercising party political activities (Estatuto do Estrangeiro, 1980, Articles 107, II and III) stood out.

Also, it is worth noticing that the new legal act does not affect the application of other specific standards on the theme, either national or international. As an example we have the Lei n. 9.474 (Lei do Refúgio, 1997) and the Lei 11.961 (2009), which deal with

2 Notwithstanding the position advocated in the text, there is a need to notice there is disagreement on the subject. The status attributed to human rights treaties is still the result of some discussions in Brazilian doctrine and jurisprudence, regarding, for instance, what was debated within the scope of the Recurso Extraordinário (RE) 466,343/SP. Thus, there are those who advocate the thesis that these treaties have a supralegal nature, as advocated by Gilmar Mendes and those who treat these documents as having a value of constitutional standard, like Augusto Cançado de Trindade, Flávia Piovesan, and Valério Mazzuoli. Finally, there is a current arguing that these standards are hierarchically superior to the constitutional standards, like Celso de Albuquerque Mello.

3 Like Article 2 of the Estatuto do Estrangeiro (1980, our translation), which stated: “in the application of this Law, Brazil’s national security, institutional organization, political, socio-economic, and cultural interests, as well as the defense of national workers, shall be met.”

temporary residence for foreigners in an irregular status in the country, in addition to other treaties to which Brazil is a party.

However, despite the progress that the recent legislation has brought, it also deserves criticism on a number of points, especially with regard to its regulatory decree (Decreto n. 9.199, 2017), which restricts numerous advances provided by it. Therefore, this decree has been considered, in some points, contrary to the normalization brought by the new Lei de Migração (2017) (Ramos et al., 2017), which should not occur, since this is a secondary standard, whose function is eminently regulatory, according to the CF (1988, Article 84, IV).

There are contradictions between what determines the law and what is provided for in the decree. For instance, while the Lei de Migração (2017) imposes non-criminalization of migration, as established by its Article 123, the Decreto n. 9.199 (2017) provides, in its Article 211, the arrest of migrants in cases of compulsory withdrawal, such as deportation and expulsion. This represents an extrapolation, by the decree, of the limits posed by law, which may be considered an illegality generated by abuse in the exercise of the Executive Branch's regulatory power. The decree also assigns various functions to the Federal Police (Polícia Federal – PF) for managing migrants, and this endorses the idea of criminalization, which, according to the law, must be combated. However, it is worth highlighting that the law itself also works in this way, by using terms such as 'expulsion,' 'extradition,' 'repatriation,' and 'deportation.'

In addition to other points that are also criticized due to the same reason, there are some common provisions in both standards that deserve a critical eye. Both the law and the decree have a certain discrimination regarding the entry of migrant workers in Brazil. Just as already provided for in the repealed Estatuto do Estrangeiro (1980), there is a preference for foreigners who are considered as belonging to a more qualified workforce. This is clear in Lei n. 13.445 (2017, Article 14, § 5), when it is determined that a temporary visa may be granted to migrants who arrive in Brazil with the intent of temporarily residing here and for the purpose of working, provided there is a formal job proposal offered by some company operating in the country.

Likewise, the Decreto n. 9.199 (2017) brings in its Article 38 other exceptions to the general rule for granting labor visas, giving preference to certain professions and establishing segregation between migrant workers. Such a determination may be seen as a division between desirable and undesirable foreign workers. Thus, it is possible that a considerable part of foreign workers who do not have a regular status in Brazil fall into the second category, since many of them may not have higher education or be able to carry out the activities considered 'strategic' by the decree.

Also concerning the decree, we highlight there may be an omission in the legal text in cases where temporary labor visas are granted, such as Articles 38, § 1, and 64, § 1. This is so because, due to the issue of trafficking in persons and slave labor, which involves

a significant number of migrants, it is necessary to ensure that such recruitment takes place in a dignified manner, so that the employer has covered all costs of the migration process. Thus, through a statement by the employer her/himself, it might be proved that the employee did not have contracted this debt, something which would be one of the elements evidencing slave labor and international trafficking in persons. Despite the efforts of some public sector agencies, such as the Defensoria Pública da União (DPU, 2017), which made several criticisms to the regulation of the Lei de Migração (2017), as well as several members of civil society, the calls for a wording more compatible with the ideals brought by this law were not considered in the drafting of this decree.

It is worth warning that, in relation to the provisions mentioned above and to Article 14, § 5, of the Lei n. 13.445 (2017), there is a problem within the practical scope brought by the two legal acts. Although the possibility of granting temporary labor visas was one of the most important innovations of the new migration rules, it was conditioned to a formal job proposal offered by some legal entity active in Brazil. This means that the scope of this standard is restricted, leaving aside a large part of the migrants who arrive here, especially due to the definition given by the decree, which now considers a formal job proposal only an individual labor contract or a service delivery contract. In this way, irregular entry of people in the country ends up being stimulated, something which does not allow Brazil to enjoy the benefits of being able to better control the migrants who arrive here via regular entry.

Furthermore, in spite of the problems observed both in the law and in the decree, and also the vetoes on the part of the head of the Executive Power to some provisions of the law, it is necessary to emphasize, once again, that it represents a considerable advance in comparison to the old Estatuto do Estrangeiro (1980). After the issuance of the new rules that establish the Brazilian immigration system, the State is normatively closer to the international human rights diktats with regard to the migration issue. Although there is still much to move forward on, the presence of a legal instrument to deal with the issue that stemmed from a dictatorial regime was not compatible with the government's purposes that were in force at the time of the publication of the Lei n. 13.445 (2017).

Brazilian labor legislation and jurisprudence

An analysis of the set of laws that govern labor law in Brazil is key to grasp how migrant workers are treated within the domestic legal system. As a consequence of Article 4 of the Lei de Migração (2017), a person who arrives in the country, even if she/he does not have the documents necessary to regularize her/his immigration status, is covered by the same rights as a Brazilian in a labor relationship. To put this into practice, the elements

that characterize a labor relationship should be observed, as required by the Decreto-Lei n. 5.452 (Consolidação das Leis do Trabalho [CLT], 1943, Articles 2 and 3).

The principle of reality prevails over form in the country. This standard represents a major guarantee for undocumented migrant workers. This is so because the concrete reality of delivery of services must prevail over any contractual clause agreed that does not have practical effects, even in the absence of a contract itself. Thus, in the case of those individuals who do not have their immigration status regularized and carry out labor activities for another person as an employer, the labor relationship is configured, even if there is no formal labor contract, just as in the case, for instance, of signing the employment record book.

The CLT (1943, Article 16, IV) requires, in the case of a foreigner, her/his identification as such, which, again, might refer her/him to the need of presenting documents she/he does not have. In the same sense, the head of Article 359 of the CLT (1943, our translation) points out the impediment to hiring a foreign employee who does not have an employment record book:

> No company shall hire to be at its service a foreign employee without the foreign national's identity card duly annotated.

Thus, any company is unable to formalize a labor contract an individual who is not in a regular migratory status.

There is also a need to stress that Chapter II, Title III, of the CLT (1943), entitled "Da Nacionalização do Trabalho," may be regarded as not enforceable. This is so because, after the promulgation of the CF (1988), such impositions remained unviable, in accordance with the provisions of the head of its Article 5, which brought, after the end of the dictatorial period from 1964 to 1985, isonomy between nationals and workers from other countries (Nicoli, 2010). In this sense, the Decreto n. 58.819 (Convenção OIT n. 97, 1966, Article 6), concerning migrant workers, and the Decreto n. 62.150 (Convenção OIT n. 111, 1968, Article 1, a), concerning discrimination with regard to employment and occupation, go against the CLT's provisions, since they provide for the prohibition of any discrimination against foreign workers (Lopes, 2009).

Other limitations such as these are also found throughout the text of the CLT (1943), as in the case of practitioners who occupy the position of chemist. The CLT (1943, Article 349, our translation) establishes that:

> The number of foreign chemists at the service of private individuals, businesses, or companies may not exceed 1/3 (one third) of the Brazilian practitioners included in their respective workforce.

Nevertheless, there is no doubt that many advances have already been consolidated in the opposite direction. In addition to the new dogmatics brought by the CF (1988), the Lei de Migração (2017), and the numerous provisions repealed or altered by the CLT (1943) represent an advance in giving equal treatment between national and foreign workers under labor law. However, it is also necessary to be aware of how the Judicial Power has dealt with the issue and, in this way, it has acted to ratify the doctrinal position in the sense that the employment relationship between the migrant worker and her/his employer should be recognized independently of the migratory status which she/he is in.

This is the case of the judgment handed down by the Tribunal Superior do Trabalho (TST, 2006) in the records of the Recurso de Revista (RR) n. 750094-05.2001.5.24.5555, in which labor rights were guaranteed to the employee, regardless of having or not the migrant's identification document, contrary to the provisions of the aforementioned act (CLT, 1943, Article 359) and preventing invalidity of the labor contract at stake. This decision is particularly highlighted due to the notoriety given to an international document. The rapporteur also referred to the position adopted by the Federal Supreme Court (Supremo Tribunal Federal – STF) when recognizing international regulations, especially with regard to labor rights. Thus, human rights rules, besides governing the international relations to which Brazil is a party, according to the CF (1988, Article 4, II), should be in force in the Brazilian legal system. In this sense, the TST (2016) has manifested more recently by means of a judgment of the 3ª Turma in the records of the Agravo de Instrumento no Recurso de Revista (AIRR) n. 160200-71.2006.5.02.0007, when analyzing the possibility to be considered null and void the employment contract of a foreigner in an irregular status in Brazil. Once again, this possibility was dismissed by the Tribunal Superior do Trabalho (TST) when not considering the object of an illicit employment contract. In addition, the constitutional principle of equality was reaffirmed as a support for the realization of another constitutional guarantee, the human being's dignity.

The Supremo Tribunal Federal (STF, 2013) dealt with migratory issues in the *Habeas Corpus* (HC) n. 117.878/SP, filed by a foreigner who was responding to a criminal case capable of leading to his expulsion. In the case, it was determined that the impossibility of progressing through a regime during the sentence execution would violate the human rights guaranteed by the CF (1988, Article 4), and the isonomy principle, which confers equality between nationals and foreigners (CF, 1988, Article 5). In the body of the sentence's text, Minister Ricardo Lewandowski stated that:

> [...] the jurisprudence of this High Court has established the understanding that, as a rule, the mere fact that the foreigner is in an irregular status in the country is not a proper reason to make the benefits of criminal execution unfeasible (STF, 2013, our translation).

As it deals with criminal matters, the considerations of the STF's ministers gain even more relevance due to the object of the lawsuit: the person's freedom. On the other hand, the association between the decisions is evidenced at the moment in which Ricardo Lewandowski addresses the legal basis used to give his vote:

> In fact, the exclusion of foreigners from the progressive punishment system conflicts with several constitutional principles, especially the prevalence of human rights (Article 4, II) and isonomy (Article 5), which prohibits any discrimination based on race, color, creed, religion, sex, age, origin, and nationality (STF, 2013, our translation).

However, despite this protective treatment given by Brazilian jurisprudence to migrant workers, there is a need to be highlight that not all decisions of the Judiciary Branch follow the same purpose. This is the case, for instance, of the RR n. 0001406-71.2015.5.12.0034, judged by the 5ª Turma of the TST (2017), in which there is discrimination between nationals and foreigners based on the decision of the collegiate body, by not allowing the participation of a Haitian refugee in a public contest to fill vacancies for the position of street-sweeper.

The ministers' justification when making use of the STF's interpretation, which considered the CF (1988, Article 37, I) of limited applicability, does not seem satisfactory. This is so due to two reasons: firstly, because the limitation of rights deriving from the failure to draw up a legal standard that has been awaiting publication for thirty years as a result of the excessive delay of the Legislative Power does not show to be satisfactory[4] ; second, in the concrete case, because the interpretation given by the court conflicts with other precepts of the CF (1988) itself – just as in the head of Article 5, providing fundamental rights for everyone who is in Brazil, including foreigners. Such rights have immediate applicability.

4 The STF's action itself reinforces this idea when remedying other legislative omissions by judging injunction applications (mandados de injunção – MI), as in the following cases: MI 670/ES, MI 708/DF, and MI 712/PA (right of civil servants' strike); MI 795/DF (civil servants' special retirement); and, more recently, MI 943/DF (prior notice proportional to the length of time in service).

Thus, in spite of the reform that it underwent, the pronouncement of the regional collegiate seems more suitable for the concrete case. The 12th Region's Regional Labor Court (Tribunal Regional do Trabalho da 12ª Região – TRT-12) relied on international standards to ground its decision, and this seemed to be more consistent with the equality diktats imposed by the CF (1988). It has been demonstrated that, although the jurisprudence as a whole recognizes the migrant worker's equality with the nationals, there are occasional cases of discrimination. This is another obstacle that people who arrive in Brazil need to face when looking for a job.

The treatment of undocumented migrants in Brazil and the need for protecting these individuals

Due to the cultural characteristics of a welcoming country that had prevailed so far, the migratory flow of people who leave their countries and seek better living conditions and job opportunities in Brazil has increased significantly (Velasco & Mantovani, 2016). Receiving these people is no easy task, especially for a country going through an economic, social, and political crisis. Hence, even with all the efforts that the Brazilian government may have made in recent years in order to adapt to the global migration phenomenon, the structure available today does not seem to be able to face the various situations generated by the arrival of immigrants.

In addition to the difficulties already posed by the absent or ineffective public services capable of serving the migrants who arrive in the country to look for a job, in early 2019, the Brazilian government, under the authority of the recently inaugurated President of the Republic, Jair Bolsonaro, decided to abandon the UN's Compact for Migration. Although the decision does not directly affect the Brazilian legislation dealing with migration, it represents a fog on the road that leads to the future of foreigners living in the country. Although their rights may be protected by the Brazilian Lei de Migração (2017), in addition to other legal acts and the CF (1988) itself, government's action, especially on the part of the federal government, is of paramount importance for enforcing these legal guarantees.

And, in addition, the position adopted by Brazilian authorities places the country against the international movement to deal with the migratory issue. While the more than 160 States that have signed the compact believe in a multilateral exit, with decisions at a global level, the new Brazilian Foreign Affairs Minister, Ernesto Araújo, believes that the subject should be dealt with internally, in accordance with the local reality and having the precepts of sovereignty as a basis. Such a view has been bemoaned by several international organizations that protect human rights and this is even regarded as harmful to Brazilians themselves, since the country has more nationals living in other countries than foreigners

on Brazilian soil, as the UN document aims to combat discrimination against individuals due to their migrant status (Chade, 2018).

Even so, some measures adopted by local governments, both at the federal and state and municipal levels, deserve to be highlighted, such as decentralization of the service issuing employment record books for immigrants provided by the Ministry of Labor and Employment (Ministério do Trabalho e Emprego – MTE), which authorized municipal bodies to issue this document, making it easier for these individuals to access it, through the Portaria MTE n. 699 (2015). Also in this way, there emerged the Referral Center for Immigrant Assistance (Centro de Referência e Atendimento para Imigrantes – CRAI) and the Lei Municipal n. 16.478/2016 – Lei de Políticas Públicas para Imigrantes (Município de São Paulo, 2016) – created by São Paulo City, the country's main migratory destination. This law also gave rise to the Conselho Municipal de Migrantes, which actively participates in decision-making in civil society, outlining the guidelines and goals brought by the law (Município de São Paulo, 2016). The São Paulo City Hall also makes available on its website all services provided, besides information about them.

Just as in the case of access to information and difficulty with the language, obstacles to migrant regularization end up exposing undocumented migrants to abusive situations (Exame, 2017). Access to public services is often hampered by the fact that a foreigner does not have a formal identification. Moreover, other cases of abuse against foreigners are usually reported and, in many of them, the vulnerability posed by lack of documentary regularization is the main cause of such disorders (Governo do Brasil, 2015).

Other factors stand out as elements capable of hindering the discriminatory context. In an interview to the BBC Brasil, Gustavo Barreto (Puff, 2015) drew attention to the selectivity of Brazilian hostility towards migrants. According to him, there are differences in the press approach, for instance, to Europeans and Africans. This distinction is also observed in the terminology used to address these persons. The connotations given to the term refugee would be considered bad, while the status of migrant reveals some uncertainty. In turn, those considered 'good' are commonly referred to only as foreigners. This separation is the result of a specific difference between the admiration caused by a foreigner in certain contexts and xenophobia. In the first, there is a predilection for something new, unfamiliar, while the second has a prevalence of prejudice, racism, which generates mistrust and discomfort (Koltar, 1999).

In the same way as in the various fields of society, migrant stigmatization also occurs in the labor market. Often, the conditions imposed by the circumstances experienced by these persons determine the type of activity they will carry out upon arriving in the country. Particularly, undocumented migrants, individuals at greater vulnerability in this context, usually undergo degrading work conditions, and it is not uncommon to find them in situations involving slave labor (Saladini, 2011). However, in general, migrants are associated

with jobs that require less skilled labor, since most of the absorption of foreign labor force is associated with these kinds of professions, something which ends up creating an additional label for these individuals, just as in the case of the USA regarding Hispanic migrants, who generally occupy job positions related to domestic or cleaning services (Saladini, 2011).

Although migrants' vulnerability, especially concerning undocumented persons, reveals an urgency in the role played by the State in protecting these individuals, there is also a latent eagerness on the part of society. At this moment, a major question emerges in order to define what is intended in this study:

• Is granting greater protection to immigrants is beneficial to the Brazilian society as a whole?

Brazil, as a member of the OAS and due to the fact that it has ratified the Convenção Americana sobre Direitos Humanos (1992), in addition to having recognized the jurisdiction of the Inter-American Court of Human Rights, through the Decreto n. 4.463 (2002), therefore submits to the decisions made by this court, as well as it must take actions in accordance with the precepts dictated by the sentences of the court. This is so because, in addition to the accountability that may be generated by non-compliance with what has been agreed, there is a good faith commitment between the States parties to act in accordance with what has been established within this international structure in the American continent.

In the event of non-compliance with provisions of the Convenção Americana sobre Direitos Humanos (1992), Brazil may be held internationally liable due to acts related to non-observance of fundamental rights of migrants in Brazilian territory and it may be required to compensate damages by means of indemnities and the imposition of other measures to comply with international provisions. As an example, there is the condemnation of the Brazilian State in the Caso Trabalhadores da Fazenda Brasil Verde vs. Brasil (TST, 2006)[5] .

In spite of this, it is observed at the domestic level that the obligations imposed by the IAHRS are not always fulfilled, either directly by the State, as it occurs in Brazil through the STF's position – Arguição de Descumprimento de Preceito Fundamental (ADPF) n. 153/DF – in face of the decision of the Inter-American Court of Human Rights in the Caso Gomes Lund (Meyer, 2012), or indirectly, by its individuals (Vieira, 2013). There remains

5 The Brazilian state was condemned by the Inter-American Court of Human Rights in the Caso Trabalhadores da Fazenda Brasil Verde vs. Brasil by means of a sentence issued on October 26, 2016, thus involving international liability due to its acts. According to the court, Brazil violated a number of human rights protected by the American Convention on Human Rights when acting negligently to analyze allegations of slave labor in the Fazenda Brasil Verde (State of Pará) and other related crimes. Among the violations, the court listed the right not to be subject to slavery (Article 6.1 of the American Convention on Human Rights, 1992 – concurrently with articles 1.1, 3, 5, 7, 11, 19, and 22 of the same legal act), not to be discriminated against due to her/his economic status (Article 6.1 concurrently with Article 1.1, also of the American Convention on Human Rights, 1992), non-observance of judicial guarantees (Article 8.1 concurrently with Article 1.1 of the same convention), and right to judicial protection (Article 25, concurrently with Articles 1.1 and 2).

only the political commitment of the Brazilian State, in relation to the other OAS members, to observe the court's decisions and act in accordance with the diktats stipulated by the regional structure for protecting human rights. Thus, even with the reparation to victims who suffered abuses, it might not be guaranteed that the State would be effective in its role of promoting human rights for all. Only a political decision in the OAS General Assembly's framework might have more coercive power when imposing sanctions and restrictions on the Brazilian State, according to Article 65 of the Convenção Americana sobre Direitos Humanos (1992):

> To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a State has not complied with its judgments, making any pertinent recommendations.

Nevertheless, throughout history, this has not been a measure usually adopted by the body (Ramos, 2002). Such a reality ends up generating a certain distrust with regard to the effectiveness of these international standards.

Thus, this gives rise to Alexander Betts' proposal. Contrary to what many studies indicate, it is not necessary that new binding treaties are created to provide undocumented migrants with protection. His proposal is that a base of legal standards is structured without cogent force capable of better managing and defining the rights that stem from the existing international standardization.

That is, through the so-called *soft laws*[6] , it would be possible to fill two gaps that, according to him, are the cause of the vulnerable scenario that is revealed to the person who is in an irregular status in a foreign country. According to Betts, there is no imperative need to create binding standards to address possible legislative deficiencies at the international level today. These standards already exist. The author thinks that what is missing is a solid and consensual understanding of their application to undocumented migrants and also systematic accountability among the international organizations that might be responsible for putting such guidelines into practice (Betts, 2010).

In addition to the consequences already addressed at the international level, in which Brazil may be held responsible for such violations through mechanisms imposed by the IAHRS, it is also necessary to analyze the consequences that may arise at the domestic

6 According to the concept adopted by Salem Nasser, *soft law* consists in standards that do not have a binding effect and present a value limitation as for their coercive capacity. They have a broad and generic nature, capable of establishing guidelines to those who are subject to them, given their relevance, for instance, in the interpretation and consecration of other legislative sets within the scope of international law. Due to this reason, they are considered a source of public international law (Nasser, 2006).

level. At this point, migrant's vulnerability, especially the undocumented person, poses a double threat. Both the individual who suffers the direct consequences of being inserted in such circumstances and the Brazilian society may become victims of such a social anomaly. This is so because, as a consequence of the miserable condition which these individuals may find themselves in, they may be more likely to be co-opted by criminal organizations or even more susceptible to exploitation through slave labor. In both cases, the consequences represent a problem not only in these migrants' individual sphere, but they can have repercussions in society in a broader way.

This reality can trigger a serious social problem, capable of destabilizing society in the economic sphere. This systematic and inhuman disregard for labor rights constitutes a social damage that affects the whole community, and it can also have repercussions abroad. Employers who use this dishonest device, especially companies, end up enjoying undue benefits by reducing their expenses with employees. This affects the economic order established by the CF (1988), since this configures the practice of unfair competition in the market, violating what is disposed in Article 170, IV, of the CF (1988) and could give rise to the practice of social dumping.

The practice of migrant worker's exploitation in an irregular situation has already been addressed by the UN in the Convenção Internacional sobre a Proteção dos Direitos de Todos os Trabalhadores Migrantes e dos Membros das suas Famílias (1990). Brazil has not adopted this convention, yet. This issue was addressed by the UN Human Rights Council in one of its recommendations made in reaction to Brazil during the Universal Periodic Review (UPR) process, in the year 2017 (ONU Brasil, 2017). In its preamble, this document recognizes the situation of maximum vulnerability of undocumented migrants, as well as the greater possibility of labor exploitation of these individuals by their employers. The Brazilian government's omission and the intensification of practices mentioned above combine to increase labor rights' flexibilization and to allow greater labor exploitation, since subjecting undocumented migrants to poor working conditions results in employers' preference for this workforce, since it is less costly. This can lead to imbalance within society and result in a more intense process of lowering rights.

Undocumented migrant workers are often subject to situations that are not allowed by labor legislation, such as excessive working hours, non-payment of compulsory values, such as vacation days and 13th wage, as well as other poor conditions that may characterize the activity as a situation similar to slavery. Nevertheless, the prevalent position in labor law is that the treatment given to migrants, regardless of their migratory status, should be the same as that offered to nationals.

Thus, it is clear that the concern with the migrant worker's dignity goes beyond the individual sphere of a potential victim of human rights violations. The society must address this issue and the authorities must make every effort needed to face such practices.

Conclusion

The vulnerability that affects migrants is a determining factor in the lives of these persons when arriving on foreign soil. The difficulties faced by such individuals often put them in a weak position before the risks that life in a capitalist society involves. As the study has shown, the circumstances surrounding undocumented migrants are quite delicate.

This reality has a direct influence on any experience lived within the new society. Especially concerning the insertion of undocumented migrants in the local labor market, these conditions reveal a challenging scenario for such individuals, since many of them are unable to resist dishonest proposals, job offers that do not provide decent conditions for carrying out the activity. Thus, migrant workers are often subject to situations that are not allowed by labor legislation, such as excessive working hours, non-payment of compulsory values, such as vacation days and the 13th wage, and other poor conditions that may characterize the activity as a situation similar to slavery.

Being aware of this scenario, international human rights law has evolved in order to provide these persons with special protection, due to the greater vulnerability to which they are exposed. Although there is still a need for better definitions and a more solid structuring of its standards and guidelines, the prevalent position in labor law is that the treatment given to migrants, regardless of their migratory status, should be the same as that offered to nationals.

The CF (1988) deals with such precepts, but reality does not always reflect them. Although infraconstitutional legislation does not has literal contradictions with the CF (1988), this may prove ineffective for its deployment. Some factors inherent to the very condition of undocumented migrants also contribute to this context, such as their difficulty to access justice.

All these elements unfavorable to migrant workers are capable of changing any threatening conception that may be attributed to such individuals. Although certain sectors of society strive to build this image, reality translates another view into that context. Indeed, while the simple arrival of migrants, especially the most vulnerable ones, may have little influence on the local labor market, the lack of protection to these individuals can, in turn, lead to major and serious problems.

Due to these reasons, international human rights protection systems have been increasingly concerned with the subject. As Brazil is a party to the Convenção Americana sobre Direitos Humanos (1992), it must also be aware of the positions of its agencies in charge of inspecting and judging the behaviors adopted by the states that are parties to them. Thus, in order to avoid Brazil being punished for violation of human rights, the State must align its behaviors with the views adopted by the IAHRS.

In this sense, it is worth stressing that the Brazilian State's accountability in the inter-American regional system may occur due to violations of human rights documents, both at the regional level and those established internationally to which it is a party. For this reason, it is important that Brazilian authorities know how the Court works and the Inter-American Commission on Human Rights, besides keeping in line with the decisions and positions of these agencies. The action of both of them demonstrates the concern to recognize this vulnerable reality of migrants and to provide these individuals with greater protection, so that they can enjoy a relationship of greater equality with the nationals.

There are increasing cases of violations of human rights of migrant workers in Brazil, even though these practices stem from a private relationship, just as in the labor sphere. According to the view of the Inter-American Court of Human Rights, States also have a duty to punish those responsible for such violations. If they fail to do so, they may be held liable for omission, as in the Caso Trabalhadores da Fazenda Brasil Verde vs. Brasil (TST, 2006).

Finally, the Brazilian State's accountability may also occur due to lack of implementation of the human rights resulting from the international documents to which it is a party. The States, when signing a human rights treaty, make a good faith commitment to carry out the agreed diktats and cannot refrain from complying with the latter by claiming that domestic legal standards prevent the realization of their precepts.

The need that the Brazilian State conforms to international human rights standards by providing migrant workers with greater protection, especially those who are in an irregular status, has been evidenced. If, on the one hand, suspicions and uncertainties regarding these individuals cannot find reasons to persist, the lack of protection for undocumented migrants is one of the main challenges to be tackled by the State and society. After all, the imbalance that may stem from such an anomaly could have negative social repercussions and, perhaps, only benefit those interested in maintaining this situation for the purposes of personal gain.

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