Institution:	Inter-American Court of Human Rights
File Number(s):	OC-18/03
Title/Style of Cause:	Juridical Condition and Rights of Undocumented Migrants
Doc. Type:	Advisory Opinion
Decided by:	President: Antonio A. Cancado Trindade; Vice President: Sergio Garcia Ramirez; Judges: Hernan Salgado Pesantes; Oliver Jackman; Alirio Abreu Burelli; Carlos Vicente de Roux Rengifo Judge Maximo Pacheco Gomez advised the Court that, owing to circumstances beyond his control, he would be unable to attend the sixtieth regular session of the Court; therefore, he did not take part in the deliberation and signature of this Advisory Opinion.
Dated:	17 September 2003
Citation:	Undocumented Migrants, Advisory Opinion, OC-18/03 (IACtHR, 17 Sep. 2003)
Editor's Comment:	Requested by the United Mexican States

THE COURT

renders the following Advisory Opinion:

I. PRESENTATION OF THE REQUEST

1. On May 10, 2002, the State of the United Mexican States (hereinafter "Mexico" or "the requesting State"), based on Article 64(1) of the American Convention on Human Rights (hereinafter "the American Convention", "the Convention" or "the Pact of San José"), submitted to the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court") a request for an advisory opinion (hereinafter also "the request") on the "[...] deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights; and also with 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."In addition, the request dealt with "the meaning that the principles of legal equality, non-discrimination and the equal and effective protection of the law have come to signify in the context of the progressive development of international human rights law and its codification."

2. Likewise, Mexico stated the considerations that gave rise to the request and, among these, it indicated that:

Migrant workers, as all other persons, must be ensured the enjoyment and exercise of human rights in the States where they reside. However, their vulnerability makes them an easy target for violations of their human rights, based, above all, on criteria of discrimination and, consequently, places them in a situation of inequality before the law as regards the effective enjoyment and exercise of these rights
[…]
In this context, the Government of Mexico is profoundly concerned by the incompatibility with the OAS human rights system of the interpretations, practices and enactment of laws by some States in the region. The Government of Mexico considers that such interpretations, practices and laws imply the negation of labor rights based on discriminatory criteria derived from the migratory status of undocumented workers, among other matters. This could encourage employers to use those laws or interpretations to justify a progressive loss of other labor rights; for example: payment of overtime, seniority, outstanding wages and maternity leave, thus abusing the vulnerable status of undocumented migrant workers. In this context, the violations of the international instruments that protect the human rights of migrant workers in the region are a real threat to the exercise of the rights protected by such instruments.

3. Mexico requested the Court to interpret the following norms: Articles 3(1) and 17 of the Charter of the Organization of American States (hereinafter "the OAS"); Article II (Right to Equality before the Law) of the American Declaration on the Rights and Duties of Man (hereinafter "the American Declaration"); Articles 1(1) (Obligation to Respect Rights), 2 (Domestic Legal Effects), and 24 (Equality before the Law) of the American Convention; Articles 1, 2(1) and 7 of the Universal Declaration on Human Rights (hereinafter "the Universal Declaration"), and Articles 2(1), 2(2), 5(2) and 26 of the International Covenant on Civil and Political Rights.

4. Based on the preceding provisions, Mexico requested the Court's opinion on the following issues:

In the context of the principle of equality before the law embodied in Article II of the American Declaration, Article 24 of the American Convention, Article 7 of the Universal Declaration and Article 26 of the [International] Covenant [of Civil and Political Rights ...]:

1) Can an American State establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labor rights, so that the migratory status of the workers impedes per se the enjoyment of such rights?
2.1) Should Article 2, paragraph 1, of the Universal Declaration, Article II of the American Declaration, Articles 2 and 26 of the [International] Covenant [of Civil and Political Rights], and Articles 1 and 24 of the American Convention be interpreted in the sense that an individual's legal residence in the territory of an American State is a necessary condition for that State to respect and ensure the rights and freedoms recognized in these provisions to those persons subject to its jurisdiction?

2.2) In the light of the provisions cited in the preceding question, can it be considered that the denial of one or more labor right, based on the undocumented status of a migrant worker, is compatible with the obligations of an American State to ensure non-discrimination and the equal, effective protection of the law imposed by the above-mentioned provisions?

Based on Article 2, paragraphs 1 and 2, and Article 5, paragraph 2, of the International Covenant on Civil and Political Rights,

3) What would be the validity of an interpretation by any American State which, in any way, subordinates or conditions the observance of fundamental human rights, including the right to equality before the law and to the equal and effective protection of the law without discrimination, to achieving migration policy goals contained in its laws, notwithstanding the ranking that domestic law attributes to such laws in relation to the international obligations arising from the International Covenant on Civil and Political Rights and other obligations of international human rights law that have an erga omnes character?

In view of the progressive development of international human rights law and its codification, particularly through the provisions invoked in the instruments mentioned in this request,

4) What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of ius cogens? If the answer to the second question is affirmative, what are the legal effects for the OAS Member States, individually and collectively, in the context of the general obligation to respect and ensure, pursuant to Article 2, paragraph 1, of the [International] Covenant [on Civil and Political Rights], compliance with the human rights referred to in Articles 3 (l) and 17 of the OAS Charter?

5. Juan Manuel Gómez-Robledo Verduzco was appointed as the Agent and the Ambassador of Mexico to Costa Rica, Carlos Pujalte Piñeiro, as the Deputy Agent.

II. PROCEEDING BEFORE THE COURT

6. In notes of July 10, 2002, the Secretariat of the Court (hereinafter “the Secretariat”), in compliance with the provisions of Article 62(1) of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”), transmitted the request for an advisory opinion to all the member States, to the Secretary General of the OAS, to the President of the OAS Permanent Council and to the Inter-American Commission on Human Rights. It also advised them of the period established by the President of the Court (hereinafter “the President”), in consultation with the other judges of the Court, for submission of written comments or other relevant documents with regard to this request.

7. On November 12, 2002, Mexico presented a communication, with which it forwarded a copy of a communication from its Ministry of Foreign Affairs providing information about an opinion of the International Labour Organization (ILO) related to labor rights for migrant workers.

8. On November 14, 2002, the State of Honduras presented its written comments. Some pages were illegible. On November 1, 2002, the complete version of the brief with comments was received.

9. On November 15, 2002, Mexico presented a communication in which it forwarded information that was complementary to the request, and included the English version of a formal opinion that it had requested from the International Labor Office of the International Labor Organization (ILO) and which, according to Mexico, "was of particular relevance for the […] request procedure."

10. On November 26, 2002, the State of Nicaragua presented its written comments.

11. On November 27, 2002, the Legal Aid Clinic of the College of Jurisprudence of the Universidad San Francisco de Quito presented an amicus curiae brief.

12. On December 3, 2002, Mexico presented a communication, with which it forwarded the Spanish version of the formal opinion that it had requested from the International Labor Office of the International Labor Organization (ILO) (supra para. 9).

13. On December 12, 2002, the Delgado Law Firm presented an amicus curiae brief.

14. On January 8, 2003, Liliana Ivonne González Morales, Gail Aguilar Castañón, Karla Micheel Salas Ramírez and Itzel Magali Pérez Zagal, students of the Faculty of Law of the Universidad Nacional Autónoma de Mexico (UNAM), presented an amici curiae brief by e-mail. The original of this communication was submitted on January 10, 2003.

15. On January 13, 2003, the States of El Salvador and Canada presented their written comments.

16. On January 13, 2003, the Inter-American Commission on Human Rights presented its written comments.

17. On January 13, 2003, the United States of America presented a note in which it informed the Court that it would not present comments on the request for an advisory opinion.

18. On January 13, 2003, the Harvard Immigration and Refugee Clinic of the Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of the Harvard and Boston College Law Schools, and the Global Justice Center presented an amici curiae brief.

19. On January 16, 2003, the President issued an Order in which he convened "a public hearing on the request for Advisory Opinion OC-18, on February 24, 2002, at 9 a.m." so that "the member States and the Inter-American Commission on Human Rights [could] present their oral arguments."

20. On January 17, 2003, the State of Costa Rica presented its written comments.

21. On January 29, 2003, the Secretariat, on the instructions of the President, and in communication CDH-S/067, invited Gabriela Rodríguez, United Nations Special Rapporteur on

the Human Rights of Migrants to attend the public hearing convened for February 24, 2003 (supra para. 19), as an observer.

22. On February 3, 2003, the Secretariat transmitted a copy of the complementary information to its request for an advisory opinion forwarded by Mexico (supra paras. 9 and 12), the written comments submitted by the States of Honduras, Nicaragua, El Salvador, Canada and Costa Rica (supra paras. 8, 10, 15 and 20), and by the Inter-American Commission (supra para. 16), to all the foregoing.

23. On February 6, 2003, Mario G. Obledo, President of the National Coalition of Hispanic Organizations, presented a brief supporting the request for an advisory opinion.

24. On February 6, 2003, Thomas A. Brill of the Law Office of Sayre & Chavez, presented an amicus curiae brief.

25. On February 6, 2003, Javier Juárez of the Law Office of Sayre & Chavez, presented an amicus curiae brief.

26. On February 7, 2003, Mexico presented a brief in which it substituted the Deputy Agent, Ambassador Carlos Pujalte Piñeiro, by Ricardo García Cervantes, actual Ambassador of Mexico to Costa Rica (supra para. 5).

27. On February 10, 2003, Beth Lyon forwarded, via e-mail, an amici curiae brief presented by the Labor, Civil Rights and Immigrants' Rights Organizations in the United States.

28. On February 13, 2003, the Harvard Immigration and Refugee Clinic of the Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of the Harvard and Boston College Law Schools and the Global Justice Center forwarded the final, corrected version of the amici curiae brief that they had presented previously (supra para. 18).

29. On February 13, 2003, Rebecca Smith forwarded another copy of the amici curiae brief presented by the Labor, Civil Rights and Immigrants' Rights Organizations in the United States (supra para. 27).

30. On February 21, 2003, the Academy of Human Rights and International Humanitarian Law of the American University, Washington College of Law, and the Human Rights Program of the Universidad Iberoamericana of Mexico submitted an amici curiae brief.

31. On February 21, 2003, the Center for International Human Rights of the School of Law of Northwestern University submitted an amicus curiae brief. The original of this brief was presented on February 24, 2003.

32. On February 24, 2003, a public hearing was held at the seat of the Court, in which the oral arguments of the participating States and the Inter-American Commission on Human Rights were heard.

There appeared before the Court:

for the United Mexican States:
- Juan Manuel Gómez Robledo, Agent;
- Ricardo García Cervantes, Deputy Agent and Ambassador of Mexico to Costa Rica;
- Víctor Manuel Uribe Aviña, Adviser;
- Salvador Tinajero Esquivel, Adviser, Director of Inter-institutional Coordination and NGOs of the Human Rights Directorate of the Ministry of Foreign Affairs, and
- María Isabel Garza Hurtado, Adviser;

for Honduras:
- Álvaro Agüero Lacayo, Ambassador of Honduras to Costa Rica, and
- Argentina Wellermann Ugarte, First Secretary of the Embassy of Honduras in Costa Rica;

for Nicaragua:
- Mauricio Díaz Dávila, Ambassador of Nicaragua to Costa Rica;

for El Salvador:
- Hugo Roberto Carrillo, Ambassador of El Salvador to Costa Rica, and
- José Roberto Mejía Trabanino, Coordinator of Global Issues of the Ministry of Foreign Affairs of El Salvador;

for Costa Rica:
- Arnoldo Brenes Castro, Adviser to the Minister of Foreign Affairs;
- Adriana Murillo Ruin, Coordinator of the Human Rights Division of the Foreign Policy Directorate;
- Norman Lizano Ortiz, Official of the Human Rights Division of the Foreign Policy Directorate;
- Jhonny Marín, Head of the Legal Department of the Directorate of Migration and Aliens, and
- Marcela Gurdián, Official of the Legal Department of the Directorate of Migration and Aliens; and

for the Inter-American Commission on Human Rights:
- Juan Méndez, Commissioner, and
- Helena Olea, Assistant.

Also present as Observers:

for the Oriental Republic of Uruguay:
- Jorge María Carvalho, Ambassador of Uruguay to Costa Rica;

for Paraguay:
- Mario Sandoval, Minister, Chargé d'Affaires of the Embassy of Paraguay in Costa Rica;

for the Dominican Republic:
- Ramón Quiñones, Ambassador, Permanent Representative of the Dominican Republic to the OAS;
- Anabella De Castro, Minister Counselor, Head of the Human Rights Section of the Ministry of Foreign Affairs, and
- José Marcos Iglesias Iñigo, Representative of the State of the Dominican Republic to the Inter-American Court of Human Rights;

for Brazil:
- Minister Nilmário Miranda, Secretary for Human Rights of Brazil;
- María De Luján Caputo Winkler, Chargé d'Affaires of the Embassy of Brazil in Costa Rica, and
- Gisele Rodríguez Guzmán, Official of the Embassy of Brazil in Costa Rica;

for Panama:
- Virginia I. Burgoa, Ambassador of Panama to Costa Rica;
- Luis E. Martínez-Cruz, Chargé d'Affaires of the Embassy of Panama in Costa Rica, and
- Rafael Carvajal Arcia, Director of the Legal Adviser's Office of the Ministry of Labor and Employment;

for Argentina:
- Juan José Arcuri, Ambassador of Argentina to Costa Rica;

for Peru:
- Fernando Rojas S., Ambassador of Peru to Costa Rica, and
- Walter Linares Arenaza, First Secretary of the Embassy of Peru in Costa Rica; and

for the United Nations:
- Gabriela Rodríguez, Special Rapporteur on the Human Rights of Migrants.

33. On March 5, 2003, Mexico presented a brief with which it forwarded a copy of the "revised text of the oral argument made by the Agent" in the public hearing held on February 24, 2003 (supra para. 32).

34. On March 20, 2003, Mexico forwarded a copy of the press communiqué issued by its Ministry of Foreign Affairs on March 11, 2003.

35. On March 28, 2003, Mexico presented a brief in which it remitted the answers to the questions formulated by Judge Cançado Trindade and Judge García Ramírez during the public hearing (supra para. 32).

36. On April 7, 2003, the President issued an Order in which he convened "a public hearing on the request for Advisory Opinion OC-18, at 10 a.m. on June 4, 2003", so that the persons and organizations that had forwarded amici curiae briefs could present their respective oral arguments. The Order also indicated that if any person or organization that had not presented an

amicus curiae brief wished to take part in the public hearing, they could do so, after they had been accredited to the Court.

37. On May 15, 2003, the Center for Justice and International Law (CEJIL) presented an amicus curiae brief.

38. On May 16, 2003, the Center for Legal and Social Studies (CELS), the Ecumenical Service for the Support and Orientation of Refugees and Immigrants (CAREF) and the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires, submitted an amici curiae brief by e-mail. The original of this brief was presented on May 28, 2003.

39. On June 4, 2003, a public hearing was held in the Conference Hall of the former Chamber of Deputies, Ministry of Foreign Affairs, in Santiago, Chile, during which the oral arguments presented as amici curiae by various individuals, universities, institutions and non-governmental organizations were presented.

There appeared before the Court:

for the Faculty of Law of the Universidad Nacional Autónoma de México (UNAM):
- Itzel Magali Pérez Zagal, Student
- Karla Micheel Salas Ramírez, Student
- Gail Aguilar Castañón, Student and
- Liliana Ivonne González Morales, Student

for the Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools and the Global Justice Center:

- James Louis Cavallaro, Associate Director, Human Rights Program, Harvard Law School
- Andressa Caldas, Attorney and Legal Director, Global Justice Center, Rio de Janeiro, Brazil and
- David Flechner, Representative, Harvard Law Student Advocates for Human Rights

for the Law Office of Sayre & Chavez:
- Thomas A. Brill, Attorney at Law

for the Labor, Civil Rights and Immigrants´ Rights Organizations in the United States of America:
- Beth Lyon, Assistant Professor of Law, Villanova University School of Law, and Rebecca Smith, Attorney, National Employment Law Project

for the Center for International Human Rights of Northwestern University School of Law:
- Douglas S. Cassel, Director, and
- Eric Johnson

for the Juridical Research Institute of the Universidad Nacional Autónoma de México:
- Jorge A. Bustamante, Researcher;

for the Center for Justice and International Law (CEJIL):
- Francisco Cox, Lawyer;

for the Center for Legal and Social Studies CELS, and (CELS), the Ecumenical Service for the Support and Orientation of Immigrants and Refugees (CAREF) and the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires:
- Pablo Ceriani Cernadas, Lawyer, Coordinator of the Legal Clinic;

for the Office of the United Nations High Commissioner for Refugees (UNHCR):
- Juan Carlos Murillo, Training Officer, Regional Legal Unit; and

for the Central American Council of Ombudsmen:
- Juan Antonio Tejada Espino, President, Central American Council and Ombudsman of the Republic of Panama.

Also present as Observers:

for the United Mexican States:
- Ricardo Valero, Ambassador of Mexico in Chile and
- Alejandro Souza, Official, General Coordination of Legal Affairs of the Ministry of Foreign Affairs Of Mexico; and

for the Inter-American Commission on Human Rights:
- Helena Olea, Lawyer.

40. On June 4, 2003, during the public hearing held in Santiago, Chile, the Central American Council of Ombudsmen presented and amicus curiae brief.

41. On June 24, 2003, Jorge A. Bustamante remitted, by e-mail, an amicus curiae brief presented by the Juridical Research Institute of the Universidad Nacional Autónoma de México (UNAM). The original of this brief was presented on July 3, 2003.

42. On July 3, 2003, Thomas A. Brill, of the Law Office of Sayre & Chavez, presented his final written arguments.

43. On July 8, 2003, Beth Lyon forwarded, by e-mail, the final written arguments of the Labor, Civil Rights and Immigrants' Rights Organizations in the United States. The original of this brief was received on August 7, 2003.

44. On July 11, 2003, Liliana Ivonne González Morales, Gail Aguilar Castañón, Karla Micheel Salas Ramírez and Itzel Magali Pérez Zagal, Students of the Faculty of Law of the Universidad Nacional Autónoma de México (UNAM), presented their brief with final arguments by e-mail. The original of this brief was presented on July 18, 2003.

45. On July 11, 2003, the Center for International Human Rights of the School of Law of Northwestern University, presented its final written arguments, by e-mail. The original of this brief was presented on July 18, 2003.

46. On July 30, 2003, the Center for Legal and Social Studies (CELS), the Ecumenical Service for the Support and Orientation of Immigrants and Refugees (CAREF) and the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires presented their final written arguments.

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47. The Court will now summarize the written and oral comments of the requesting State, the participating States and the Inter-American Commission, and also the briefs and oral arguments presented by different individuals, universities, institutions and non-governmental organizations as amici curiae:

The requesting State:

Regarding the admissibility of the request, Mexico stated in its brief that:

By clarifying the scope of the State's international obligations with regard to the protection of the labor rights of undocumented migrant workers, irrespective of their nationality, the opinion of the Court would be of considerable relevance for effective compliance with such obligations by the authorities of States that receive those migrants.
The request submitted by Mexico does not expect the Court to rule in the abstract, "but to consider concrete situations in which it is called on to examine the acts of the organs of any American State, inasmuch as the implementation of such acts may lead to the violation of some of the rights protected in the treaties and instruments mentioned in the […] request." Nor does it expect the Court to interpret the domestic law of any State.

In addition to the considerations that gave rise to the request and that have been described above (supra para. 2), the requesting State indicated that:

The protection of the human rights of migrant workers is also an issue of particular interest to Mexico, because approximately 5,998,500 (five million nine hundred and ninety-eight thousand five hundred) Mexican workers reside outside national territory. Of these, it is estimated that 2,490,000 (two million four hundred and ninety thousand) are undocumented migrant workers who, lacking regular migratory status, "become a natural target for exploitation, as individuals and as workers, owing to their particularly vulnerable situation."
In less than five months (from January 1 to May 7, 2002), the Mexican Government had to intervene, through its consular representatives, in approximately 383 cases to defend the human rights of Mexican migrant workers, owing to issues such as discrimination in employment-related matters, unpaid wages, and compensation for occupational illnesses and accidents.
The efforts made by Mexico and other States in the region to protect the human rights of migrant workers have been unable to avoid a resurgence of discriminatory legislation and practices

against aliens seeking employment in a foreign country, or the regulation of the labor market based on discriminatory criteria, accompanied by xenophobia in the name of national security, nationalism or national preference.

With regard to the merits of the request, Mexico indicated in its brief:

Regarding the first question of the request (supra para. 4):

In the context of the principle of equality before the law embodied in Article II of the American Declaration, Article 24 of the American Convention, Article 7 of the Universal Declaration and Article 26 of the Covenant, any measures that promotes a harmfully different treatment for persons or groups of persons who are in the territory of an American State and subject to its jurisdiction, are contrary to the acknowledgment of equality before the law that prohibits any discriminatory treatment established by law.
Workers whose situation is irregular are subjected to harsh treatment owing to their migratory status and, consequently, are considered an inferior group in relation to the legal or national workers of the State in question.
An organ of a State party to the international instruments mentioned above which, when interpreting domestic legislation, establishes a different treatment in the enjoyment of a labor right, based solely on the migratory status of a worker, would be making an interpretation contrary to the principle of legal equality.
This interpretation could provide justification for employers to dismiss undocumented workers, under the protection of a prior decision entailing the suppression of certain labor rights because of an irregular migratory status.
The circumstance described above is particularly critical when we consider that this irregular situation of the undocumented worker leads to the latter being afraid to have recourse to the government bodies responsible for monitoring compliance with labor standards; consequently, employers who utilize such practices are not punished. It is more advantageous from a financial point of view to dismiss an undocumented worked because, contrary to what happens when national or legal resident workers are dismissed, the employer is not obliged to compensate such dismissals in any way; and this is in “evident contradiction with the principle of equality before the law.”
The right to equality before the law is not applicable only with regard to the enjoyment and exercise of labor rights, it also extends to all rights recognized in domestic legislation; thus it covers “a much broader universe of rights that the fundamental rights and freedoms embodied in international law.” The scope of the right to equality “has important applications in the jurisdiction of human rights bodies.” For example, the United Nations Human Rights Committee has examined complaints concerning discrimination of rights that are not expressly included in the International Covenant on Civil and Political Rights, and rejected the argument that it lacks the competence to hear complaints about discrimination in the enjoyment of rights protected by the International Covenant on Economic, Social and Cultural Rights.
Mexico referred to the contents of General Comment 18 of the Human Rights Committee on Article 26 of the International Covenant on Civil and Political Rights.

Regarding the second question of the request (supra para. 4):

The provisions of Articles 2(1) of the Universal Declaration, II of the American Declaration, 2 and 26 of the International Covenant on Civil and Political Rights, and 1 and 24 of the American Convention, underscore the obligation of States to ensure the effective exercise and enjoyment of the rights encompassed by those provisions, and also the prohibition to discriminate for any reason whatever.

The obligation of the American States to comply with their international human rights commitments "goes beyond the mere fact of having laws that ensures compliance with such rights." The acts of all the organs of an American State must strictly respect such rights, so that "the conduct of the State organs leads to real compliance with and exercise of the human rights guaranteed in international instruments."

Any acts of an organ of an American State resulting in situations contrary to the effective enjoyment of the fundamental human rights, would be contrary to that State's obligation to adapt its conduct to the standards established in international human rights instruments.

Regarding the third question of the request (supra para. 4):

It is "unacceptable" for an American State to subordinate or condition in any way respect for fundamental human rights to the attainment of migratory policy objectives contained in its laws, evading international obligations arising from the International Covenant on Civil and Political Rights and other obligations of international human rights law of an erga omnes nature. This is so, even when domestic policy objectives are cited, which are provided for in domestic legislation and considered legitimate for attaining certain ends from the Government's point of view, "including, for example, the implementation of a migratory control policy based on discouraging the employment of undocumented aliens."

Even in the interests of public order – which is the ultimate goal of the rule of law – it is unacceptable to restrict the enjoyment and exercise of a right. And, it would be much less acceptable to seek to do so by citing domestic policy objectives contrary to the public welfare.

"Although […] in some cases and in very specific circumstances, an American State may restrict or condition the enjoyment of a particular right, in the situation brought to the attention of the Court […] the requirements for these circumstances are not met."

Article 5(2) of the International Covenant on Civil and Political Rights enshrines the pre-eminence of the norm most favorable to the victim; "this establishes the obligation to seek, in the corpus iuris gentium, the norm intended to benefit the human being as the ultimate owner of the rights protected in international human rights law."

This is similar to transferring to international human rights law the Martens clause, which is part of international humanitarian law, and which confirms the principle of the applicability of international humanitarian law to all circumstances, even when existing treaties do not regulate certain situations.

The legal effects of obligations erga omnes lato sensu are not established only between the contracting parties to the respective instrument. These effects "are produced as rights in favor of third parties (stipulation pour autrui), thus recognizing the right, and even the obligation, for other States – whether or not they are parties to the instrument in question – to guarantee their fulfillment." In this respect, Mexico invoked the decisions of the International Court of Justice in the Barcelona Traction (1970), East Timor (1995) and Implementation of the Convention for the Prevention and Punishment of the Crime of Genocide (1996) cases.

International case law, with the exception of that related to war crimes, "has not interpreted […] fully the legal regime applicable to obligations erga omnes, or, at best, it has done so cautiously and perhaps with a certain trepidation. The Inter-American Court of Human Rights is hereby called on to play an essential role in establishing the applicable law and affirming the collective guarantee that is evident in Article 1 of its Statute."

Regarding the fourth question of the request (supra para. 4):

Abundant "teachings of the most highly qualified publicists of the various nations (Article 38, paragraph (d), of the Statute of the International Court of Justice)[,] have stated that the fundamental human rights belong ab initio to the domain of norms of ius cogens." Judges have also rendered individual opinions about the legal effect of recognition that a provision enjoys the attributes of a norm of jus cogens, in accordance with Article 53 of the Vienna Convention on the Law of Treaties.
Mexico referred to the commentary of the International Law Commission on Articles 40 and 41 of the then draft articles on State responsibility.
As in the case of obligations erga omnes, "case law has acted cautiously and even lagged behind the opinio iuris communis (the latter as a manifestation of the principle of universal morality) to establish the norms of jus cogens concerning the protection of the fundamental human rights definitively and to clarify the applicable legal norms."

Furthermore, in the brief submitted on November 15, 2002 (supra paras. 9 and 12), Mexico added that:

Regarding the first question of the request (supra para. 4):

This question "is intended to clarify the existence of fundamental labor rights which all workers should enjoy[,] and which are internationally recognized in different instrument [,] and to determine whether denying those rights to workers because of their migratory status would signify according a harmful treatment, contrary to the principles of legal equality and non-discrimination."
States may accord a distinct treatment to documented migrant workers and to undocumented migrant workers, or to aliens with regard to nationals. For example, political rights are only recognized to nationals. However, in the case of internationally recognized human rights, all persons are equal before the law and have the right to equal protection in accordance with Article 26 of the International Covenant on Civil and Political Rights.
A harmfully distinct treatment may not be accorded in the implementation of the fundamental labor rights, "even though, except as provided for in this basic body of laws, States are empowered to accord a distinct treatment." Harmfully distinct treatment of undocumented migrant workers would violate fundamental labor rights.
Several international instruments permit us to identify the fundamental labor rights of migrant workers. For example, Articles 25 and 26 of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families recognize fundamental labor rights to all migrant workers, irrespective of their migratory status.
In addition, on November 1, 2002, the International Labor Office of the International Labor Organization issued a formal opinion on the scope and content of ILO Convention No. 143

concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers and Recommendation No. 151 on Migrant Workers. This opinion elaborates on other fundamental labor rights of all migrant workers. Mexico agrees with the International Labor Office that there is a basic level of protection that is applicable to documented and undocumented workers.

Regarding the second question of the request (supra para. 4):

States may accord a different treatment to migrant workers, whose situation is irregular; however, under no circumstance are they authorized to take discriminatory measures as regards the enjoyment and protection of internationally recognized human rights.
Even though it is possible to identify fundamental labor rights based on the international instruments, "this concept is evolving. As new norms arise and are incorporated into the body of fundamental labor rights, they should benefit all workers, irrespective of their migratory status."

In response to the questions of some of the judges of the Court, Mexico added that:

The fundamental labor rights that may not be restricted are those that are established in international human rights instruments with regard to all workers, including migrants, irrespective of their regular or irregular situation. In this respect, there appears to be consensus, deriving from these international instruments, that there are "a series of rights that, by their very nature, are so essential to safeguard the principle of equality before the law and the principle of non-discrimination, that their restriction or suspension, for any reason, entails the violation of these two cardinal principles of international human rights law." Some examples of these fundamental rights are: the right to equal remuneration for work of equal value; the right to fair and satisfactory remuneration, including social security and other benefits derived from past employment; the right to form and join trade unions to defend one's interests; the right to judicial and administrative guarantees to determine one's rights; the prohibition of obligatory or forced labor, and the prohibition of child labor.
Any restriction of the enjoyment of the fundamental rights derived from the principles of equality before the law and non-discrimination violates the obligation erga omnes to respect the attributes inherent in the dignity of the human being, and the principal attribute is equality of rights. Specific forms of discrimination can range from denying access to justice to defend violated rights to denying rights derived from a labor relationship. When such discrimination is made by means of administrative or judicial decisions, it is based on the thesis that the enjoyment of fundamental rights may be conditioned to the attainment of migratory policy objectives.
The individual has acquired the status of a real active and passive subject of international law. The individual may be an active subject of obligations as regards human rights, and also individually responsible for non-compliance with them. This aspect has been developed in international criminal law and in international humanitarian law. On other issues, such as the one covered by this request for an advisory opinion, it can be established that "in the case of fundamental norms, revealed by objective manifestations and provided there is no doubt concerning their validity, the individual, such as an employer, may be obliged to respect them, irrespective of the domestic measures taken by the State to ensure or even violate, compliance with them."

The “transfer” of the Martens clause to the protection of the rights of migrant workers would imply that such persons had been granted an additional threshold of protection, according to which, in situations in which substantive law does not recognize certain fundamental rights or considers them less important, such rights would be justiciable. The safeguard of such fundamental human rights as those evident from the principles of equality before the law and non-discrimination, is protected by “the principles of universal morality,” referred to in Article 17 of the OAS Charter, even in the absence of provisions of substantive law that are immediately binding for those responsible for ensuring that such rights are respected.

Honduras:

In its written and oral comments, Honduras stated that:

Regarding the first question of the request (supra para. 4):

Not every legal treatment establishing differences violates per se the enjoyment and exercise of the right to equality and to non-discrimination. The State is empowered to include objective and reasonable restrictions in its legislation in order to harmonize labor relations, provided it does not establish illegal or arbitrary differences or distinctions. “Legality is intended to guarantee the right to fair, equitable and satisfactory conditions.”
The State may regulate the exercise of rights and establish State policies by legislation, without this being incompatible with the purpose and goal of the Convention.

Regarding the second question of the request (supra para. 4):

The legal residence of a person who is in an American State cannot be considered conditio sine qua non to ensure the right to equality and non-discrimination, as regards the obligation established in Article 1(1) of the American Convention and in relation to the rights and freedoms recognized to all persons in this treaty.
Article 22 of the American Convention guarantees freedom of movement and residence, so that every person lawfully in the territory of another State has the right to move about in it and to reside in it subject to the provisions of the law. The American Convention and the International Covenant on Civil and Political Rights grant “States the right that those subject to their jurisdiction must observe the provisions of the law.”
The regulation concerning legal residence established in the laws of the State does not violate the international obligations of the State if it has been established by a law – strictu sensu and including the requirements that are established – which does not violate the intent and purpose of the American Convention.
“[I]t cannot be understood that legislation establishes a harmfully distinct treatment for undocumented migrant workers, when the Convention determines that the movement and residence of an alien in the territory of a State party should be legal and is not incompatible with the intent and purpose of the Convention.”

Regarding the third question of the request (supra para. 4):

Determining migratory policies is a decision for the State. The central element of such policies should be respect for the fundamental rights arising from the obligations assumed before the international community. An interpretation that violates or restricts human rights "subordinating them to the attainment of any objective[,] violates the obligation to protect such rights." The interpretation must not deviate from the provisions of the American Convention, or its intent and purpose.
The purpose of compliance with the provisions of the law is to protect national security, public order, public health or morality, and the rights and freedoms of others.
The General Study on Migrant Workers conducted by the International Labour Organization concluded that "it is permissible" to restrict an alien's access to employment, when two conditions are met: a) in the case of "limited categories of employment or functions"; and b) when the restriction is necessary in "the interests of the State." These conditions may refer to situations in which the protection of the State's interest justifies certain employments or functions being reserved to its citizens, owing to their nature.

Regarding the fourth question of the request (supra para. 4):

In certain cases, inequality in treatment by the law may be a way of promoting equality or protecting those who appear to be weak from a legal standpoint.
The fact that there are no discriminatory laws or that the legislation of Honduras prohibits discrimination is not sufficient to ensure equality of treatment or equality before the law in practice.
The American States must guarantee a decorous treatment to the migrant population in general, in order to avoid violations and abuse of this extremely vulnerable sector.

Nicaragua:

In its written and oral comments, Nicaragua indicated that:

The request for an advisory opinion submitted by Mexico "is one more measure that can assist States, and national and international organizations, define the scope of their peremptory obligations[,] established in human rights treaties, and apply and comply with them, in particular, with regard to strengthening and protecting the human rights of migratory workers."
Article 27 of the Constitution of Nicaragua establishes that, in national territory, all persons enjoy State protection and recognition of the rights inherent in the human being, the respect, promotion and protection of human rights, and the full exercise of the rights embodied in the international human rights instruments acceded to and ratified by Nicaragua.

El Salvador:

In its written and oral comments, El Salvador indicated that:

It considers that the request should take into account provisions of the International Covenant on Economic, Social and Cultural Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador") and the International Convention on the Protection of the Rights of all Migrant Workers and

Members of their Families, “because these treaties are relevant to the opinion requested on the protection of human rights in the American States.”
“[T]he implementation and interpretation of secondary legislation cannot subordinate the international obligations of the American States embodied in international human rights treaties and instruments.”
When an employment relationship is established between a migrant worker and an employer in an American State, the latter is obliged to recognize and guarantee to the worker the human rights embodied in international human rights instruments, including those relating to the right to employment and to social security, without any discrimination.

Canada:

In its written comments, Canada stated that:

Three elements of Canadian legislation and policy relate to the subject of the request for an advisory opinion: first, the international support that Canada provides to matters concerning migrants; second, the categories of migrants and temporary residents (visitors) that are established in the Canadian Immigration and Refugee Protection Act; and, third, the protection of fundamental rights and freedoms in Canada.
Canada is concerned about the violations of the rights of migrants throughout the world. Canada supported the United Nations resolution establishing the Office of the Special Rapporteur on the Human Rights of Migrants and collaborated in drafting the mandate of this Office in order to make it strong and balanced.
Immigration is a key component of Canadian society. Attracting and selecting migrants can contribute to the social and economic interests of Canada, reuniting families and protecting the health, security and stability of Canadians.
The term “migrant” is not generally used in Canada. However, the term “migrants,” as understood in the international context, covers three categories of person.
The first category corresponds to permanent residents. It includes migrants, refugees who come to live in Canada and asylum seekers who obtained this status through the corresponding procedure. All these persons have the right to reside permanently in Canada and to request citizenship after three years' residence.
The second category refers to persons who have requested refugee status, as defined in the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol, and who have not obtained the corresponding response. If it is established that the person fulfills the conditions to request refugee status, he has the right to represent himself or to be represented by a lawyer in the proceeding to determine his refugee status. Any person who represents a serious danger to Canada or to Canadian society may not proceed with a request for refugee status. In most cases, those who request refugee status have access to provincial social services, medical care and the labor market. They and their minor children have access to public education (from pre-school to secondary). Once they are granted refugee status, they may request permanent residence and include their immediate family in their request, even if the latter are outside Canada.
The third category corresponds to temporary residents who arrive in Canada for a temporary stay. There are several categories of temporary residents according to the Immigration and Refugee Protection Act: visitors (tourists), foreign students and temporary workers.

Although temporary workers do not enjoy the same degree of freedom as Canadian citizens and permanent residents on the labor market, their fundamental human rights are protected by the Canadian Charter of Rights and Freedoms, enacted in 1982 as part of the 1982 Constitution Act. This Charter applies to all government legislation, programs and initiatives (federal, provincial, territorial and municipal). Most of the fundamental rights and freedoms protected by the Canadian Charter of Rights and Freedoms are guaranteed to all individuals who are in Canadian territory, irrespective of their migratory status or citizenship. Some of these rights are: freedom of association, the right to due process, the right to equality before the law, and the right to equal protection without discrimination of any kind owing to race, national or ethnic origin, color, religion, sex, age, or mental or physical disability. There are some exceptions, because the Canadian Charter of Rights and Freedoms guarantees some rights only to Canadian citizens, such as: the right to vote, and the right to enter, remain in and depart from Canada. The right to travel between the provinces, and the right to work in any province is guaranteed to citizens and permanent residents. Many of these guarantees reflect the right of sovereign States to control the movement of persons across international borders.

The right to equality guaranteed by section 15 of the Canadian Charter of Rights and Freedoms is of particular importance in the context of this request for an advisory opinion. In 1989, in Andrews v. Law Society of British Columbia, the Supreme Court of Canada established that the right to equality includes substantive rather than merely formal equality.Substantive equality usually refers to equal treatment of all individuals and, on some occasions, requires that the differences that exist be acknowledged in a non-discriminatory manner. For example, giving equal treatment to the disabled involves taking the necessary measures to adapt to such differences and to promote the access and inclusion of such individuals in government programs.

In order to demonstrate that section 15 of the Canadian Charter of Rights and Freedoms has been violated, a person alleging discrimination must prove: 1) that the law has imposed on him a different treatment from that imposed on others, based on one or more personal characteristics; 2) that the differential treatment is due to discrimination based on race, national or ethnic origin, color, religion, sex, age, mental or physical disability, or nationality; and 3) that discrimination in the substantive sense exists, because the person is treated with less concern, respect and consideration, so that his human dignity is offended.

For example, in Lavoie v. Canada, most members of the Supreme Court of Canada decided that the preference given to Canadian citizens in competitions for employment in the federal public service discriminates on the grounds of citizenship, and therefore violates section 15(1) of the Canadian Charter of Rights and Freedoms.

In addition to constitutional protection, the federal provincial and territorial governments have enacted human rights legislation to promote equality and prohibit discrimination in employment and services. This legislation applies to the private sector acting as an employer and provider of services, and to the governments.

The Supreme Court of Canada has established that the courts must interpret human rights legislation so as to advance towards the goal of ensuring equal opportunities to all. Following this interpretation, the Supreme Court has reached a series of conclusions on the scope of human rights codes, including the principle of their precedence over regular legislation, unless the latter establishes a clear exception. Discriminatory practices can be contested, even when they are legal. Although the Canadian jurisdictions have different human rights legislation, they are subject to these general principles and must provide the same fundamental protections.

Inter-American Commission on Human Rights:

In its written and oral comments, the Commission stated that:

In international human rights law, the principle of non-discrimination enshrines equality between persons and imposes certain prohibitions on States. Distinctions based on gender, race, religion or national origin are specifically prohibited in relation to the enjoyment and exercise of the substantive rights embodied in international instruments. Regarding these categories, any distinction that States make in the application of benefits or privileges must be carefully justified on the grounds of a legitimate interest of the State and of society, "which cannot be satisfied by non-discriminatory means."

International human rights law prohibits not only deliberately discriminatory policies and practices, but also policies and practices with a discriminatory impact on certain categories of persons, even though a discriminatory intention cannot be proved.

The principle of equality does not exclude consideration of migratory status. States are empowered to determine which aliens may enter their territory and under what conditions. However, the possibility of identifying forms of discrimination that are not specifically intended, but which constitute violations of the principle of equality must be preserved.

States may establish distinctions in the enjoyment of certain benefits between its citizens, aliens (with regular status) and aliens whose situation is irregular. Nevertheless, pursuant to the progressive development of norms of international human rights law, this requires detailed examination of the following factors: 1) the content and scope of the norm that discriminates between categories of persons; 2) the consequences that this discriminatory treatment will have on the persons prejudiced by the State's policy or practice; 3) the possible justifications for this differentiated treatment, particularly its relationship to the legitimate interest of the State; 4) the logical relationship between the legitimate interest and the discriminatory practice or policies; and 5) whether or not there are means or methods that are less prejudicial for the individual and allow the same legitimate ends to be attained.

The international community is unanimous in considering that the prohibition of racial discrimination and of practices directly associated with it is an obligation erga omnes. The jus cogens nature of the principle of non-discrimination implies that, owing to their peremptory nature, all States must observe these fundamental rules, whether or not they have ratified the conventions establishing them, because it is an obligatory principle of international common law. "Even though the international community has not yet reached consensus on prohibiting discrimination based on motives other than racial discrimination, this does not lessen its fundamental importance in all international laws."

To underscore the importance of the principle of equality and non-discrimination, human rights treaties expressly establish this principle in articles related to determined categories of human rights. In this respect, we should mention Article 8.1 of the American Convention, owing to its particular relevance for this request for an advisory opinion. Equality is an essential element of due process.

Any distinction based on one of the elements indicated in Article 1 of the American Convention entails "a strong presumption of incompatibility with the treaty."

Basic human rights must be respected without any distinction. Any differences established with regard to the respect and guarantee of the fundamental rights must have limited application and

comply with the conditions indicated in the American Convention. Some international instruments explicitly establish certain distinctions.

At times the principle of equality requires States to adopt positive measures to reduce or eliminate the conditions that cause or facilitate the perpetuation of the discrimination prohibited by the treaties.

The American States are obliged to guarantee the basic protection of the human rights established in the human rights treaties to all persons subject to their authority, "and [this] does not depend[…] for its application on factors such as citizenship, nationality or any other aspect of the person, including his migratory status."

The rights embodied in the human rights treaties may be regulated reasonably and the exercise of some of them may be subject to legitimate restrictions. The establishment of such restrictions must respect the relevant formal and substantive limits; in other words, it must be accomplished by law and satisfy an urgent public interest. Restrictions may not be imposed for discriminatory purposes, nor may they be applied in a discriminatory manner. Furthermore, "any permissible restriction of rights may never imply the total negation of the right."

The elaboration and execution of migratory policies and the regulation of the labor market are legitimate objectives of the State. To achieve such objectives, States may adopt measures that restrict or limit some rights, provided they respect the following criteria: 1) some rights are non-derogable; 2) some rights are reserved exclusively for citizens; 3) some rights are conditioned to the status of documented migrant, such as those relating to freedom of movement and residence; and 4) some rights may be restricted, provided the following requirements are met: a) the restriction must be established by law; b) the restriction must respond to a legitimate interest of the State, which has been explicitly stated; c) the restriction must have a "reasonable relationship to the legitimate objective", and d) there must not be "other means to achieve these objectives that are less onerous for those affected."

It is the State's responsibility to prove that it is "permissible" to restrict or exclude a specific category of persons, such as aliens, from the application of some provision of the international instrument. "Migratory status can never be grounds for excluding a person from the basic protections granted to him by international human rights law."

In addition, the Inter-American Commission on Human Rights indicated that labor rights are protected in international human rights instruments and, in this respect, referred to the Declaration on Fundamental Principles and Rights at Work of the International Labor Organization (ILO) and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families.

Bearing in mind the development of international human rights law and international labor law, it can be said that "there are a series of fundamental labor laws that derive from the right to work and are at the very center of it."

Lastly, the Inter-American Commission on Human Rights requested the Court to systematize the rights related to employment "ranking them in order to show that some of these labor rights are considered fundamental" and that, consequently, such rights would "comprise the category of rights regarding which no discrimination is allowed, not even owing to migratory status."

Costa Rica:

In its written and oral comments, Costa Rica stated that it would not refer to the last question formulated by the requesting State. Before making its comments on the other three questions, it

set out the following considerations on the "protection of the human rights of migrants in Costa Rica" and on the "principle of reasonableness in the differential treatment of nationals and aliens."

The Costa Rican Constitution establishes a situation of equality in the exercise of rights and obligations between nationals and aliens, with certain exceptions, such as the prohibition to intervene in the country's political affairs, and others established in legal norms. Those exceptions may not violate the other rights enshrined in the Constitution.

"Despite legal measures and executive actions, some situations of a less favorable treatment for illegal immigrant workers unfortunately occur in the area of employment." The General Law on Migration and Aliens prohibits the employment of aliens residing in the country illegally; however, it also establishes that those who do employ such persons are not exempt from the obligation to provide workers with the wages and social security benefits stipulated by law. In this respect, the Legal Department of the Directorate of Migration and Aliens has established that all workers, irrespective of their migratory status, have the right to social security.

The principles of equality and non-discrimination do not imply that all aspects of the rights of aliens must be equated with the rights of nationals. Each State exercises its sovereignty by defining the legal status of aliens within its territory. To this end, "the principle of reasonableness should be used to define the scope of the activities of aliens in a country."

The Constitutional Chamber of the Supreme Court of Justice of Costa Rica has established that reasonableness is a fundamental requirement for an exclusion or restriction to the rights of aliens compared to nationals to be constitutional. Exclusion is when a right is not recognized to aliens, denying them the possibility of performing some activity. Examples of constitutional exclusions relating to aliens are the prohibition to intervene in political affairs and to occupy certain public offices. To the contrary, restrictions recognize a right to the alien, but restrict or limit it reasonably, taking into account the protection of a group of nationals or a specific activity, or the fulfillment of a social function. Restrictions based exclusively on nationality should not be imposed because xenophobic factors, unrelated to parameters of reasonableness, could exist.

The Constitutional Chamber also indicated that "[e]vidently, the equality of aliens and nationals declared in Article 19 of the Constitution is related to that core of human rights regarding which no distinctions are admissible for any reason whatsoever, particularly owing to nationality. However, the Constitution reserves the exercise of political rights to nationals, because such rights are an intrinsic consequence of the exercise of the sovereignty of the people[…]."

The Constitutional Court has emphasized that any exception or restriction to the exercise of a fundamental rights affecting an alien must have constitutional or legal rank, and that the measures should be reasonable and proportional and should not be contrary to human dignity.

The Constitutional Court has declared some norms unconstitutional because it considered them irrational or illogical. They include: legal restrictions for aliens to take part as merchants in a "bonded warehouse"; the prohibition for aliens to be notaries, for advertisements recorded by aliens to be broadcast, and for aliens to act as private security agents; and the exclusion of foreign children as possible beneficiaries of the basic education allowance.

Regarding the first question of the request (supra para. 4):

No human right is absolute and, therefore, the enjoyment of human rights is subject to certain restrictions. The legislator may establish logical exceptions arising from the natural difference between nationals and aliens, but may not establish distinctions that imply a void in the principle

of equality. “It should be recalled that, in all countries, there are differences of treatment – which do not conflict with international standards of protection – for reasons such as age and gender.” There can be no differences as regards salary, and working conditions or benefits.

As in most countries, Costa Rican law establishes that aliens who reside illegally in the country may not work or carry out paid or lucrative tasks, either for their own or someone else’s account with or without a relation of dependency. Accordingly, the irregular situation of a person in a State of which he is not a national results per se in a considerable limitation in his conditions of access to many workers’ rights. Many social benefits for health and employment security and those that are strictly related to employment “entail a series of bureaucratic procedures which cannot be carried out when a person is undocumented.”

When the domestic legislation of a State establishes essential requirements that a persons must fulfill to be eligible for a specific service, this cannot be considered to signify a harmfully distinct treatment for undocumented migrant workers. “Moreover, if an employer includes the names of his undocumented workers in certain records, it would imply that he is violating migratory legislation, which would make him liable to punishment.”

Owing to the way in which States organize their administrative structure, in practice, there are a series of provisions that indirectly prevent undocumented migrant workers from enjoying their labor rights.

Notwithstanding the above, an employer who has engaged undocumented workers is obliged to pay them wages and other remunerations. Furthermore, “the irregular status of a person does not prevent him from having recourse to the courts of justice to claim his rights”; in other words, “as regards access to judicial bodies, irregular immigrant workers and members of their families have the right to judicial guarantees and judicial protection in the same conditions as nationals.”

Regarding question 2(1) of the request (supra para. 4):

Respect for the principles of equality and non-discrimination does not mean that some restrictions or requirements for the enjoyment of a specific right cannot be established, using a criterion of reasonableness. The classic example is the exercise of political rights, which is reserved for nationals of a country.

There are other rights that may not be restricted or limited in any way and must be respected to all persons without distinction. In Costa Rica, the right to life is one of these rights. This implies, for example, that a directive ordering border guards to fire on those who try and enter national territory through a non-authorized border post would be a flagrant violation of human rights.

Regarding question 2(2) of the request (supra para. 4):

The legal residence of an alien in a recipient State is not a necessary condition for his human and labor rights to be respected. All persons, regardless of whether or not they are authorized to enter or remain in Costa Rica, may have recourse to the Constitutional Chamber of the Supreme Court of Justice to uphold or re-establish their constitutional and other fundamental rights.

Regarding the third question of the request (supra para. 4):

To answer this question, we must refer to the rank of human rights in domestic law. The human rights instruments in force in Costa Rica “are not only of similar weight to the Constitution, but,

to the extent that they grant greater rights or guarantees to individuals, they have prevalence over the Constitution." The Constitutional Chamber of the Supreme Court of Justice has taken international human rights legislation as the benchmark for interpreting the Constitution or as a parameter of the constitutionality of other lesser legal norms.
Any migratory norm or policy contrary to the provisions of the International Covenant on Civil and Political Rights would be totally null and void, even if adopted as law by the Legislature.

The Legal Clinics of the College of Jurisprudence of the Universidad San Francisco de Quito:

In their brief of November 27, 2002, indicated that:

Regarding the first question of the request (supra para. 4):

Undocumented migrant workers should not lack protection before the State; migratory status does not deprive them of their human condition. The violation of domestic legislation cannot be considered grounds to deprive a person of the protection of his human rights; in other words, it does not exempt States from complying with the obligations imposed by international law. "To affirm the contrary would be to create an indirect means of discriminating against undocumented migrant workers by, to a certain extent, denying them legal personality and creating legal inequality between persons."
There is no provision of the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights that allows the right to work to be restricted owing to migratory status. Article 26 of the International Covenant on Civil and Political Rights is explicit when referring to national origin as grounds that may not be used to discriminate against a person; moreover, it adds that neither can "other status" be cited to deny a person equal treatment by the law. "The norm is clear: the documented or undocumented status may not be used as grounds to deny the exercise of any human right and, consequently, to be treated unequally by the law." Moreover, no interpretation of Article 24 of the American Convention allows equality to be subordinated to a person's legal residence or citizenship.
Nowadays, migrants are faced with discriminatory State legislation and labor practices and, what is worse, they are constantly denied access to governmental bodies and guarantees of due process; "this is a serious situation for migrants who are documented, but even more so for those who have been unable to legitimize their legal status in the country in which they reside."
The United Nations and the International Labour Organization (ILO) have drawn up norms to guard against the lack of legal protection for migrants. For example, when referring to migrant workers, the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families does not establish any difference on the basis of their legal status, "in other words, it recognizes to migrant workers all the human, civil, political, social, cultural or labor rights, whether or not they are documented." Furthermore, in a previous effort to improve the human rights situation of migrants, ILO Convention No. 143 concerning Migrant Workers (Supplementary Provisions) of 1975, contains important provisions in this respect.
The General Conference of the International Labor Organization has issued two relevant recommendations. However, Recommendation No. 86 on Migrant Workers (revised in 1949) "is discriminatory, inasmuch as it only applies to workers who are accepted as migrant workers. It appears that it does not apply to undocumented migrant workers. In 1975, the International Labor Organization issued Recommendation No. 151 on Migrant Workers, which also only refers to

documented migrants. “In other words, although there is concern for migrant workers, they are recognized rights only because of their legal status, and not because of their status as human beings.”
In this respect, the route followed by the United Nations in the field of international law has been more coherent. For example, resolution 1999/44 of the Commission on Human Rights recognizes that the principles and standards embodied in the Universal Declaration of Human Rights apply to everyone, including migrants, without making any reference to their legal status.
The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families refers to the migrant worker without differentiating between the documented and the undocumented migrant worker.
States may not provide different treatment to migrants who are in their territory, whatever their migratory status. “[T]he Court must respond to the first question by affirming that[,] in accordance with the international norms in force, a harmfully different treatment may not be established for undocumented migratory workers.”

Regarding the second question of the request (supra para. 4):

States may not establish discrimination because a person’s residence has not been regularized, and it may not disregard the guarantees necessary for the protection of universal fundamental rights. “It is unacceptable for a State not to guarantee and protect the human rights of all persons in its territory.”
The articles mentioned in the questions at issue establish categorically that all persons are equal before the law. An individual does not acquire the status of person when he is admitted legally into a certain territory; it is an intrinsic quality of the human being. Furthermore, the provisions referred to contain a list of grounds on which a person may not be discriminated against and conclude with phrases such as “nor any other” or “any other condition.” The rights and freedoms proclaimed in international instruments “belong to all individuals, because they are persons, and not because of the recognition a State grants them, owing to their migratory status.” “[I]nternational law does not permit any grounds for distinction that would allow human rights to be impaired or restricted.”
The State may not deny any person the labor rights embodied in many international norms. The denial of one or more labor rights, based on the undocumented status of a migrant workers is entirely incompatible with the obligations of the American States to ensure non-discrimination and the equal and effective protection of the law, to which the said provisions commit them.
According to Article 5 of the International Covenant on Civil and Political Rights and Article 29 of the American Convention, “it cannot be alleged that a State has the right to accept or not a certain individual into its territory and to limit the right to equality before the law, or any of the rights established in the said instrument.”

Regarding the third question of the request (supra para. 4):

“[I]t is unacceptable to restrict the enjoyment and exercise of a human right citing domestic policy objectives, even when public order (ordre public), the ultimate goal of any State, is involved.”
Human rights cannot be subordinated to domestic laws, whether these relate to migratory or any other policy. The right to non-discrimination cannot be conditioned to compliance with

migratory policy objectives, even when such objectives are established in domestic legislation. "In accordance with international obligations, laws that restrict the equal enjoyment of human rights of any person are inadmissible and the State is obliged to abolish them." Moreover, since they are of an erga omnes nature, these obligations may be applied to third parties that are not a party to the Convention recognizing them.

In addition to convention-related obligations concerning the prohibition to discriminate, all States have the obligation erga omnes, namely, to the international community, to prevent any form of discrimination, including discrimination derived from their migratory policy. The prohibition to discriminate is of fundamental importance to the international community; "consequently, no domestic policy may be aimed at tolerating or permitting discrimination in any form that affects the enjoyment and exercise of human rights."

"[T]he Court must answer this question by indicating that any subordination of the enjoyment and exercise of human rights to the existence of migratory policies and the achievement of the objectives established in those policies is unacceptable."

Regarding the fourth question of the request (supra para. 4):

International human rights law establishes limits to the exercise of power by States. These limits are determined in conventions and in customary law provisions and peremptory or jus cogens norms.

"Like obligations erga omnes, ius cogens contains elements of fundamental importance for the international community, elements that are so essential that they are more important than State consent, which, in international law, determines the validity of norms."

There is little disagreement about the existence of these peremptory norms in international law. In this respect, the Vienna Convention on the Law of Treaties does not set limits to the content of jus cogens; that is, it does not determine what these peremptory norms are, but merely cites some examples. Article 53 of the Convention establishes four requisites for determining whether a norm is of a jus cogens character. They are: it must be a norm of general international law, it must be accepted and recognized by the international community, it must be non-derogable, and it may only be modified by a subsequent norm having the same character.

"Therefore, we must ask ourselves whether it would offend the human conscience and public morality if a State [should reject] the principle of non-discrimination and the right to equal and effective protection of the law. The answer is evidently in the affirmative."

"The Court must evaluate whether the principle of non-discrimination and the right to equal and effective protection of the law fulfill the four requirements of a ius cogens norm."

If the Court accepts that both the principle of non-discrimination and the right to equal and effective protection of the law are jus cogens norms, this would have several legal effects. In this regard, the European Court of Human Rights has indicated that such effects include: recognition that the norm ranks higher than any norm of international law, except other jus cogens norms; should there be a dispute, the jus cogens norm would prevail over any other norm of international law and any provision contrary to the peremptory norm would be null or lack legal effect.

The legal effects derived, individually and collectively, from the norms contained in Article 3(1) and 17 of the OAS Charter must be determined. According to these norms, the States parties assume a commitment, both individually and collectively, to "prevent, protect and punish" any violation of human rights. The spirit of Article 17 of the OAS Charter is to create binding

principles for the States, even if they have not accepted the competence of the Court, so that they respect the fundamental rights of the individual. The Charter proclaims that human rights should be enjoyed without any distinction. Both the States parties and the OAS organs have the obligation to prevent any violation of human rights and to allow them to be enjoyed fully and absolutely. "If the Court decides that the principle of non-discrimination is a rule of jus cogens[,] then we may infer that these norms are binding for States, whether or not the international conventions have been ratified; since […] the principles [of] jus cogens create obligations erga omnes." If this principle were to be considered a norm of jus cogens it would form part of the fundamental rights of the human being and of universal morality.
The Court must answer this question by stating that the principle of non-discrimination is a peremptory international norm, "therefore, the provisions of Articles 3(1) and 17 of the OAS Charter must be interpreted similarly."

The Delgado Law Firm:

In its brief of December 12, 2002, stated that:

The decision of the United States Supreme Court in Hoffman Plastic Compounds Inc. v. National Labor Relations Board has given rise to uncertainty with regard to the rights of migrants in that country – a situation which could have serious implications for migrants.
In the area of labor law, the United States does not treat irregular migrants with equality before the law. The United States Supreme Court decided that a United States employer could violate the labor rights of an irregular migrant worker without having to give him back pay. In the Hoffman Plastic Compounds case, the United States Supreme Court did not impose a fine on the employer who violated the labor rights of an irregular migrant worker and did not order any compensation for the worker.
According to the decision in the Hoffman Plastic Compounds case, a migrant worker incurs in "serious misconduct" when he obtains employment in breach of the Immigration Reform and Control Act (IRCA). However, in this case, the United States Supreme Court did not deny that the employer had dismissed the worker for trying to organize a union, which entailed the responsibility of the employer for having committed an evident violation of the labor laws. Even though the employer committed this violation, he was not treated equally by the Supreme Court.
Although the United States affirms that its domestic policy discourages illegal immigration, in practice, it continues to take measures that make it less expensive and therefore more attractive for United States employers to engage irregular migrant workers. For example, even in the United States, it is agreed that the decision in the Hoffman Plastic Compounds case will result in an increase in discrimination against undocumented workers, because employers can allege that they did not know that the worker was undocumented so as to avoid any responsibility for violating the rights of their workers.
This discriminatory treatment of irregular migrants is contrary to international law. Using cheap labor without ensuring workers their basic human rights is not a legitimate immigration policy.
The effects of the Immigration Reform and Control Act and the Hoffman Plastic Compounds case indicate that there is an increase in discrimination against undocumented migrant workers. Indeed, the reasoning of the United States Supreme Court suggests that allowing irregular workers to file actions or complaints would only "encourage illegal immigration."

In the United States, irregular workers are exposed to “dangerous” working conditions. Domestic immigration policy should not be distorted in order to use it to exonerate employers who expose irregular migrant workers to unreasonable risk of death.

The United States continue to benefit daily from the presence in its workforce of a significant number of irregular migrant workers. Conservative estimates suggest that there are at least 5.3 million irregular migrants working in the United States and that three million of them are Mexicans. No State should be allowed to benefit knowingly and continuously from the labor of millions of migrant workers, while pretending it does not want such workers and, hence, does not have to guarantee them even the most basic rights. Migrant workers have the right to equal protection of the law, including the protection of their human rights.

Undocumented workers who have filed complaints about remuneration and working conditions in the United States have been intimidated by their employers, who usually threaten to call the Immigration and Naturalization Service.

Moreover, in the Hoffman Plastic Compounds case, the United States Supreme Court stated that, owing to his migratory status, no individual whose situation in the country was irregular could require his former employer to pay back wages.

The principle of equality before the law embodied in Article 26 of the International Covenant on Civil and Political Rights obliges States not to enact legislation that creates differences between workers based on their ethnic or national origin.

The principle of equality before the law applies to the enjoyment of civil, political, economic and social rights, without any distinction.

All workers have the right to recognition of their basic human rights, including the right to earn their living and to be represented by a lawyer, despite their migratory status.

The International Labor Organization has drafted important treaties, such as Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equal Opportunity and Treatment of Migrant Workers. This Convention establishes equal treatment between migrants and nationals as regards security of employment, rehabilitation, social security, employment-related rights and other benefits.

Many of the rights included in the International Labor Organization conventions are considered international customary law. These rights are also included in the most important human rights conventions, such the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination.

Lastly, it should be stressed that human rights extend to all migrant workers, whether their situation in a State is regular or irregular.

Students of the Law Faculty of the Universidad Nacional Autónoma de México (UNAM):

In their written and oral statements, indicated that:

Regarding the admissibility of the consultation:

The advisory opinion requested is clearly important, “not only for Mexico, but also for all Latin America, owing to the number of migrants in an irregular situation in other countries and because they are considered a vulnerable group, prone to systematic violation of their human rights.”

Regarding the first question of the consultation (supra para. 4):

Even though labor rights have been included among the economic, social and cultural rights, in reality, they form part of an indissoluble whole of all human rights, with no hierarchy, because they are inherent to human dignity.
"The problem of discrimination occurs particularly in labor-related matters." Undocumented migrants endure several disadvantages; for example, they are paid low wages, receive few or no social benefits or health expenses, are not allowed to join unions and are under constant threat of dismissal or being reported to the migration authorities. "This is confirmed institutionally." Some United States laws and decisions establish a distinction between undocumented migrants, nationals and residents "that is neither objective nor reasonable and, consequently, results in evident discrimination."
The principle of non-discrimination applies to all rights and freedoms, pursuant to domestic law and international law, in accordance with the provisions of Article II of the American Declaration and Articles 1(1) and 24 of the American Convention.
Obviously, States have the sovereign authority to enact labor laws and regulations and establish the requirements they consider appropriate for aliens who become part of their workforce. However, this authority may not be exercised disregarding the international human rights corpus juris.
"Human rights do not depend on the nationality of an individual, on the territory where he is, or on his legal status, because they are inherent in him. Upholding the contrary would be akin to denying human dignity. If the exercise of authority is limited by human rights, State sovereignty cannot be cited to violate them or prevent their international protection."

Regarding the second question of the consultation (supra para. 4):

Human rights treaties are based on a notion of collective guarantee; consequently, they do not establish mutual obligations between States; rather, they determine the State obligation to respect and guarantee the rights contained in such instruments to all persons.
Any interpretation of the international human rights instruments must take into account the pro homine principle; in other words, they must be interpreted so as to give preference to the individual, "it is therefore unacceptable that Article 2, paragraph 1, of the Universal Declaration, Article II of the American Declaration, and Articles 2 and 26 of the Covenant, as well as Articles 1 and 24 of the American Convention should be interpreted as limiting the human rights of a group of persons, merely because of their undocumented status."
An interpretation of any international instrument that leads to the restriction of a right or freedom of an individual, who is not legally resident in the country where he resides, is contrary to the object and purpose of all international human rights instruments.

Regarding the third question of the consultation (supra para. 4):

States have the sovereign authority to issue migratory laws and regulations and to establish differences between nationals and aliens, provided that such domestic norms are compatible with their international human rights obligations. These differences must have an objective,

reasonable justification; consequently, they should have a legitimate objective and there must be a reasonable relationship of proportionality between the means used and the aim sought.
A State party to the International Covenant on Civil and Political Rights which enacts a law that clearly violates this instrument or takes measures that limit the rights and freedoms embodied in this treaty to the detriment of a group of persons incurs international responsibility,
Equality before the law and non-discrimination are essential principles that apply to all matters. Therefore, any act of the State, including an act in keeping with its domestic laws, which subordinates or conditions the fundamental human rights of a group of persons, entails the State's non-compliance with its obligations erga omnes to respect and guarantee those rights. Consequently, it results in the increased international responsibility of the State and any subject of international law may legitimately cite this.

Regarding the fourth question of the consultation (supra para. 4):

The 1969 Vienna Convention on the Law of Treaties has recognized the existence of norms of jus cogens, by establishing them as peremptory norms of international law. However, it did not define them clearly.
Norms of jus cogens respond to the need to establish an international public order (ordre public), because a community ruled by law requires norms that are superior to the will of those who form part of it.
The international community has repudiated violations of the principle of non-discrimination and the right to the equal and effective protection of the law.
The principle of non-discrimination and the right to equality before the law are of transcendental importance in relation to the situation of undocumented migrant workers, because their violation involves the systematic violation of other rights.
The principle of non-discrimination and the right to equal protection of the law, "which are the essence of human rights, are norms of ius cogens." Norms of jus cogens are enforceable erga omnes, because they contain elemental values and concerns of mankind based on universal consensus, owing to the special nature of the prerogative they protect.

Javier Juárez, of the Law Office of Sayre & Chavez:In his brief of February 6, 2003, stated that:

On March 27, 2002, the United States Supreme Court decided that undocumented migrant workers, who had been unduly dismissed because they had organized unions, did not have the right to back pay under the National Labor Relations Act.
For undocumented workers, this decision creates a clear legal exception to the guarantees granted to other workers; therefore, it contravenes the provisions of the international agreements that seek to ensure equal protection for migrant workers and it increases the vulnerability that distinguishes them from other groups in the general population.
The case cited involves Mr. Castro, a worker employed in the plant of the Hoffman Plastic Compounds company in Los Angeles, California. In 1989, when Mr. Castro helped organize a union to improve working conditions in the plant, he was dismissed. In January 1992, the National Labor Relations Board decided that Mr. Castro's dismissal was illegal and ordered payment of back pay and his reinstatement.
In June 1993, during the hearing held before an administrative judge of the National Labor Relations Board to determine the amount of back pay, Mr. Castro indicated that he had never

been legally admitted or authorized to work in the United States. As a result of this statement, the administrative judge decided that he could not grant payment of back pay, because this would conflict with the 1986 Immigration Control and Reform Act, which prohibits employers from knowingly employing undocumented workers, and employees from using false documents in order to seek employment.

In September 1998, the National Labor Relations Board revoked the decision of the administrative judge and indicated that the most effective way to promote immigration policies was to provide undocumented workers with the same guarantees and remedies as those granted to other employees under the National Labor Relations Act.

The National Labor Relations Board decided that, even though the undocumented worker did not have the right to be reinstated, he should receive back pay and the interest accrued for the three years' lost work.

The United States Court of Appeal denied the request for review filed by Hoffman Plastic Compounds and reaffirmed the decision of the National Labor Relations Board.

On March 27, 2002, the United States Supreme Court considered the case and annulled the payment that was to be made to the worker.

The decision of the United States Supreme Court rejecting the payment to the worker stated that allowing the National Labor Relations Board to allow payment of back pay to illegal aliens would prejudice statutory prohibitions that were essential to the federal immigration policy. This would help individuals avoid the migratory authorities, pardon violations of immigration laws and encourage future violations.

The minority opinion of the United States Supreme Court indicated that the decision adopted in the Hoffman Plastic Compounds case would undermine labor legislation and encourage employers to hire undocumented workers. The dissenting opinion in the case established that payment of back pay is not contrary to the national immigration policy.

This dissenting opinion also indicated that, by failing to apply the labor legislation, those persons who most needed protection were left open to exploitation by employers. It added that the immigration law did not weaken or reduce legal protection, or limit the power to remedy unfair practices carried out against undocumented workers.

In its broadest sense, the decision of the United States Supreme Court implies that undocumented workers do not have the right to file proceedings to obtain payment of overtime, or to claim violations of the minimum wage or discrimination.

However, in two different cases related to violations of the minimum wage, a district court and a superior court decided that the migratory status of workers was not relevant in order to request payment of the minimum wage for the period of employment.

Several state authorities were mentioned which consider that the decision of the United States Supreme Court in the Hoffman Plastic Compounds case has a negative impact on the labor rights of migrant workers.

Most migrant workers are unwilling to exercise their rights and, on many occasions, do not report the abuses to which they are subjected.

Corporate associations also confirm the legal, social and economic vulnerability of undocumented workers. Recently, the Center for Labor Market Studies of Northwestern University conducted a study on the impact of migrants in the United States. The study director indicated that, over the last 100 years, the economy of the United States has become more dependent on migrant labor. He added that many of these new migrant workers, possibly half of

them, are in the United States without legal documents, which means that the economy depends on individuals who are in a "legal no-man's land."
In summary, the decision of the United States Supreme Court in the Hoffman Plastic Compounds case may be seen as one of the latest additions to the legal structure that, directly or indirectly, has denied migrants the basic guarantees required to alleviate their social and economic vulnerability.
Many differences in treatment are derived directly from the undocumented status of workers and, at times, these differences also extend to documented migrants.
Harvard Immigration and Refugee Clinic of Greater Boston Legal Services and the Harvard Law School, the Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, and the Global Justice Center: In their written and oral statements, indicated that:
They are interested in this case and, in particular, in the labor rights of migrant workers in the Americas.
They endorse Mexico's argument that the facts show that migrant workers do not enjoy universal human rights in fair and equitable conditions. The disparity between existing international norms that oprtect migrant workers and national discriminatory practices and legislation is the greatest challenge faced by migrant workers.
They proceeded to review the laws and practice of some American States in order to understand the disparity that exists between the rights of migrant workers and the relevant public policy.

Regarding laws and practices in Argentina:

According to the Argentine General Migration Act only migrants admitted as permanent residents enjoy all the civil rights guaranteed in the Constitution, including the right to work. The right to work granted to temporary or transitory migrants is more limited, while migrants who are in breach of the General Migrations Act do not have the right to work and may be detained and expelled.
It is almost impossible for many undocumented migrants to comply with the requirements for obtaining legal residence in Argentina established in Decree No. 1434/87, which stipulates that the Migrations Department may deny legal residence to migrants who: 1) entered the country avoiding migratory control; 2) remained in the country for more than 30 days, in violation of the law; or 3) work without the legal authorization of the Migrations Department. Likewise, the Ministry of the Interior has extensive discretionary powers to deny legal residence to migrants.
In the practice, because most migrants in Argentina have few resources, are not professionals and do not have Argentine relatives, the best way to regularize their migratory status is to present an employment contract entered into with an Argentine employer. However, as the regulations are very complex, many migrants are obliged to maintain their illegal status. Consequently, they have to accept precarious working conditions and very low salaries, and endure other abuse from their employers.

Regarding laws and practice in Brazil:

The 1988 Federal Constitution of Brazil guarantees the legitimacy of the rights embodied in the international treaties to which Brazil is a party. The Federal Constitution also establishes equal treatment for nationals and aliens.

Brazilian labor laws make no distinction between nationals and aliens. Undocumented workers have the right to receive wages and social benefits for work performed. Moreover, there are no provisions that limit access to justice because of the complainant's nationality.
In practice, irregular workers in Brazil endure many difficulties, including long working hours and lower than minimum wages. Many irregular migrants never report abuses for fear of being deported. This fear also means that irregular migrants do not send their children to school, request driving licenses, buy goods, or visit their countries of origin.
Likewise, these workers have little information about their rights and can only claim them when they receive help from non-governmental organizations working with migrants.

Regarding laws and practice in Chile:

According to Chilean laws and regulations, national and foreign workers have equal labor rights.
Under Chilean labor legislation, an employment contract does not have to be in writing; however, the migratory law requires migrant workers to have a written contract drawn up before a public notary, in which the employer commits himself to paying the migrant's transport back to his country of origin on termination of the contract.
Migrant workers working in Chile without a written contract often receive very low wages, do not have access to social security benefits and can be dismissed at any time without monetary compensation. This situation is especially difficult for irregular migrant workers, because they fear being identified by the immigration authorities.
Likewise, given that irregular workers often do not possess national identity documents, they do not have access to many public services, including medical care and public housing.
The labor legislation does not expressly regulate the rights of workers without a contract, so the Labor Department and the Inspections Unit regulate their situation. Information on how these labor authorities interpret the law is not readily available to migrant workers. Chilean legislation on foreign workers has not been updated and provides them with very little protection, particularly in labor disputes.

Regarding laws and practice in the Dominican Republic:

The greatest obstacle to the protection of the rights of migrant workers in the Dominican Republic is the difficulty that Haitians face in establishing legal residence there. Once they have obtained their legal status, the law guarantees migrants the same civil rights as Dominicans. The law does not distinguish between citizens and documented aliens as regards their economic, social and cultural rights. Basic labor rights are guaranteed to all workers, regardless of whether or not they are legally resident in the country.
There are diverse problems in the workplace. For example, the minimum wage is insufficient to enjoy a decent life; the requirements for collective negotiation are unattainable; the fines imposed on employers are insufficient to prevent the violation of workers' rights, and many health and security inspectors are corrupt.
Most Haitian migrant workers in the Dominican Republic face long working hours, low wages and lack of employment security. Their living conditions are inadequate. Most workers do not have drinking water, latrines, medical care or social services.

Haitian migrant workers have a very limited possibility of combating these unfair working conditions. They have to face political and social attitudes that are generally hostile. At the same time, most of these workers do not have access to legal aid and, consequently, to the labor courts. The way that the migratory and citizenship laws are applied in the Dominican Republic contributes to perpetuating the permanent illegality of Haitians and Dominicans of Haitian descent. Moreover, given their poverty and illiteracy, it is very difficult for migrant workers to comply with the requirements to obtain temporary employment permits. The status of Haitian workers as irregular migrants affects their children, even those born in the Dominican Republic. The children of Haitians, who are born in the Dominican Republic, are not considered citizens, because Haitians are classified as aliens in transit. This situation has meant that Haitians are subject to deportation at any time and mass expulsions have been carried out in violation of due process.
For decades, the Dominican Republic has benefited from the cheap labor of Haitians and the State has developed a system that maintains this flow of migrant workers without taking the minimum measures to ensure their fundamental rights.

Regarding laws and practice in the United Mexican States:

Pursuant to Articles 1 and 33 of the Constitution, which refer to equal protection, constitutional labor rights must be guaranteed to all migrants.
According to its Constitution, Mexico is obliged to implement the bilateral and multilateral treaties on the labor rights of migrant workers to which it has acceded. These treaties ensure equal protection and non-discrimination, as well as other more specific guarantees.
The Federal Labor Act allows migrants to work legally in Mexico as visitors. However, there are professional restrictions on certain categories of visitors; these categories include most migrant workers from Central America, who are usually less qualified. Therefore, workers from Central America can only enter Mexico legally under the “Migratory Form for Agricultural Visitors” or under the “Migratory Form for Local Border Visitors.” Some provisions of the Federal Labor Act allow preferential treatment in contracting Mexican workers in relation to migrant workers.
The most common violations of the rights of migrant workers are: long working hours; inadequate living, health and transport conditions; below minimum wages; deductions from wages for food and housing; retention of wages and employment documents and racial discrimination. Owing to the bleak social and economic conditions in their countries of origin, may migratory agricultural workers are obliged to accept these abuses.
Although the “Migratory Form for Agricultural Visitors” and the “Migratory Form for Local Border Visitors” programs exist, and measures have been taken to protect the rights of migrant workers, these programs have been managed inadequately and have not prevented the abuse of workers. For example, the Local Arbitration and Conciliation Committees settle disputes between workers and employers, but the process is often slow. Also, many workers resort to the Committees without any legal representation and are summarily deported, even when their cases are pending.

Regarding laws and practice in the United States of America:

As a State party to the OAS Charter, the United States are subject to the obligations established by the American Declaration, which guarantee the right to work and to fair wages, as well as the

right to organize unions and to receive equal treatment before the law. The Universal Declaration also guarantees the right to form trade unions and to equal remuneration for work of equal value. The International Covenant on Civil and Political Rights, to which the United States is a party, guarantees the right to equality before the law, without discrimination, and establishes the right to form trade unions. Lastly, the International Labor Organization conventions protect the labor rights of irregular workers.

Under existing labor legislation in the United States, irregular workers are recognized as "employees," which gives them the right to the protection indicated in the principal federal labor laws. However, in practice they are not treated equally.

The National Labor Relations Act (NLRA) authorizes the National Labor Relations Board (NLRB) to establish remedies for employees who are victims of unfair labor practices. For example, in cases of unjustified dismissal, the remedy might consist of reinstatement and payment of back pay. In Hoffman Plastic Compounds v. National Labor Relations Board (2002), the United States Supreme Court decided that an irregular worker did not have the right to back pay, even when he had been dismissed for taking part in the organization of a union to obtain fair pay. In this case, the Supreme Court determined that "migratory policy had precedence over labor policy." According to the Supreme Court's decision in Sure–Tan v. National Labor Relations Board (1984), workers can be handed over to the Immigration and Naturalization Service even when the employer's reason for doing so is unlawful retaliation against a worker who is carrying out an activity protected by the National Labor Relations Act. With these decisions, the Supreme Court has created inequality in the labor laws of the United States, based on migratory status.

Many irregular workers in the United States face serious problems owing to poor health and security conditions in the workplace, because they are paid less than the legal minimum. Migrant workers are also the target of discrimination and violence by third parties. Several States deny irregular workers access to education and medical care. Also, irregular workers who defend their rights run the risk of being reported to the Immigration and Naturalization Service. Undocumented migrants do not have access to legal aid, which makes it more difficult for workers to insist on their rights.

The difficult situation faced by irregular workers also affects migrant workers who are covered by the "H2A" and "H2B" visa programs. The rights of such workers are extremely restricted; for example, they are not covered by the law that establishes payment for overtime. In addition, the permit to be in the country legally is conditioned to remaining in a job with one employer, which restricts the worker's possibility of insisting on his rights.

Lastly, approximately 32 million workers, including many migrants who provide domestic services or work on farms, are not protected by the provision of the National Labor Relations Act establishing the right to organize unions or by any state legislation.

Thomas Brill, of the Law Office of Sayre & Chavez:

In his written and oral statements, indicated that:

In March 2002, the United States Supreme Court decided, in Hoffman Plastic Compounds v. National Labor Relations Board, that an undocumented worker did not have the right to the payment of lost wages, after being illegally dismissed for trying to exercise rights granted by the National Labor Relations Act.

Hoffman Plastic Compounds engaged José Castro in May 1988. In December 1988, Mr. Castro and other workers began a campaign to organize a union. In January 1989, the company dismissed Mr. Castro and three other workers for trying to create and join a union. In January 1992, the National Labor Relations Board ordered Hoffman Plastic Compounds to reinstate Mr. Castro and to give him the back pay he would have received, had it not been for the company's decision to dismiss him because he was involved in union activities. The company refused to give Mr. Castro the back pay, because he admitted that he did not have an employment permit.

In September 1998, the National Labor Relations Board decided that Hoffman Plastic Compounds must pay Mr. Castro back pay corresponding to the period from his dismissal up until the date on which he admitted that he did not have the documentation corresponding to the employment permit. In its decision, the National Labor Relations Board said that "[t]he most effective way to adapt and promote the United States immigration policies […] is to provide the guarantees and remedies of the National Labor Relations Act to undocumented workers in the same way as to other workers." The National Labor Relations Board ordered Hoffman Plastic Compounds to pay Mr. Castro the amount of US$66,951 (sixty-six thousand nine hundred and fifty-one United States dollars) for the concept of back pay. Hoffman Plastic Compounds refused to pay Mr. Castro and filed an appeal. In 2001, the Federal Appeals Court confirmed the decision of the National Labor Relations Board and Hoffman Plastic Compounds filed an appeal before the United States Supreme Court.

In its decision of March 2002, the Supreme Court revoked the decisions of the Appeals Court and the National Labor Relations Board. It denied Mr. Castro's request for back pay and stated that, in the case of irregular workers who are dismissed for carrying out union-related activities, the prohibition to work without an authorization contained in the immigration legislation prevailed over the right to establish and join a union.

The National Employment Law Project, an American non-profit agency that examined the effect of the decision in the Hoffman Plastic Compounds case, determined that, as of that decision, employers have tried to deteriorate further the rights of irregular workers in the United States.

Many employers have infringed the rights of their employees since the decision in the Hoffman Plastic Compounds case was published. Indeed, employers can argue that irregular workers cannot file a complaint with the justice system when they are discriminated against or when their right to the minimum salary is violated. Clearly, the decision in the Hoffman Plastic Compounds case has led employers to discriminate against their irregular workers, arguing that the latter have no right to take legal action when their labor rights are violated. Thus, engaging irregular workers has been encouraged, because they are cheaper for the employer, and so as not to employ citizens or residents who can demand the protection of their rights before the courts.

However, it is important to note that the decision in the Hoffman Plastic Compounds case was not adopted unanimously by the United States Supreme Court, but by a majority of 5 votes to 4; the author of the dissenting opinion was Judge Breyer. He indicated that allowing irregular migrants access to the same legal remedies as citizens was the only way to ensure that migrants' rights were protected. Judge Breyer carefully examined the possible impact of the decision on irregular workers and stated that if undocumented workers could not receive back pay when they were illegally dismissed, employers would dismiss such workers when they tried to establish trade unions, because there would be no consequences for the employer, at least the first time he used this method.

Likewise, as Judge Breyer stated, there is no provision in the United States immigration legislation that prohibits the National Labor Relations Board from allowing irregular workers to

file remedies or actions when their rights are violated. However, the majority opinion of the United States Supreme Court eliminated the possibility that an irregular worker could file a claim for back pay before the courts, based on the alleged conflict between the National Labor Relations Act and the 1986 Immigration Reform and Control Act.

Both the National Labor Relations Board and the Supreme Court approached the Hoffman Plastic Compounds case as one that required a balance between labor legislation and immigration legislation. The National Labor Relations Board and the four judges of the Supreme Court in the minority gave priority to labor laws, while the five judges who comprised the majority granted priority to immigration laws.

In their decisions, the National Labor Relations Board and the Supreme Court did not take international human rights law and the norms of international labor law into consideration. Nor did they consider the obligations of the United States, pursuant to international law, to "ensure, in cooperation with the United Nations, the universal and effective respect for the fundamental rights and freedoms of man."

In summary, the decision in the Hoffman Plastic Compounds case denies a group of workers their inherent labor rights that have been recognized by the international community.

One of the principal entities that has referred to the topic of human rights is the Organization of American States (OAS). The United States and Mexico are two of the 35 States parties actively involved in the OAS administration and, in theory, they adhere to the general principles and standards established by this international organization.

In this respect, it is important to cite Articles 3(l) and 17 of the OAS Charter, which refer to equality and non-discrimination. These principles are also mentioned in the American Declaration.

However, Mexico has not requested the Court to examine the United States immigration legislation. The right of each State to establish immigration rules is not questioned. Nevertheless, when the legislators of any specific State establish policies that discriminate against certain categories of workers in the labor market, it can have a devastating result on the protection of human rights. Fundamental human rights must prevail over the objective of preventing certain workers from enjoying the benefits granted by law.

For the above reasons, it is considered that the recent decision of the United States Supreme Court in Hoffman Plastic Compounds v. National Labor Relations Board creates a system that violates international law.

Labor, Civil Rights and Immigrants´ Rights Organizations in the United States of America:

In their written and oral statements, they stated that:

The brief was prepared in representation of 50 civil rights, labor and immigrant organizations in the United States.

Migrant workers in the United States are among those workers who receive the lowest wages and most unfair treatment. Attempts by organizations to protect the rights of migrants, including "unauthorized" workers, have been obstructed by United States laws that discriminate based on the status of alien and migrant and, above all, owing to the decision of the United States Supreme Court in Hoffman Plastic Compounds v. National Labor Relations Board. Moreover, federal and state labor legislation violate international human rights law, which is obligatory for the United

States. There is an urgent need for strong regional standards for the protection of migrant workers.

The expression “unauthorized worker” is used to describe migrant workers who are not authorized to be employed legally in the United States. This group includes workers who, for different reasons, are legally in the United States but are not authorized to work. The expression “undocumented” migrant is used to describe migrants whose presence in the United States is illegal. These workers form a subgroup of the migrant population that is not authorized to work. Most decisions taken by the courts are based on the authorization to work.

The United States has the largest migrant population in the world. For the purposes of this brief, the figure of 5.3 million persons (an approximate calculation of the total number of undocumented workers in the United States), will be sufficient to establish that this population represents a sizeable economic factor and an issue of political and human concern. Undocumented workers perform most of their work in sectors characterized by low salaries and high risk.

The practice of threatening migrant workers with reporting them to the Immigration and Naturalization Service (INS), in order to limit the exercise of their labor rights, has been common for many years and has not decreased since the decision in Hoffman Plastic Compounds v. National Labor Relations Board.

Penalties for employers who hire “unauthorized” workers are ineffective in the United States. The 1986 Immigration Reform and Control Act (IRCA) establishes that an employer must verify the identity and eligibility of the personnel he engages. However, the law allows employers to review the documents superficially. Employers have very little reason to fear that the Immigration and Naturalization Service will penalize them for engaging undocumented migrants; rather, they see this as a legitimate decision that saves them money. Even when employers break the law, the penalties and fines they receive are low and infrequent. Therefore, under current legislation, employers can engage “unauthorized” workers, benefit from them and threaten to report them to the Immigration and Naturalization Service, without fear of possible Government action.

Some migrant workers, particularly those who are “unauthorized”, are expressly excluded from the possibility of receiving certain reparations that are available to United States citizens. For examples in the Hoffman Plastic Compounds case, the United States Supreme Court decided that “unauthorized” workers could not receive back pay following a dismissal in reprisal for union activities, which is illegal under by the National Labor Relations Act that protects the right to organize unions and negotiate collectively. The Equal Employment Opportunity Commission (EEOC), the governmental agency that applies most of the federal labor laws on discrimination, has indicated that it is reviewing the practice of ordering payment of back pay to undocumented workers in light of the decision in the Hoffman Plastic Compounds case.

Lastly, the decision in the Hoffman Plastic Compounds case leaves intact the right to a minimum wage and the payment of overtime, under the Fair Labor Standards Act, because it referred only to the payment of back pay for work that had not been performed. However, the US Department of Labor, the federal agency responsible for applying the Fair Labor Standards Act, has not defined its opinion on the right of “unauthorized” migrants to payment of back pay arising from dismissals for reprisals, and has said that “it is still considering the effect of the Hoffman [Plastic Compounds] case on this reparation.”

Even before the Hoffman Plastic Compounds case, some United States laws discriminated explicitly against workers in certain migratory categories, including “unauthorized” workers and

those who held specific types of visas. In most states, “unauthorized” workers have the right to receive compensation for occupational accidents or incapacity. In general, such compensation is regulated by state legislation and this varies in each state. Workers usually receive medical expenses, a partial reimbursement of their salaries, pensions, benefits in case of death and, at times, training for new employment. While the legislation on compensations in almost all the states applies to “unauthorized” workers, the laws of the state of Wyoming explicitly exclude them from the benefits of compensation, while other judicial decisions and provisions restrict payment of compensation for factors such as rehabilitation, death and back pay.

Workers included in the H-2A visa program (for agricultural employment), who are mostly from Mexico, are denied many basic federal labor measures protection. They are excluded from the protection of the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), the principal labor act regulating agricultural workers. Therefore, their employer is not controlled by the United States Labor Department. In addition, the permit for H-2A workers to remain legally in the United States is linked to a single employer. Consequently, these workers are not at liberty to change employment.

The right of migrant workers to legal representation is also seriously restricted. The 1974 Legal Services Corporation Act created the Legal Services Corporation, and its programs are prohibited from providing legal aid for, or in representation of, most migrants who are not legal permanent residents.

Once an alien is physically in the territory of a country and has found employment, the refusal to provide him with labor protection measures violates the human right to non-discrimination. Numerous international instruments that are obligatory for the United States establish a universal norm of non-discrimination that protects all persons within the jurisdiction of a State. Differences in treatment based on nationality or migratory status, such as those established in the above-mentioned United States labor laws, violate Articles 2 and 26 of the International Covenant on Civil and Political Rights, and Article II of the American Declaration. The wording of these provisions and that of the conventions of the International Labor Organization indicate that the guarantee of equality and non-discrimination, as well as others related to work, are universal and apply “to all persons.”

States may not discriminate on the basis of nationality or any other condition, according to the International Covenant on Civil and Political Rights, but only to establish distinctions based on reasonable and objective criteria. The argument that some United States labor laws establish discriminations that violate Articles 2 and 26 of the International Covenant on Civil and Political Rights is supported by the interpretation of the United Nations Committee on Human Rights. In Gueye et al. v. France, the Committee reasserted its position that the provisions of the International Covenant on Civil and Political Rights are applicable to non-nationals, provided that the contrary is not expressly established. It was also shown that distinctions based on being an alien violate Article 26 of the International Covenant on Civil and Political Rights, even though this treaty does not expressly guarantee the substantive benefit in dispute (in this case, the right to a pension or, for example, the right to fair wages, adequate working conditions and an effective remedy with legal assistance). The decision in this case states that a distinction based on a person’s status as an alien is inadmissible, when it lacks reasonable and objective grounds, even though the substantive rights, in themselves, are not fundamental and are not recognized by the International Covenant on Civil and Political Rights. Finally, the decision establishes that if the distinction in the employment benefit is reasonable and objective and, therefore, permissible, a court must examine the implicit purpose of the labor law in order to determine whether the

distinction is relevant for attaining the proposed objective. United States labor rights laws that discriminate on the basis of alien or migratory status do not resist this examination. Once an alien has been engaged, his nationality and his legal status are irrelevant for the purpose of protecting an individual in his place of employment and preventing his exploitation. Migratory control cannot be considered the principal aim of labor protection legislation, and restrictions imposed by the United States on the labor protection of aliens does not contribute objectively or reasonably to this end.

The language and the arguments expresio unius established in the International Covenant on Civil and Political Rights also apply to the American Declaration and Convention. The language of the inter-American instruments is universal and does not establish express distinctions based on alien or migratory status. The case law of the inter-American system on non-discrimination agrees substantially with case law relating to the International Covenant on Civil and Political Rights and helps us conclude that the United States labor laws discriminate unduly against migrant workers.

Other international treaties and declarations applicable to the United States, including the International Covenant on Economic, Social and Cultural Rights and Convention No. 111 of the International Labour Organization, confirm that the basic principles of non-discrimination apply to labor protection without distinction owing to nationality or migratory status.

In addition to violating the principle of international law of non-discrimination, United States labor legislation does not protect the freedom of association of “unauthorized” workers and other migrant workers and violates the fundamental international principle of freedom of association. The International Labor Organization has expressly recognized freedom of association as one of the four fundamental human rights that protect all workers, including “unauthorized” and undocumented workers. Other international instruments (such as the American Declaration, the American Convention, the OAS Charter and the International Covenant on Civil and Political Rights), applicable to the United States, allow exceptions to the right to freedom of association only in limited circumstances, which do not justify the failure to guarantee this right to aliens and “unauthorized” migrants.

The decision of the United States Supreme Court in the Hoffman Plastic Compounds case that back pay cannot be paid to “unauthorized” workers when they are improperly dismissed for taking part in union activities, affects the right to freedom of association of such workers. Since these workers do not have the right to reinstatement when they are improperly dismissed, payment of back pay is the only available effective reparation for violations of the National Labor Relations Act.

The Academy of Human Rights and International Humanitarian Law of the American University, Washington College of Law, and the Human Rights Program of the Universidad Iberoamericana de México:

In their brief of February 21, 2003, indicated that:

This request for an advisory opinion should take into consideration the “autonomous clauses” of the international treaties and instruments cited by the requesting State; that is, Articles II of the American Declaration, 24 of the American Convention, 7 of the Universal Declaration and 26 of the International Covenant on Civil and Political Rights. Regarding the norms that embody the principle of non-discrimination subordinated to the existence of a violation of one of the rights

protected in these instruments, "there is no doubt that Articles 1(1) of the American Convention and 2(1) of the International Covenant on Civil and Political Rights should be excluded from the analysis, because these instruments do not guarantee labor rights. The situation concerning Article 2 of the Universal Declaration is different, because this instrument effectively guarantees such rights, including, in particular, what could be considered minimum standards of protection in this area."

The human rights norms cited by the requesting State do not expressly forbid making distinctions based on the nationality or migratory status of an alien. However, the provisions being examined do not establish a specific or exhaustive list of reasons for which distinctions may not be established; to the contrary, "they appear to admit that, in principle, a distinction on some specific grounds may result in discriminatory treatment."

The provisions applicable to this request have all been interpreted under international human rights law, in the sense that a measure is discriminatory only when the distinction in treatment is not based on objective and reasonable grounds; in other words, when it does not pursue a legitimate goal or when the relationship between the means used and the goal that the measure is intended to achieve is not proportionate. However, States enjoy a certain margin of maneuver to evaluate whether a difference in treatment between persons who are in a similar situation is justified.

This analysis makes no specific reference to Mexico's two final questions, because the answer to those questions is subsumed in the analysis of the other questions.

Although the requesting State referred to "labor rights" in their broadest sense in its questions, this analysis focuses specifically on the "right of all persons to wages and benefits for work performed"; therefore, there is no doubt that, in international human rights law applicable to the American States, this minimum labor protection must be guaranteed to every individual, including undocumented workers. In this respect, it is important to clarify that, for the purposes of this amici curiae, the definition of "remuneration and benefits for work performed" includes not only the so-called back pay, but also other accessory labor rights such as the right to join a union or the right to strike.

Regarding the first question of the consultation (supra para. 4):

In different international instruments, international human rights law enshrines a wide variety of norms on workers' rights. The labor rights provisions contained in instruments adopted or ratified by OAS Member States are: Article 23 of the Universal Declaration; Articles 34(g), 45(b) and 45(c) of the OAS Charter, and Article XIV of the American Declaration. Other relevant international instruments also determine the scope of regional human rights obligations with regard to workers' rights, they include: Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights; the American Convention; the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Convention No. 97 of the International Labour Organization concerning Migrant Workers; the Constitution of the International Labour Organization; and the International Convention on the Protection of the Rights of all Migrant Workers and their Families.

The right of all persons to receive remuneration for work performed is one of a group of rights that "are closer to civil and political rights, either because they have a direct impact on rights such as the right to property or the right to legal personality […] or because of their immediate and urgent nature, which is implicitly or explicitly reiterated in many […] instruments".

Articles 34(g) and 45(b) of the OAS Charter presume the existence of the worker's right to receive remuneration for work performed, a right that is so obvious that it was not necessary to enshrine it explicitly. The right is explicitly protected in Article XIV of the American Declaration. The OAS Charter and the American Declaration do not differentiate between a citizen and an alien whose status is irregular, but refer in general to "person" or "worker."

Article 23 of the Universal Declaration reflects implicitly and explicitly the general principle that if a persons has worked, he should receive the corresponding remuneration.

Mexico did not cite the International Covenant on Economic, Social and Cultural Rights in its request for an advisory opinion; however, this treaty also contains relevant references to the right to receive remuneration for work performed. In the same way, Article 7 of the Additional Protocol of the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" guarantees the right to a "fair and equal wages for equal work, without distinction." The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families explicitly embodies minimum guarantees, including the right of undocumented migrant workers to the remuneration for which they have already worked.

As irregular migrant workers and the members of their families are a particularly vulnerable sector of society, the State has the special obligation "to grant particular protection or, in this case, to abstain from taking excessively oppressive measures that restrict the labor rights of such persons and that, evidently, are not only unnecessary to achieve the legitimate goal sought, but also have the contrary effect."

In addition to any legal construct relating to international instruments, "the most elemental sense of justice requires that a person who has worked should be guaranteed that he will receive his remuneration"; the contrary would mean the acceptance of a modern form of slave labor.

The general practice of States, reflected in international instruments, and the perception of those States that it is a legal norm sustaining the notion of opinio juris, suggest the existence of an international norm of customary law concerning the right of the worker to receive remuneration for work performed. Moreover, it appears that States do not oppose recognizing this right, which excludes the possibility of arguing that there has been a persistent objection to this norm.

Human rights, such as the right to equality or the right to remuneration may be restricted, but limitations must respond to criteria of necessity and proportionality in order to attain a legitimate objective. Implementing measures to control irregular immigration into a State's territory is a legitimate objective. However, if such measures are intended to strip irregular migrant workers of the right to receive remuneration for work performed, it is urgent to examine the proportionality and the need and, to do this, we must consider whether there are other measures that are less restrictive of the said right.

There are other mechanisms that can be adopted to control irregular immigration into a State's territory. They include the possibility of penalizing those who employ undocumented workers administratively or criminally, reinforcing border immigration controls, establishing mechanisms to verify legal status in order to avoid the falsification of documents, deporting undocumented persons, and investigating and punishing those who commit offences. It does not appear proportionate or necessary to adopt measures aimed at stripping migrant workers of the remuneration for which they have already worked. Such measures "appear to be a 'punishment' that excessively affects not only the worker but also the members of his family." The International Convention on the Protection of the Rights of all Migrant Workers and Members of

their Families can serve as a guide to confirm that some restrictions to the right to receive remuneration for work performed are neither necessary nor proportionate.
Likewise, the right to receive remuneration for work performed cannot be limited by indirect measures, such as the adoption of measures restricting the right of the worker whose situation is irregular to take legal action to claim his wages; for example, by demanding that he should be physically present in the jurisdiction of the recipient State in order to be able to make this claim, after he has been deported and will not be granted authorization to enter the said State again.

Regarding question 2(1) of the request (supra para. 4):

Regarding the provisions of the Universal Declaration – except for Articles 21 and 13 – there is agreement that, under norms of customary law, States have the obligation to respect and guarantee fundamental human rights to aliens under their jurisdiction, including those whose resident status is irregular.
International customary law obliges States to guarantee the principle of equality before the law and non-discrimination to all aliens resident in their jurisdiction and to prohibit differences in treatment between citizens and aliens that could be considered unreasonable. However, the rights and freedoms are not absolute and certain restrictions regulated in Article 29(2) of the Universal Declaration may be established.
In conclusion, the international instruments cited by Mexico in the request guarantee the right to equality before the law to all persons subject to the jurisdiction of a State, irrespective of their nationality or migratory status. However, this right is not absolute; consequently, it may be subject to reasonable restrictions. Moreover, under the International Covenant on Civil and Political Rights and the American Convention, the right to equality before the law is not considered a non-derogable norm; in other words, it may be suspended under certain circumstances.

Regarding question 2(2) of the request (supra para. 4):

We must bear in mind that the existence of discrimination is not determined in the abstract, but because of the concrete circumstances of each case. In the specific context of the request made by Mexico, the grounds for distinguishing between irregular migrant workers and other workers, for the recognition of minimum labor rights, is the migratory status of the former and not their nationality.
The different treatment that certain States afford irregular workers, owing to their migratory status, does not imply discrimination per se. Pursuant to constant international case law, a difference in treatment will be discriminatory when it is not based on objective and reasonable grounds; that is, when it does not have a legitimate objective or when there is no proportionality between the means used and the end sought with the questioned measure or practice. Likewise, the right to equality is not absolute; consequently, it may be subject to permissible restrictions and its exercise may be suspended in states of emergency. When examining the proportionality of the difference in treatment, the fact that labor rights are in question and that they would be denied to a vulnerable population should be taken into consideration.
Also, even though States enjoy a margin of discretion to establish differences in treatment between nationals and aliens in the application of immigration laws, this margin is considerably

reduced when the rights at stake are so fundamental that their restriction or deprivation affects the minimum principles of respect for human dignity.

In circumstances when denying rights could place a person in a situation similar to forced labor, "[the] Honorable Court should restrict to a minimum the State's freedom to decide and exercise strict control on the justifications put forward by the latter as the basis for it policies."

Only in exceptional situations, with characteristics such as those of a state of emergency, and in the case of measures strictly limited to the requirements of the situation, can a different treatment be justified as regards the enjoyment of the minimum labor rights previously indicated, between aliens in an irregular migratory situation and nationals or legal residents.

The practice of some American States to subordinate recognition of the right to remuneration, understood in its broadest sense, to compliance with norms of immigration law, is unreasonable and incompatible with the obligation to respect and guarantee the right to equality before the law.

Denying minimum labor standards to undocumented workers does not help restrict the entry of irregular migrants into States. To the contrary, it encourages unscrupulous employers to hire more workers whose situation is irregular, owing to the possibility of subjecting them to extreme working conditions without any penalty from the State. If undocumented workers unite to claim their rights, employers can report their irregular situation and thus avoid complying with minimum labor standards.

A more appropriate policy to control immigration would be to apply severe penalties to those who employ irregular migrants, despite knowing or having the obligation to know their migratory status, so as to benefit from being able to offer inferior labor guarantees. Several American States do not have legislation penalizing this type of conduct and, in the States that have established fines, it is recognized that these are not sufficiently severe to discourage the employment of workers whose situation is irregular.

The standard of interpretation proposed does not restrict the right of States to apply the corresponding penalties, such as the deportation of those who fail to comply with the provisions of immigration legislation or who violate in any way the criminal provisions of domestic law. Nevertheless, even when an individual is subject to deportation for having been found to be in the territory of a State illegally, the latter must fulfill its obligations to respect the fundamental rights embodied in international human rights instruments.

In conclusion, denying undocumented workers minimum labor standards, understood as the right to remuneration in the broadest sense, based on their migratory status, is contrary to the right to equality before the law, because it is a disproportionate measure to achieve the immigration policy objectives of the States who adopt this practice.

The Center for Justice and International Law (CEJIL):

In its written and oral statements, indicated that:

Mexico's request is directly related to a very serious concrete situation; it will therefore be very useful for the region.

This amicus curiae focuses on questions 1(1), 2(1) and 2(2) of the request for an advisory opinion.

In law, the principle of equality is considered a fundamental right and the obligation not to discriminate is one of the essential prohibitions of international human rights law. This principle "is a basic rule, applicable to all rights."

In practice, the right to equality may be violated in different ways; for example, by the issue or implementation of discriminatory norms, the establishment or implementation of rules that are prima facie neutral, but have a negative differentiated effect on an individual or a group of individuals, and the establishment of measures or practices that are directly harmful to an individual or a group.

Although no instrument of the inter-American system is exclusively devoted to protecting migrant workers from discrimination, the American Convention and the American Declaration contain provisions that establish a commitment for States to ensure equality before the law and the exercise of the rights enshrined in the different conventions, without any discrimination. The inter-American system extends protection from non-discrimination to rights protected at the national level by means of the article on equality before the law. Therefore, Member States must ensure that their legislation does not contain discriminatory provisions and that there are no measures, practices, acts or omissions that cause harm to a group or to an individual.

Article 26 of the International Covenant on Civil and Political Rights does not simply reiterate the provisions of Article 2(1) of this instrument, but "extends autonomous protection because it prohibits any discrimination on any grounds as well as protection before the public authorities." This principle is directly applicable to economic, social and cultural rights because it is included in the International Covenant on Economic, Social and Cultural Rights.

The rights embodied in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families must be guaranteed to all migrant workers, regardless of their migratory status.

The principle of equality and non-discrimination is recognized in the American Declaration, the American Convention and other international treaties, which coincide in ensuring to all persons the rights embodied in these instruments, without any discrimination based on sex, language, religion, national or social origin, or other status.

The potential grounds for discrimination are not limited to those expressly included in the inter-American instruments. The texts of the American Convention, the American Declaration and other international instruments presume the existence of other possible grounds for discrimination. The United Nations Committee on Human Rights has indicated that the non-discrimination clause applies to cases that are not specifically set out in the international covenants. In this respect, the European Court has examined discriminatory treatment on the grounds of sexual orientation and age.

Likewise, the grounds that can create a "suspect category" are not exhausted in the list that appears in the inter-American instruments. The establishment of these categories "relates to the characteristics of discrimination at a specific time in a country or region." The relevance of the identification of a "suspect category" will depend largely on examination of the specific situation that is being regulated. Hence, in the case of migrant workers, it is essential to examine the concrete issues regulated by labor law.

To establish whether an act arising from the differentiation of two actual situations is discriminatory under the inter-American system, we must first evaluate whether we are faced with a situation that is truly and objectively unequal; then, we must assess whether the norm or measure that has made the distinction seeks a legitimate goal; and, finally, we must establish whether there is a relationship of proportionality between the differences established by the norm or measure and its aims.

Many States have become originators or recipients of persons who emigrate in search of work. A study of 152 States by the International Labor Organization found that, from 1979 to 1990, the

number of States classified as major recipients of migrants in search of employment increased from 39 to 67, and the number of States considered major originators of migrants for economic reasons/employment increased from 29 to 55. In recent decades, the principal reason for which individuals have abandoned their country of origin has been to find better employment opportunities or to have access to better wages.

Irregular immigration has been growing as a result of extreme poverty and lack of opportunities in the States of origin. This has encouraged the appearance of the "migration industry." Employers opt to employ undocumented migrants, so as not to pay adequate salaries or make an effort to provide suitable working conditions. "The recipient States are not unaware of the exploitation, since they also benefit from that 'industry', since their economy grows by dint of this irregular situation."

On the American continent, migrant workers, whose status is irregular, are subject to many discriminatory and abusive practices, which may be observed in their traumatic entry into the recipient State, in the discrimination and the xenophobic attacks they endure in their daily life, in the ill-treatment they receive at work, and in the way in which they are expelled from the recipient State.

The inequality of conditions between the employer and the undocumented migrant worker is more critical than in other labor relations, because of the latter's irregular situation. Owing to their precarious economic situation, undocumented migrant workers are ready to accept inferior working conditions to those of other persons who are legally resident in the country. The occupations to which migrant workers have access vary according to each country; however, "as regards wages, the employment they obtain is always the least attractive and, as regards hygiene and health, it is always the most dangerous."

Migrant workers whose situation is irregular have limited possibilities (de facto and de jure) of obtaining the protection of their rights when confronted by precarious situations or exploitation. In general, there is a system of immunity for those who abuse the vulnerability of these workers and a system of punishment for the latter.

All these conditions which undocumented migrant workers are subjected to convert them into a disadvantaged group that is the victim of systematic discriminatory practices throughout the region. Furthermore, the situation of migrant women merits special mention because they are victims of double discrimination: first as women and then as migrants.

Frequently, the departure of migrants from recipient States takes places in the context of arbitrary procedures. Deportation procedures are not always conducted in accordance with the required minimum guarantees.

"In conclusion, studies by supranational and non-governmental organizations describe the precarious situation of irregular migrants workers, both men and women, as regards the enjoyment and exercise of their human rights in the countries which receive them. In particular, they stress the systematic discrimination to which such migrant workers are subject in the workplace."

Owing to the vulnerability of irregular migrant workers, it is essential to pay special attention to any distinction in treatment based on their migratory status, because such a situation creates a "suspect category." Identification of a "suspect category" requires a presumption that the distinction is illegal.

The definition of situations that create a "suspect category" should include those that depict the realities of actual systematic discrimination and abuse in the region.

The first justification for recognizing that irregular migrant workers comprise a "suspect category" is that discrimination against this group is closely linked to its nationality, ethnic origin or race, which is always different from the majority in the State of employment. In this respect, nationality, race or ethnic origin are explicitly prohibited as grounds for distinction. In its decision in Trimble v. Gordon, the United States Supreme Court considered that classifications based on national origin were "first cousin" to those based on race; accordingly, they related to areas where it was necessary to apply the principle of equality and equal protection.

The second justification for recognizing that irregular migrant workers comprise a "suspect category" is the special vulnerability of this group, particularly because of the systematic discrimination they suffer in the workplace in recipient States. Undocumented migrant workers are discriminated against in several areas of their lives. However, discrimination is most clearly visible in the workplace.

Human rights treaties refer to the rights of "all persons" and treaties that establish workers' rights speak of the rights of "all workers," without making distinctions as to their migratory status. Similarly, the International Convention on the Protection of the Rights of All Migrant Workers and their Families recognizes the rights of migrant workers irrespective of whether they are documented or undocumented.

Distinctions in treatment owing to national or ethnic origin or race are explicitly prohibited in the American Convention, the American Declaration and other international instruments. The European Court of Human Rights has considered that cases of discrimination based on nationality should be closely examined and that, in the case of rights to social security, national origin should be considered a "suspect category." In Gaygusuz v. Austria, the European Court indicated that very powerful reasons must be alleged for difference in treatment, based solely on nationality, to be considered compatible with the European Convention and decided that Article 14 of the Convention had been violated by denying unemployment insurance to a Turkish worker based on his nationality.

The prohibition to afford a different treatment based on nationality, added to the systematic discrimination to which irregular migrant workers are subjected in the workplace, requires that any distinction between undocumented migrant workers and legal migrant workers or citizens in the workplace "must bear a relationship to the aim sought."

The elaboration and implementation of migratory policies and the regulation of the labor market can justify restrictions to the labor rights of migrants, provided such restrictions are necessary. "[A] legal or practical distinction between undocumented migrants on the one hand and documented residents and citizens on the other hand, which denies the former the right to enjoy dignified and equitable working conditions, limited working days, paid vacations, fair wages and promotion, or any other labor right recognized in the recipient country's legislation, or which disregards their right to join unions to defend their interests or denies their right to social security, can never be necessary for the regulation of migratory or labor market policies."

In principle, there is no "relationship of necessity" between, on the one hand, the elaboration and implementation of migratory policies and the regulation of the labor market and, on the other hand, possible restrictions of labor rights while a contract is in force, which would allow those restrictions to be defined as proportionate to the aims sought. "Such restrictions are not the kind that clearly seek an essential social interest, or the kind that restrict the protected right to a lesser degree."

The labor rights contained in international covenants correspond to workers because they are workers, irrespective of their nationality or migratory status. The unprotected situation in which undocumented migrant workers find themselves cannot be aggravated or perpetuated, citing as an aim, "the formulation and implementation of migratory policies or the regulation of the labor market."

Restricting the enjoyment of labor rights by irregular migrant workers is unreasonable and unnecessary. Such restrictions encourage the employment of undocumented migrants and increase the vulnerability of a sector of the population that faces a situation of systematic discrimination and serious defenselessness.

The aims of migratory policies and labor market regulation can be achieved through measures that are less onerous for the protection of the rights of irregular migrant workers. For example, increased control, through migrant entry policies or monetary penalties for employers.

The International Convention on the Protection of the Rights of All Migrant Workers and their Families shows that the aim of regulating the labor market can be achieved by measures that are less onerous for migrant workers, when it establishes that "[t]he recourse of the employment of migrant workers who are in an irregular situation will be discouraged if the fundamental human rights of all migrant workers are more widely recognized."

The costs of a policy that does not protect the labor rights of irregular migrant workers, but provides economic benefits by exploiting their work should be identified. "If international law is intended to strengthen democratic societies, States should be encouraged to provide generous protection to undocumented migrant workers, both men and women, based on labor law, international law and human rights law, instead of permitting the continuation of situations of exclusion, which are merely another means of penalizing migrants."

In conclusion, no difference should be established in the scope of labor law protection with regard to undocumented migrants. The actual conditions of irregular migrant workers engender a "suspect category," so that any potential restriction of their labor rights should be strictly monitored. Irregular migrant workers who are employed to perform a task should enjoy all labor rights.

The State can respond to the special vulnerability of irregular migrant workers in different ways, but their special situation of systematic discrimination and defenselessness cannot be ignored. "[I]n the face of this reality, special or differentiated measures should be taken in order to ensure equality."

During the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, held in Durban in 2001, the need to eliminate discrimination against migrant workers was reaffirmed. Likewise, it was recommended that all possible measures should be adopted to ensure that migrants can enjoy human rights, in particular the rights related to: fair wages and equal remuneration for work of equal value, without any distinction; the right to insurance in case of unemployment, illness, disability, death of a spouse, old age, or any other lack of means of subsistence owing to circumstances beyond their control; and to social benefits, including social security.

Among the measures tending to eliminate such discriminations, States must modify discriminatory conduct and examine their legislation and practices in order to repeal all provisions that restrict the rights of migrant workers. Nevertheless, States may "promote public policies to foment respect for diversity, discourage discrimination and encourage public institutions to adopt concrete measures to promote equality." The State may also organize educational and awareness-raising campaigns aimed at its officials and the general public.

The existence of conditions of genuine inequality makes it necessary to adopt compensatory measures that help reduce or eliminate the obstacles and restrictions that impede or reduce the effective defense of the interests of migrant workers.

In addition, a fundamental measure to ensure the effective protection of the labor rights of irregular migrant workers is "to establish procedures for the justice system to listen to their complaints," because the mere existence of substantive rights is not enough to guarantee their exercise. Likewise, when migrants have returned to their State of origin, the recipient State must also guarantee access to justice. If employers treat migrants in a manner contrary to the norms of international human rights law, the latter can demand the corresponding reparation, irrespective of their migratory status. "Therefore, the State should provide irregular migrant workers with free or low-cost legal assistance so that they may file complaints using a simple and prompt remedy." This principle is included in Article 18 of the International Convention on the Rights of All Migrant Workers and Members of Their Families.

Reforms established by the State to improve the situation of irregular migrants should have effect in both the public and the private sector, because violations of rights "that occur in the private sector, insofar as they have been perpetrated with the consent or complicity of the State[,] may be attributed to the State." In this respect, the United Nations Committee on Human Rights, in its General Comment 28, has stated that States must eliminate discriminatory activities in both the public and the private sector.

The migratory status of migrant workers cannot be a variable that is taken into consideration to recognize them their labor rights while they are employed. They must be guaranteed not only the fundamental labor rights, but also all the labor rights recognized in the international covenants applicable in the Americas.

Human rights are interrelated, not only as regards different categories of rights, but also "all the rights that are included in a single category of rights, such as labor rights, in this case." In particular, the International Convention on the Rights of All Migrant Workers and the Members of Their Families establishes that the labor rights of migrant workers, whether they are documented or undocumented, cannot be restricted in any way.

For the purposes of this amicus curiae, the rights included in the international covenants include: 1) labor rights in the context of the employment contract; 2) rights of association, and 3) rights to social security.

The Center for Legal and Social Studies (CELS), Ecumenical Service for the Support and Orientation of Immigrants and Refugees (CAREF) and the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires: In its written and oral statements, indicated that:

This amici curiae merely answers questions 2(1) and 3.

Migratory status has been and continues to be an obstacle for the access of all migrants to their fundamental human rights. There are a series of legal and non-legal norms, which are contrary to the provisions of the American Convention and the American Declaration and other international instruments, and which deprive individuals of their human rights because of their migratory status.

Regarding the second question (supra para. 4):

The preamble to the American Convention recognizes the universal and essential nature of human rights, which are based upon attributes of the human personality and not on nationality. Consequently, the protection of the individual encompasses all persons; in other words, it is universal in nature.

When acceding to and ratifying international human rights treaties, States assume a series of mandatory obligations towards all persons subject to their jurisdiction. These obligations have been extensively clarified by the different treaty-monitoring bodies, "either generically, with regard to a particular social group, or with reference to each specific right."

When interpreting the International Covenant on Civil and Political Rights recently, the Human Rights Committee, in its General Comment 15, emphasized that the enjoyment of the rights recognized by the Covenant is not limited to the citizens of States parties but should also be accessible to all individuals irrespective of their nationality or statelessness, including those requesting asylum, refugees, migrant workers and other persons who are within the territory or subject to the jurisdiction of the State party.

According to international human rights instruments, and their interpretation by monitoring bodies and legal writings, all persons who are within the territory of a State may require the State to protect their rights. The principle of non-discrimination is an essential element of international human rights law and is embodied in all international human rights instruments.

The millions of migrants throughout the world, who do not have regular residence in the country they live in, constitute a group in a particular "social condition."

The principle of non-discrimination should be considered intimately and inseparably linked to the concept of a group in an extremely vulnerable situation that requires special protection. Therefore, the situation of vulnerability and the "social condition" of migrants, particularly those whose status is irregular, could determine the existence of grounds on which discrimination is prohibited, according to the principle of non-discrimination.

The United Nations has organized three world conferences against racism and discrimination and, at all of them, extensive reference has been made to discrimination against migrants, with express mention of their residence status. Moreover, special rapporteurs have been appointed at the regional and global level to verify the human rights situation of migrants and the discrimination they suffer owing to their status as aliens or their residence status.

Likewise, national legislation has included the concept of "migratory status" as a social condition that should be considered grounds that are prohibited, according to the principle of non-discrimination.

State obligations arising from international instruments cannot be bypassed because of the nationality, migratory status or residence status of a person. On this question, the bodies created by virtue of the Charter of the United Nations or the human rights treaties have conclusively stated that migrants, irrespective of their migratory status, are protected by all the international human rights instruments ratified by the State where they live.

The United Nations Inter-governmental Working Group of Experts on the Human Rights of Migrants has stated that "[a]ll persons, regardless of their place of residence, have a right to the full enjoyment of all the rights established in the Universal Declaration of Human Rights. States must respect the fundamental human rights of migrants, irrespective of their legal status." It has also emphasized that "[a] basic principle of human rights is the fact of entering a foreign country, violating the immigration laws of that country, does not lead to losing the human rights of an 'immigrant with an irregular status.' Nor does it eliminate the obligation of a Member State to protect them."

In conclusion, the response to question 2(1) may be summarized as "[t]he obligations and responsibility of States within the framework of international human rights law are not altered in any way by the residence status of an individual in the State in which he resides. The rights arising from international human rights law apply to all persons because they are human beings and should be respected, protected and guaranteed, without any discrimination on prohibited grounds (including, the migratory status of the person). In addition [...], all persons are subject to the jurisdiction of the State on whose territory they reside, irrespective of their migratory status. Consequently, the monitoring bodies of the human rights treaties – and also those deriving from the Charter of the United Nations – have repeatedly stressed that human rights must be respected and guaranteed to all persons, irrespective of their migratory status."

Regarding the third question (supra para. 4):

Each State has the authority – based on the principle of sovereignty – to formulate its own migratory policy and, consequently, to establish criteria for the admission and residence of migrants. However, this does not mean that the said policy is exempt from the obligations of each State under international human rights law.

Migratory policy and legislation should respect all the provisions of the international human rights instruments recognized by each State. According to the provisions of international human rights law and their interpretation by the competent bodies, the sovereign authority to establish migratory policy – and also other policies emanating from State sovereignty – "does not in any way exempt or restrict the obligations of respect, protection and guarantee to all persons subject to the jurisdiction of each State."

With regard to migratory legislation, as in any other area of State policy, each law or policy defined by the State or its absence could constitute the violation of rights embodied in the international instruments to which that State is a party. To avoid this situation, international human rights law establishes a series of principles, standards and limits that each State must respect when it institutes any policy, including migratory policy and legislation.

At the Durban Conference, the States committed themselves to "revising, when necessary, their immigration laws, policies and practices, to ensure that they are free of all racial discrimination and that they are compatible with the obligations of the States under international human rights instruments." Similarly, at the regional conference for the Americas, the Governments committed themselves to "reviewing their immigration policies and practices in order to eliminate those that discriminate against migrants in a way that is not coherent with the obligations assumed under international human rights instruments."

Each international human rights instrument has been careful to establish expressly the criteria and requirements that each State party must respect when regulating and restricting the rights recognized in such instruments.

Any restrictions to the exercise of human rights must be established in accordance with certain formal requirements and substantive conditions.

Article 30 of the American Convention indicates the formal requirements for such restrictions. The need for a formal law implies that States have the obligation to adopt all necessary measures to ensure that any norm that does not originate from "democratically elected and constitutionally empowered bodies" should not establish any illegal restriction or violation or affect a right recognized in the Convention.

In order to comply with this obligation in the case of the rights of migrants, States must first examine the norms issued by agencies specializing in migratory matters. Then they must analyze the different decisions (resolutions, decrees, etc.) issued in all sectors and policies of the State that have or may have a serious and indisputable influence on the violation of the rights of migrants, as a result of their migratory status.

The fact that the restriction must be promulgated by law "supposes a norm of general application that should be compatible with respect for the principle of equality and not be arbitrary, meaningless or discriminatory."

To be legitimate, in addition to complying with the formal requirement, the restriction of a human right must be addressed at attaining a specific valid objective.

According to the provisions of the international instruments, the objectives that justify or legitimize a restriction of human rights – in other words the basic requirements – are concepts such as "democratic necessity", "public order (ordre public)", "national security", "the common good", "public health" and "morality." Each of these concepts was then examined.

The questions posed by Mexico can only have one answer: "international human rights law is intended for the universal protection of all persons, without any discrimination on prohibited grounds (including a person's migratory status)."

In conclusion, any migratory policy or legislation must conform to the international and regional standards in force with regard to legitimate restrictions to human rights. First, rights may only be limited to the extent that the restriction is aimed at achieving a legitimate end provided for in international human rights instruments. Second, the restriction must be established by a formal law, which must respect the principle of equality and be neither arbitrary nor discriminatory. Third, there should be no alternative that would be less restrictive of the rights in question. Lastly, in each specific case, the State must justify not only the reasonableness of the measure, but also examine rigorously whether it damages the principle of illegitimacy that affects all measures that restrict a right based on grounds that are prohibited by the principle of non-discrimination.

"[P]eople who migrate for reasons related to poverty have previously been deprived of their rights (including the right to employment, education, housing, health, etc.). Confronted by this lack of protection by their own State (or rather the human rights violations committed by the State), the person decides to migrate to another country, in which he hopes to be able to enjoy the rights guaranteed in international instruments [...]. Consequently, it is particularly inadmissible that millions of persons can be excluded from the international system for the protection of human rights, this time owing to their migratory status in the country to which they have migrated."

United Nations High Commissioner for Refugees (UNHCR):

In its oral statement UNHCR indicated that:

Nowadays it is meaningless to trace a strict line between voluntary and enforced displacement of persons, because the motives for migration are complex and imply a combination of political, economic and social factors. The nature and complexity of current displacements make it difficult to draw a clear line between migrants and refugees. As of the 1990s, UNHCR has been studying the link between asylum and migration and, in particular, the need to protect refugees

within the migratory flows. However, there is still no international mechanism that deals exclusively with migration.

Although migratory policies fall within the sphere of State sovereignty, human rights instruments establish limits to the adoption and implementation of such policies. These limits include those stipulated in the American Convention, the 1951 Convention Relating to the Status of Refugees and its 1966 Protocol, and the International Convention for the Protection of the Rights of all Migrant Workers and Members of their Families. These instruments should also guide the decision of the Court in this request for an advisory opinion, pursuant to Article 29 of the American Convention and the pro homine principle.

Regarding the connection between asylum and migration, it is worth mentioning that, in the current circumstances, migrants and other persons who seek protection, such as asylum seekers and refugees, are all part of the same migratory flows and all require protection. Although not all these persons qualify as refugees under the international instruments, safeguards should be established that allow different migratory categories to be identified and granted protection. Since there are limited legal options for the entry into and residence in determined territories, "asylum systems are increasingly being used to give certain migratory categories the possibility of remaining in a country.

Nowadays, it is presumed not only that aliens who enter a territory are migrants, but also that, when they are categorized as such, "what is meant is that they do not have rights and, therefore, that the State, in exercise of its sovereignty, may expel or deport them, or violate their basic rights." Likewise, the lack of legal options for migration and the restrictive policies on asylum and migration mean that refugees and migrants "face infrahuman conditions, with an uncertain legal status and, in many cases, with their rights openly restricted," are more vulnerable to the problem of trafficking in persons, and are subject to greater discrimination and xenophobia in most recipient States.

The irregular status of a migrant should not deprive him of the enjoyment and exercise of the fundamental rights established in the American Convention and other human rights instruments. The State must protect all persons subject to its jurisdiction, whether or not they are nationals.

The vulnerability of migrants should be underscored and this is exacerbated not only by the limited number of countries that have ratified the international instruments protecting them, but also by the absence of an international organization with the specific mandate of protecting the fundamental rights of such persons. In this respect, it is important to point out that the Statute of the International Organization for Migration (IOM) refers to the management and administration of migration, which does not necessarily correspond to the protection of the fundamental rights of migrants.

In a context where most American States are parties to the international conventions on refugees, it should be stressed that most of them do not have appropriate instruments to identify those persons who require protection. This does not refer only to asylum seekers and refugees, but also to migrants who do not have the necessary safeguards to guarantee the minimum respect for their fundamental rights, embodied in the American Convention.

Also, the implementation of increased migratory controls and interception policies means that, in most case, anonymity and irregular residence are chosen; thus, contrary to what occurred in the past, today we can speak of "de facto refugees", because most do not wish to be recognized by the States or are being returned.

Moreover, although a refugee's right to work is embodied in the 1951 Convention relating to the Status of Refugees, unfortunately this international instrument, which establishes minimum

rights for that migratory category, does not refer to asylum seekers. In this respect, a simplistic interpretation could even say that asylum seekers and migrants have no labor rights. This interpretation is not only contrary to the spirit of the international instruments; it is also an evident step backward as regards the progressive nature of human rights.

Consequently, the protection parameters established by this request for an advisory opinion may be applicable, by analogy, to the protection of the labor rights of asylum seekers.

Migratory status "is and must be prohibited grounds for discrimination in our hemisphere, based on the American Declaration and the American Convention on Human Rights". The principle of non-discrimination is embodied in all human rights instruments.

The United Nations Committee on Human Rights has expanded the grounds for non-discrimination, based on Article 2(1) of the International Covenant on Civil and Political Rights. It has established that any differentiation must be reasonable, objective and aimed at achieving a legitimate goal. In the case of the International Covenant on Economic, Social and Cultural Rights, the United Nations Committee on Economic, Social and Cultural Rights has established the grounds of discrimination for "other status," which would be equivalent to "other condition"; in other words, there could be cases of discrimination for grounds that are not explicitly set out in that Covenant.

That line of reasoning is relevant for the present advisory opinion, because the American Declaration establishes that there may be discrimination for "other" distinctions, in addition to race, sex, language and religion. In the case of the American Convention on Human Rights, this treaty prohibits any kind of discrimination of rights and freedoms, establishing twelve grounds, including nationality and "any other social status."

Since the principle of non-discrimination is a basic rule of international human rights law and in light of statements made by the monitoring bodies of the United Nations international treaties, we must conclude that "the grounds for non-discrimination established in the inter-American instruments are equally indicative and illustrative and never exhaustive or restrictive, as that would distort the object and purpose of the American Convention on Human Rights, which is the protection of the fundamental rights and freedoms in our hemisphere."

In particular, based on the exceptionally vulnerable situation of asylum seekers, refugees and migrants, it may validly be inferred that, according to the American Declaration and the American Convention, any other social condition or "any other factor" would provide sufficient grounds to indicate that, in our hemisphere, there is a specific prohibition to discriminate.

We should point out that, in the Americas, the vulnerability of migrants, asylum seekers and refugees has been explicitly recognized in the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, the Convention of Belém do Pará, which stipulated that, "with respect to the adoption of the measures in this chapter, the States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons."

In view of the above, we must conclude that the prohibited discriminations include "any distinction, exclusion, restriction or preference based on any grounds such as nationality" aimed at invalidating the recognition, enjoyment or exercise of the rights established in the international instruments, in equal conditions.

Likewise, the judicial and legal guarantees established in Articles 8 and 25 of the American Convention are equally applicable when determining a situation that affects the rights of asylum seekers or refugees, but they should also guide the protection of migrants in the hemisphere.

The Central American Council of Ombudsmen with the support of its Technical Secretariat (the Inter-American Institute of Human Rights):

In its written and oral statements, indicated that:

Regarding the first question (supra para. 4):

It is necessary to recognize the distinction between the human right not to be subjected to discriminatory treatments (in either the formulation of the law or its implementation) and the obligation of States not to make any discrimination in the enjoyment and exercise of human rights with regard to persons subject to their jurisdiction.
In international human rights law, the principle of equality has two dimensions: a) equality in the enjoyment and exercise of human rights; and b) the right of all persons to be treated equally before the law. The importance of these two dimensions is not merely their recognition in a constitutional text, but also that the State should implement all pertinent measures to ensure that the obstacles to equality among persons are removed in practice, in accordance with Article 1 of the American Convention and Article 2(1) of the International Covenant on Civil and Political Rights. The State must not only abstain from generating de jure discriminations, but must also eliminate the factors that give rise to de facto discrimination in relation to civil and political rights and also to economic, social and cultural rights.
The answer to the first question alludes to labor-related human rights that are regulated in an extensive series of norms in the inter-American system, which has two levels of recognition: one applicable to OAS member States which are not parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; and a second applicable to OAS member States who are also parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador." These two levels entail two distinct legal situations regarding the protection of labor rights: the States who belong to the first group are obliged by Articles 30, 34 and 45 of the OAS Charter and Articles XIV, XV and XVI of the American Declaration; while the States parties to the Protocol, in addition to being obliged by the preceding provisions, have obligations arising from Articles 3, 4, 5, 6, 7, 8 and 9 of the Protocol.
To understand the expression "labor legislation" in Mexico's request, we should mention that, in the legal systems of all OAS member States, the international obligations they have assumed arising from conventions, "may be classified as legislation; in other words, as an integral part of their domestic law." Thus, the expression "labor legislation" included in the requesting State's first question refers to the domestic law of the States. The norms of international law indicated above do not admit a restrictive or discriminatory interpretation or implementation, in particular because they are based on a specific migratory status. "From the legal perspective of migration, the regular or irregular situation does not alter or affect the scope of the State obligation" to respect and ensure human rights. Domestic labor legislation includes more rights than those protected in the international norms cited above. States have the right to exercise control on migratory matters and to adopt measures to protect their national security and public order; but States must exercise this control, respecting human rights.
A detailed answer to Mexico's first question would require a specific examination of each State. Nevertheless, we can say that, like human rights, labor rights correspond to all persons and are required in the context of labor relations. Consequently, the ability to perform a productive

activity depends exclusively on professional training and skill, and is never related to the migratory status of a person.

The causes of migration, particularly irregular migration, are different from the conditions of persecution that give rise to the existence of refugees, who are protected by refugee law. Irregular migration is associated with socio-economic conditions and the search for better opportunities and means of subsistence than those the person has in his State of origin. In practice, high levels of irregular migrants increase the offer of manpower and affect how it is valued. Since the irregular migrant does not want to be discovered by the State authorities, he refuses to have recourse to the courts, and this encourages the violation of his human rights in the workplace.

A person who migrates to another State and enters into an employment relationship "activates his human rights" in that context, irrespective of his migratory status. He also "activates" the obligations of the recipient State contained in the OAS Charter, the American Declaration (in the case of an OAS member State) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (where the State is also a party to the latter). This "activation" of rights implies that a measure taken by the State with the aim of producing a denial of the enjoyment and exercise of labor human rights based on the migratory status of a person "would lead to a differentiated treatment that would give rise to arbitrariness, and consequently discrimination."

Accordingly, we consider that the answer to Mexico's first question is: OAS member States and States parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "may not apply a distinct treatment that is harmful to undocumented migrant workers as regards the enjoyment of their labor rights," understanding such rights to be those contained in Articles 30, 34(g) and 45 of the OAS Charter; Articles XIV, XV and XVI of the American Declaration; and Articles 6, 7, 8 and 9 of the said Protocol, as well as those recognized in the domestic legislation of the States, using the migratory status of the said workers as a basis for this distinct treatment. Those human rights are enjoyed as soon as an employment relationship is established and do not depend on migratory status.

Regarding the second question (supra para. 4):

The obligations to respect and guarantee human rights do not arise from Article 1(1) of the American Convention or from Article 2 of the International Covenant on Civil and Political Rights, but from the nature of human rights and human dignity, which does not depend on a classification based on some positive act of the State. Thus, the enforceability of these obligations does not depend on a State's accession to or ratification of the American Convention; it depends only on its justiciability before the organs of the inter-American system. In this respect, the obligations of respect and guarantee are not conditional obligations because they derive from human dignity.

Consequently, we consider that the answer to the first part of the second question is that the State obligations to respect and guarantee human rights, in general, and the human right not to be subjected to discriminatory treatment or unequal treatment before the law, in particular, cannot be interpreted as conditioning the content of such obligations to a person's regular migratory status in the territory of a State. Migratory status is not a necessary condition for a State to respect and guarantee the human rights contained in Articles 2(1) of the Universal Declaration, II

of the American Declaration, 2 and 26 of the International Covenant on Civil and Political Rights, and 1 and 24 of the American Convention.
The second part of the second question should be answered bearing in mind the human right not to be subjected to discriminatory treatment or unequal treatment before the law, which the State is obliged to respect and guarantee. Accordingly, the State may not deny a worker one or more of his labor rights based on his irregular migratory status, since if it did so, it would be failing to comply with its obligation to guarantee those rights and could be attributed with this act of denial under international law.

Regarding the third question (supra para. 4):

The source of the obligation to respect and guarantee human rights is international law; consequently, in accordance with the Vienna Convention on the Law of Treaties, domestic norms cannot be alleged to try and justify non-compliance with this obligation. Moreover, this generic obligation is enforceable with regard to all human rights.
Notwithstanding the generalized practice of most States, the pre-eminence of international law over domestic law is not determined by the latter. In application of the pro homine principle, international human rights law accords prevalence to the norm intended to protect human dignity (the one that provides a more comprehensive recognition of human rights), regardless of the source of the obligation in question. Hence, the laws of a State are valid insofar as they are congruent with human rights.
The answer to the third question is that no State is authorized to use its domestic law to interpret the human rights resulting from a source of international law, when this will diminish the degree to which such rights are recognized. An interpretation of this type is not valid and cannot produce legal effects. However, a State may develop an interpretation of the human rights deriving from a source of international law using its domestic law, when the result of this interpretation will give preference to the option that provides the most extensive degree of recognition.

Regarding the fourth question (supra para. 4):

There is no finite list of jus cogens norms, because, there appear to be no criteria that allow them to be identified. It is the courts that determine whether a norm can be considered jus cogens, "for the purposes of invalidating a treaty." Such norms establish limits to the will of States; consequently, they create an international public order (ordre public), and thus become norms of enforceability erga omnes. Owing to their transcendence, human rights norms are norms of jus cogens and, consequently, a source of the legitimacy of the international legal system. All human rights must be respected equally, because they are rooted in human dignity; therefore, they must be recognized and protected based on the prohibition of discrimination and the need for equality before the law.
The answer to the first part of the fourth question is that, owing to the progressive development of international human rights law, the principle of non-discrimination and the right to the equal and effective protection of the law must be considered norms of ius cogens. They are norms of peremptory international law, which create an international public order that cannot be opposed validly by other norms of international law, and particularly by the domestic legislation of States.

Norms of jus cogens rank higher than other legal norms, so that the validity of the latter depends on their congruency with the former.
An OAS member State which is a party to the International Covenant on Civil and Political Rights is obliged to respect and guarantee the rights recognized therein and also in the American Declaration, because "human rights form a single, indivisible, interrelated and interdependent corpus iuris."
The answer to the second part of the fourth question is that, in the case of the American States, the legal effect of the recognition of the principle of non-discrimination and the right to equal and effective protection of the law as norms of jus cogens is that any act of the State that conflicts with this principle and right has no legal effect or validity.

Jorge A. Bustamante, Juridical Research Institute, Universidad Nacional Autónoma de México (UNAM):

In his written and oral statements, indicated that:

The legal framework for evaluating the actual situation of Mexican migrants in both their own country and the United States, as the recipient State of almost all international Mexican migrants, should be considered in two different analytical contexts: the international context, deriving from the international nature of migration (analysis of the State which receives immigration and the relationship of the migrants with the State and the society that receives them); and the national context (analysis of the migrants as subjects of human rights in their State of origin).
The vulnerability that affects the human rights of international migrants is of a structural nature and arises from the way in which most States define nationals and aliens in their Constitutions. Most States afford nationals a certain priority in their legislation with regard to aliens, so that the structural situation of the vulnerability of migrants as subjects of human rights is equal to the social inequality between them and the nationals of the recipient State.
The vulnerability of migrants as subjects of human rights in their national context arises from the ideological association that the members of civil society in their State of origin make between the social definition of a migrant and any other socially undervalued condition (woman, girl/boy child, indigenous person, disabled person, member of a religious order, etc.) or any other condition which society in the State of origin considers inferior to the rest of the non-migrants in that society. This association has an ideological dimension and a historical context that is different for each State, in the same way as the degree to which this situation of inferiority is assigned to migrants varies.
There is an objective dimension of vulnerability, according to which the greater the distance between a migrant and his home, the greater his vulnerability as a subject of human rights. Although this hypothesis may be valid for all migrants, it is more so in the national context of internal migrants than for the international context of migration.
There is an asymmetry of power that is transformed into a context of social relations between nationals and aliens-migrants, that is confirmed by the State through the establishment of differential access to public resources for the two categories; this gives rise to a legal framework of social relations that enters into contradiction with the more extensive concept of human rights.
In this asymmetry of power, it is probable that the alien will find himself in a position of subordination to the national. This results in a situation of structural vulnerability for aliens.

The position of subordination imposed on aliens/migrants is something that the recipient State "confirms." Here, the vulnerability is potentially supplemented by the role of the State, either by act or omission, but always in the context of this differential treatment that the recipient State grants to nationals compared to aliens.

The asymmetries of power between the States of origin and the States that receive international migrants may be clearly seen by the limited number of recipient States that have ratified the International Convention on the Rights of all Migrant Workers and Members of their Families.

"[T]he integration of migrants/aliens as equals of nationals before the law and the State implies a legal authorization or empowerment of aliens/migrants, which would result in the disappearance of the vulnerability of the migrants as subjects of human rights." This "empowerment" is associated with the pre-eminence of human rights in the domestic law of the recipient State, based on which aliens/migrants may defend themselves from discrimination and the abuse of their human rights, by acquiring conditions of equality with nationals before the law and the State.

The death of almost two thousand Mexican and some Central American migrants is the strongest evidence that the United States has violated and continues to violate human rights by maintaining the so-called "Operation Guardian." This thesis is strengthened by the fact that a report of the United States General Accounting Office expressly recognized the link between "Operation Guardian" and the deaths of migrants. The State has the obligation to repair the harm caused by the acts that it has planned, implemented and maintained, by the payment that corresponds to the next of kin for the loss of life of a productive member of their family. "It is very strange that the Government of Mexico has not filed any claim," establishing the relationship between: the planning, implementation and continuity of "Operation Guardian" and State responsibility arising from these governmental acts.

One factor that prevents Mexico from being able to formulate this claim against the United States for the latter's responsibility in the deaths of Mexican migrants on its border, is the absence of Mexico's express recognition of its co-responsibility in those deaths, arising from the fact that its economic policy has caused Mexicans to migrate in search of employment in the United States. This migratory phenomenon is the result of the interaction of factors on both sides of the border; namely, the interaction between a demand for migrant manpower in the United States and an offer of manpower from Mexico. The causal relationship between Mexico's economic policy and the generation of the factors that produce this supply of manpower, give rise to "State responsibility" with regard to migration and, hence, to the co-responsibility of Mexico in the deaths of migrants on the border with the United States.

The recognition of responsibility by Mexico should be considered an element in the bilateral negotiation of an agreement on migrant workers between the two Governments. In this context, negotiations could be based on Mexico's express recognition of co-responsibility for the deaths of the migrants and co-participation in the payment of compensation to repair the harm arising from those deaths and the agreement of the United States to suspend "Operation Guardian."

III. COMPETENCE

48. This request for an advisory opinion was submitted to the Court by Mexico, in exercise of the faculty granted to it by article 64(1) of the Convention, which establishes that:

[t]he member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.

49. This faculty has been exercised in compliance with the following requirements established in the Court's Rules of Procedure: precise formulation of the questions on which the Court's opinion is sought; identification of the norms to be interpreted; presentation of the considerations giving rise to the request; name and address of the Agent (Article 59 of the Rules of Procedure), and indication of the international treaties other than the American Convention to be interpreted (Article 60(1) of the Rules of Procedure).

50. Compliance with the regulatory requirements for formulating a request does not imply that the Court is obliged to respond to it. In this respect, the Court must bear in mind considerations that go beyond the merely formal aspects related to the generic limits that the Court has recognized to the exercise of its advisory function [FN1]. These considerations will be examined in the following paragraphs.

[FN1] Cf. Legal Status and Human Rights of the Child. Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 19; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 31; Reports of the Inter-American Commission on Human Rights (Art. 51 of the American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No.15, para. 31; and "Other treaties" subject to the Advisory Jurisdiction of the Court (Art. 64 of the American Convention on Human Rights). Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, para. 13.

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51. The application submits four questions to the consideration of the Court regarding the "[...] deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to guarantee the principles of legal equality, non-discrimination and equal and effective protection of the law embodied in international instruments for the protection of human rights; and also with the subordination or conditioning of the observance of the obligations imposed by international human rights law, including those of an erga omnes nature, to the attainment of certain domestic policy objectives of an American State." The request also deals with "the status that the principles of legal equality, non-discrimination and equal and effective protection of the law have achieved in the context of the progressive development of international human rights law and its codification."

52. Specifically, Mexico has asked the following questions:

In the context of the principle of equality before the law embodied in Article II of the American Declaration, Article 24 of the American Convention, Article 7 of the Universal Declaration and Article 26 of the [International] Covenant [on Civil and Political Rights],

1) Can an American State establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that prejudices undocumented migrant workers in the enjoyment of their labor rights, so that the migratory status of the workers impedes per se the enjoyment of such rights?
2.1) Should Article 2, paragraph 1, of the Universal Declaration, Article II of the American Declaration, Articles 2 and 26 of the [International] Covenant [on Civil and Political Rights] and Articles 1 and 24 of the American Convention be interpreted in the sense that an individual's legal residence in the territory of an American State is a necessary condition for that State to respect and ensure the rights and freedoms recognized in these provisions to those persons subject to its jurisdiction?
2.2) In the light of the provisions cited in the preceding question, can it be considered that the denial of one or more labor right, based on the undocumented status of a migrant worker, is compatible with the obligations of an American State to ensure non-discrimination and the equal, effective protection of the law imposed by the above-mentioned provisions?
Based on Article 2, paragraphs 1 and 2, and Article 5, paragraph 2, of the International Covenant on Civil and Political Rights,
3) What would be the validity of an interpretation by any American State which, in any way, subordinates or conditions the observance of fundamental human rights, including the right to equality before the law and to the equal and effective protection of the law without discrimination, to achieving migration policy goals contained in its laws, notwithstanding the ranking that domestic law attributes to such laws in relation to the international obligations arising from the International Covenant on Civil and Political Rights and other obligations of international human rights law that have an erga omnes character?
In view of the progressive development of international human rights law and its codification, particularly through the provisions invoked in the instruments mentioned in this request,
4) What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of ius cogens? If the answer to the second question is affirmative, what are the legal effects for the OAS Member States, individually and collectively, in the context of the general obligation to respect and ensure, pursuant to Article 2, paragraph 1, of the [International] Covenant [on Civil and Political Rights], compliance with the human rights referred to in Articles 3 (l) and 17 of the OAS Charter?

53. From these questions, it is evident that the requesting State requires an interpretation of the American Convention, as well as of other international treaties and declarations. The Court has established some guidelines on the interpretation of international norms other than the American Convention. Principally, it has considered that Article 64(1) of the Convention, when referring to the authority of the Court to provide an opinion on "other treaties concerning the protection of human rights in the American States," is broad and non-restrictive. In other words:

[…] the advisory jurisdiction of the Court can be exercised, in general, with regard to any provision dealing with the protection of human rights set forth in any international treaty applicable in the American States, regardless of whether it be bilateral or multilateral, whatever

be the principal purpose of such a treaty, and whether or not non-Member States of the inter-American system are or have the right to become parties thereto. [FN2]

[FN2] "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, first operative paragraph.

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54. In this respect, the Court has established that it can "examine the interpretation of a treaty provided that the protection of human rights in a member State of the inter-American system is directly involved" [FN3], even though the said instrument does not belong to the regional system of protection [FN4], and that:

[n]o good reason exists to hold, in advance and in the abstract, that the Court lacks the power to receive a request for, or to issue, an advisory opinion, about a human rights treaty applicable to an American State merely because non-American States are also parties to the treaty or because the treaty has not been adopted within the framework or under the auspices of the inter-American system. [FN5]

[FN3] Legal Status and Human Rights of the Child, supra note 1, para. 22; and cf. The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 36; International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2, American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 21; and "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, para. 21.
[FN4] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, paras. 71 and 109; and "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, para. 38.
[FN5] "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, para. 48. See also, paras. 14, 31, 37, 40 and 41.

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55. Therefore, the Court considers that it is competent to rule on the questions posed by Mexico which also requests the interpretation of the American Declaration, the American Convention, the Universal Declaration and the International Covenant on Civil and Political Rights, all of them instruments that protect human rights and that are applicable to the American States.

56. With regard to the Charter of the Organization of American States, in another opinion, the Court indicated, referring to the American Declaration, that:

[…]Article 64(1) of the American Convention authorizes [it], at the request of a member state of the OAS [...] to render advisory opinions interpreting the American Declaration of the Rights and Duties of Man, provided that in doing so the Court is acting within the scope and framework of

its jurisdiction in relation to the Charter and Convention or other treaties concerning the protection of human rights in the American States. [FN6]

Moreover, at the same time, the Court has indicated that "the Charter of the [OAS] cannot be interpreted and applied, as far as human rights are concerned, without relating its norms, consistent with the practice of the organs of the OAS, to the corresponding provisions of the [American] Declaration." [FN7]

[FN6] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 36; and Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights. Advisory Opinion OC-10/89 of July 14, 1989. Series A No. 10; sole operative paragraph and cf. para.44.

[FN7] Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, supra note 6, para. 43.

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57. This means that the Court has competence to render advisory opinions on the interpretation of the OAS Charter, taking into consideration the relationship of the Charter to the inter-American system for the protection of human rights, specifically within the framework of the American Declaration, the American Convention, or other treaties on the protection of human rights in the American States.

58. Nevertheless, should the Court restrict its ruling to those States that have ratified the American Convention, it would be difficult to separate this Advisory Opinion from a specific ruling on the legislation and practices of States that have not ratified the Convention with regard to the questions posed. The Court considers that this would restrict the purpose of the advisory proceeding, which, as has been mentioned, "is designed [...] to enable OAS Member States and OAS organs to obtain a judicial interpretation of a provision embodied in the Convention or other human rights treaties in the American States." [FN8]

[FN8] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 36, para. 40; and Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3; para. 22.

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59. Likewise, if the opinion only encompassed those OAS Member States that are parties to the American Convention, the Court would be providing its advisory services to a limited number of American States, which would not be in the general interest of the request.

60. Consequently, the Court decides that everything indicated in this Advisory Opinion applies to the OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration, or have ratified the International Covenant on Civil

and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.

61. Following its practice in advisory matters, the Court must determine whether rendering the opinion might "have the effect of altering or weakening the system established by the Convention in a manner detrimental to the individual human being." [FN9]

[FN9] Legal Status and Human Rights of the Child, supra note 1, para. 31; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 43; Reports of the Inter-American Commission on Human Rights, supra note 1, para. 31; and "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, second operative paragraph.

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62. The Court may use various factors when considering this matter. One of them, which coincides with much of the international jurisprudence in this area, [FN10] refers to the problem that, a ruling on an issue or matter that might eventually be submitted to the Court in the context of a contentious case could be obtained prematurely, using a request for an opinion. [FN11] However, this Court has noted subsequently that the existence of a difference concerning the interpretation of a provision does not, per se, constitute an impediment for exercise of the advisory function. [FN12]

[FN10] Cf. Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989, p. 177, para 29-36; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, para. 27-41; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12; Reservations to the Convention on Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 15, (19, 20); and I.C.J.: Interpretation of Peace Treaties, Advisory Opinion, I.C.J. Reports 1950, p. 65 (71, 72).

[FN11] Cf. Legal Status and Human Rights of the Child, supra note 1, para. 32; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 45; and Reports of the Inter-American Commission on Human Rights, supra note 1, paras. 37 and 40.

[FN12] Cf. Legal Status and Human Rights of the Child, supra note 1, para. 32; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 45; and Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights. Advisory Opinion OC-12/91 of December 6, 1991. Series A No. 12, para. 28.

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63. In the exercise of its advisory function, the Court is not called on to resolve questions of fact, but to determine the meaning, purpose and reason of international human rights norms. In this context, the Court fulfills an advisory function [FN13]. On several occasions, the Court has

upheld the distinction between its advisory and contentious competence. In Advisory Opinion OC-15/97 on Reports of the Inter-American Commission on Human Rights, it indicated that:

[t]he advisory jurisdiction of the Court differs from its contentious jurisdiction in that there are no "parties" involved in the advisory procedure nor is there any dispute to be settled. The sole purpose of the advisory function is "the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states." The fact that the Court's advisory jurisdiction may be invoked by all the Member States of the OAS and its main organs defines the distinction between its advisory and contentious jurisdictions.
[…] The Court therefore observes that the exercise of the advisory function assigned to it by the American Convention is multilateral rather than litigious in nature, a fact faithfully reflected in the Rules of Procedure of the Court, Article 62(1) of which establishes that a request for an advisory opinion shall be transmitted to all the "Member States", which may submit their comments on the request and participate in the public hearing on the matter. Furthermore, while an advisory opinion of the Court does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects. Hence, it is evident that the State or organ requesting an advisory opinion of the Court is not the only one with a legitimate interest in the outcome of the procedure. [FN14]

[FN13] Legal Status and Human Rights of the Child, supra note 1, para. 33; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 47; and cf. International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention , supra note 3, para. 23.
[FN14] Reports of the Inter-American Commission on Human Rights, supra note 1, paras. 25 and 26.

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64. When affirming its competence in this matter, the Court recalls the broad scope of its advisory function, unique in contemporary international law, which "enables the Court to perform a service to all the members of the inter-American system, and is designed to assist them in fulfilling their international human rights commitments," [FN15] and

to assist states and organs to comply with and to apply human rights treaties without subjecting them to the formalism and the sanctions associated with the contentious judicial process. [FN16]

[FN15] Legal Status and Human Rights of the Child, supra note 1, para. 34; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 64; and "Other treaties" subject to the Advisory Jurisdiction of the Court, supra note 1, para. 37 and 39.
[FN16] Legal Status and Human Rights of the Child, supra note 1, para. 34; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 64; and cf. Compatibility of Draft Legislation with Article 8(2)(h) of the American Convention on Human Rights, supra note 12, para. 20.

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65. The Court observes that the use of examples serves the purpose of referring to a specific context and illustrates the different interpretations that could be given to the legal issue raised in the advisory opinion in question, without implying that the Court is rendering a legal ruling on the situation described in such examples [FN17]. Likewise, the latter allow the Court to show that its advisory opinion is not mere academic speculation and is justified by its potential benefit for the international protection of human rights and for strengthening the universal juridical conscience [FN18]. When tackling the respective issue, the Court acts as a human rights tribunal, guided by the international instruments that regulate its advisory competence and makes a strictly juridical analysis of the questions submitted to it.

[FN17] Legal Status and Human Rights of the Child, supra note 1, para. 35; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 49; and cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 16.

[FN18] Cf. Legal Status and Human Rights of the Child, supra note 1, para. 35; The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 49; and Reports of the Inter-American Commission on Human Rights, supra note 1, para. 32.

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66. In view of the foregoing, the Court considers that it should examine the matters set out in the request and issue the corresponding opinion.

IV. STRUCTURE OF THE OPINION

67. The Court is empowered to structure its rulings as it considers best suited to the interests of justice and the purposes of an advisory opinion. Accordingly, the Court takes into account the basic issues that underlie the questions posed in the request for an opinion and examines them in order to reach general conclusions that can, in turn, be extended to the specific points mentioned in the request itself and related issues [FN19]. On this occasion, the Court has decided to start by drawing up a glossary in order to define the conceptual scope of the words used in this Opinion. Once this conceptual framework has been established, the Court will proceed to examine the specific matters submitted to its consideration and, to this end, will reply to the questions it has been asked in the order it considers most appropriate, with a view to the coherence of the Opinion. Pursuant to the power inherent in all courts to give their rulings the logical structure they consider most adequate to the interest of justice, [FN20] the Court will consider the questions raised as follows:

a) Obligation to respect and guarantee the human rights and fundamental nature of the principle of equality and non-discrimination (Questions 2(1) and 4);
b) Application of the principle of equality and non-discrimination to migrants (Question 2(1));
c) Rights of undocumented migrant workers (Questions 2(2) and 1); and

d) State obligations in the determination of migratory policies in light of the international instruments for the protection of human rights (Question 3).

[FN19] Cf. Legal Status and Human Rights of the Child, supra note 1, para. 37.
[FN20] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 66.

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68. The Court will now consider each of the points mentioned above in the sequence indicated.

V. GLOSSARY

69. For the purposes of this Advisory Opinion, the Court will use the following words with the meaning indicated:

a) to emigrate or migrate	To leave a State in order to transfer to another and establish oneself there.
b) emigrant	A person who leaves a State in order to transfer to another and establish himself there.
c) to immigrate	To enter another State in order to reside there.
d) immigrant	A person who enters another State in order to reside there.
e) migrant	A generic word that covers both emigrants and immigrants.
f) migratory status	Legal status of a migrant, in accordance with the domestic legislation of the State of employment.
g) worker	A person who is to be engaged, is engaged or has been engaged in a remunerated activity.
h) migrant worker	A person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he is not a national. [FN21]
i) documented migrant worker or migrant worker in a regular situation	A person who is authorized to enter, stay and engage in a remunerated activity in the State of employment, pursuant to the law of the State and international agreements to which that State is a party. [FN22]
j) undocumented migrant worker or migrant worker in an irregular situation	A person who is not authorized to enter, stay and engage in a remunerated activity in the State of employment, pursuant to the law of the State and international agreements to which that State is a party and who, despite this, engages in the said activity. [FN23]
k) State of origin	State of which the migrant worker is a national. [FN24]
l) State of employment or recipient State	State in which the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity. [FN25]

[FN21] Cf. ILO, Convention No. 97 concerning Migrant Workers (revised) of 1949 and Convention No. 143 concerning Migrant Workers (Supplementary Provisions) of 1975, Article 11 of which defines a migrant worker as "a person who migrates or has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker."
[FN22] Cf. U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990. Article 5 indicates that migrant workers and their families "are considered as documented or in regular situation if they are authorized to enter, to stay and to 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."
[FN23] Cf. U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990. Article 5 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."
[FN24] Cf. U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990. Article 6(a) indicates that "[t]he term 'State of origin' means the State of which the person concerned is a national."
[FN25] Cf. U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990. Article 6(b) indicates that "[t]he term 'State of employment' means a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity, as the case may be."

VI. OBLIGATION TO RESPECT AND GUARANTEE HUMAN RIGHTS AND THE FUNDAMENTAL NATURE OF THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION

70. With regard to the general obligation to respect and guarantee human rights, the following norms are cited in the request:

a) Article 1 of the American Convention, which states that:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
2. For the purposes of this Convention, "person" means every human being.

b) Article 2 of the International Covenant on Civil and Political Rights, which stipulates that:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
b) To ensure that any persons claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority, provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
c) To ensure that the competent authorities shall enforce such remedies when granted.

71. With regard to the principle of equality and non-discrimination, the norms mentioned in the request are:

a) Articles 3(l) and 17 of the OAS Charter, which indicate that:

The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.
Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.

b) Article 24 of the American Convention, which determines that:

All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.

c) Article II of the American Declaration, which states that:

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.

d) Article 26 of the International Covenant on Civil and Political Rights, which stipulates that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

e) Article 2(1) of the Universal Declaration, which indicates that:

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

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Obligation to Respect and Guarantee Human Rights

72. The Court now considers it pertinent to refer to the general State obligation to respect and guarantee human rights, which is of the highest importance, and will then examine the principle of equality and non-discrimination.

73. Human rights must be respected and guaranteed by all States. All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure.

74. The general obligation to respect and ensure human rights is enshrined in various international instruments [FN26].

[FN26] Some of these international instruments are: American Convention on Human Rights (Articles 1 and 2), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 1), Charter of the United Nations (Article 55(c)), Universal Declaration of Human Rights (Preamble), International Covenant on Civil and Political Rights (Article 2(1) and 2(2)), International Covenant on Economic, Social and Cultural Rights (Article 2(2)), International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 7), International Convention on the Elimination of All Forms of Racial Discrimination (Preamble), European Convention for the Protection of the Human Rights and Fundamental Freedoms (Article 1), European Social Charter (Preamble), African Charter of Human and People's Rights "Banjul Charter" (Article 1), and the Arab Charter of Human Rights (Article 2).

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75. The supervisory bodies of the American Convention and the International Covenant on Civil and Political Rights, the instruments indicated by Mexico in the questions of the request for an advisory opinion examined in this chapter, have ruled on the said obligation.

76. In this respect, the Inter-American Court has indicated that:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee, the rights recognized in the Convention. Any impairment of those rights which can be attributed to the action or omission of any public

authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.
According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention, is illegal. Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention.
This conclusion is independent of whether the organ or official has contravened provisions of domestic law or overstepped the limits of his authority. Under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate domestic law. [FN27]

[FN27] "Five Pensioners" case. Judgment of February 28, 2003. Series C No. 98, para. 163; and cf. The case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 154; and Baena Ricardo et al. case. Judgment of February 2, 2001. Series C No. 72, para. 178.
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77. The Inter-American Court has also stated that:

In international law, a customary norm establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that its embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of effet utile). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection. [FN28]

[FN28] "Five Pensioners" case, supra note 27, para. 164; and cf. Cantos case. Judgment of November 28, 2002. Series C No. 97, para. 59; and Hilaire, Constantine and Benjamin et al. case. Judgment of June 21, 2002. Series C No. 94, para. 213; and cf. also "principe allant de soi"; Exchange of Greek and Turkish populations, Advisory Opinion, 1925, P.I.C.J., Collection of Advisory Opinions. Series B. No. 10.
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78. Likewise, the Court has declared that:

[t]he general duty set forth in Article 2 of the American Convention implies the adoption of measures on two fronts. On the one hand, the suppression of rules and practices of any kind that entail the violation of the guarantees set forth in the Convention. On the other had, the issuance of rules and the development of practices leading to the effective observation of the said guarantees [FN29].

[FN29] Cf. "Five Pensioners" case, supra note 27, para. 165; Baena Ricardo et al. case, supra note 27, para. 180; and Cantoral Benavides case. Judgment of August 18, 2000. Series C No. 69, para. 178.

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79. With regard to the provisions of Article 2 of the International Covenant on Civil and Political Rights, the Human Rights Committee has observed that:

[…] article 2 of the Covenant generally leaves it to the States parties concerned to choose their method of implementation in their territories within the framework set out in that article. It recognizes, in particular, that the implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights. […]
In this connection, it is very important that individuals should know what their rights under the Covenant (and the Optional Protocol, as the case may be) are and also that all administrative and judicial authorities should be aware of the obligations which the State party has assumed under the Covenant [FN30].

[FN30] U.N., Human Rights Committee, General Comment 3, Application of the International Covenant on Civil and Political Rights at the National Level (Article 2), 29 July 1981, CCPR/C/13, paras. 1 and 2.

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80. Likewise, the European Court of Human Rights has indicated that:

The Convention does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies; as is shown by Article 14 (art. 14) and the English text of Article 1 (art. 1) ("shall secure"), the Convention also has the consequence that, in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels. [FN31]

[FN31] Eur. Court H.R., Case of Ireland v. the United Kingdom, Judgment of 18 January 1978, Series A No 25, para. 239.

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81. As can be seen from the above, both the international instruments and the respective international case law establish clearly that States have the general obligation to respect and ensure the fundamental rights. To this end, they should take affirmative action, avoid taking

measures that restrict or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.

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The principle of equality and non-discrimination

82. Having established the State obligation to respect and guarantee human rights, the Court will now refer to the elements of the principle of equality and non-discrimination.

83. Non-discrimination, together with equality before the law and equal protection of the law, are elements of a general basic principle related to the protection of human rights. The element of equality is difficult to separate from non-discrimination. Indeed, when referring to equality before the law, the instruments cited above (supra para. 71) indicate that this principle must be guaranteed with no discrimination. This Court has indicated that "[r]ecognizing equality before the law, [...] prohibits all discriminatory treatment." [FN32]

[FN32] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 54.

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84. This Advisory Opinion will differentiate by using the terms distinction and discrimination. The term distinction will be used to indicate what is admissible, because it is reasonable, proportionate and objective. Discrimination will be used to refer to what is inadmissible, because it violates human rights. Therefore, the term "discrimination" will be used to refer to any exclusion, restriction or privilege that is not objective and reasonable, and which adversely affects human rights.

85. There is an inseparable connection between the obligation to respect and guarantee human rights and the principle of equality and non-discrimination. States are obliged to respect and guarantee the full and free exercise of rights and freedoms without any discrimination. Non-compliance by the State with the general obligation to respect and guarantee human rights, owing to any discriminatory treatment, gives rise to its international responsibility.

86. The principle of the equal and effective protection of the law and of non-discrimination is embodied in many international instruments. [FN33] The fact that the principle of equality and non-discrimination is regulated in so many international instruments is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle.

[FN33] Some of these international instruments are: OAS Charter (Article 3(1)); American Convention on Human Rights (Articles 1 and 24); American Declaration on the Rights and Duties of Man (Article 2); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" (Article 3);

Charter of the United Nations (Article 1(3)); Universal Declaration of Human Rights (Articles 2 and 7); International Covenant on Economic, Social and Cultural Rights (Articles 2(2) and 3); International Covenant on Civil and Political Rights (Articles 2 and 26); International Convention on the Elimination of All Forms of Racial Discrimination (Article 2); Convention on the Rights of the Child (Article 2); Declaration on the Rights of the Child (Principle 1); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Articles 1, 7, 18(1), 25, 27, 28, 43, 45(1), 48, 55 and 70); Convention on the Elimination of All Forms of Discrimination against Women (Articles 2, 3, 5 to 16); Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs (Articles 2 and 4); Declaration of the International Labor Organization (ILO) concerning the Fundamental Principles and Rights in Work and their Monitoring (2(d)); Convention No. 97 of the International Labor Organization (ILO) concerning Migrant Workers (revised) (Article 6); Convention No. 111 of the International Labor Organization (ILO) concerning Discrimination with regard to Employment and Occupation (Articles 1 to 3); Convention No. 143 of the International Labor Organization (ILO) concerning Migrant Workers (supplementary provisions) (Articles 8 and 10); Convention No. 168 of the International Labor Organization (ILO) concerning Promotion of Employment and Protection against Unemployment (Article 6); Proclamation of Teheran, the Teheran International Conference on Human Rights, May 13, 1968 (paras. 1, 2, 5, 8 and 11); Vienna Declaration and Programme of Action, World Conference on Human Rights, 14 to 25 June 1993 (I.15; I.19; I.27; I.30; II.B.1, Articles 19 to 24; II.B.2, Articles 25 to 27); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Articles 2, 3, 4(1) and 5); World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, Programme of Action (paragraphs1, 2, 7, 9, 10, 16, 25, 38, 47, 48, 51, 66 and 104 of the Declaration); Convention against Discrimination in Education (Article 3); Declaration on Race and Racial Prejudice (Articles 1, 2, 3, 4, 5, 6, 7, 8 and 9); Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live (Article 5(1)(b) and 5(1)(c)); Charter of the Fundamental Rights of the European Union (Articles 20 and 21); European Convention for the Protection of Human Rights and Fundamental Freedoms (Articles 1 and 14); European Social Charter (Article 19(4), 19(5) and 19(7)); Protocol No.12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1); African Charter of Human and People's Rights "Banjul Charter"(Articles 2 and 3); Arab Charter of Human Rights (Article 2); and Cairo Declaration of Human Rights in Islam (Article 1).

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87. The principle of equality before the law and non-discrimination has been developed in international case law and legal writings. The Inter-American Court has understood that:

[t]he notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with that notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights that are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character. [FN34]

[FN34] Legal Status and Human Rights of the Child, supra note 1, para. 45; and Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica., supra note 32, para. 55.

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88. The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law. Consequently, States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws.

89. Nevertheless, when examining the implications of the differentiated treatment that some norms may give to the persons they affect, it is important to refer to the words of this Court declaring that "not all differences in treatment are in themselves offensive to human dignity." [FN35] In the same way, the European Court of Human Rights, following "the principles which may be extracted from the legal practice of a large number of democratic States," has held that a difference in treatment is only discriminatory when "it has no objective and reasonable justification." [FN36] Distinctions based on de facto inequalities may be established; such distinctions constitute an instrument for the protection of those who should be protected, considering their situation of greater or lesser weakness or helplessness. [FN37] For example, the fact that minors who are detained in a prison may not be imprisoned together with adults who are also detained is an inequality permitted by law. Another example of these inequalities is the limitation to the exercise of specific political rights owing to nationality or citizenship.

[FN35] Legal Status and Human Rights of the Child, supra note 1, para. 46; and Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica., supra note 32 , para. 56.

[FN36] Cf. Eur. Court H.R., Case of Willis v. The United Kingdom, Judgement of 11 June 2002, para. 39; Eur. Court H.R., Case of Wessels-Bergervoet v. The Netherlands, Judgement of 4 June 2002, para. 46; Eur. Court H.R., Case of Petrovic v. Austria, Judgment of 27 March 1998, Reports 1998-II, para. 30; Eur. Court H.R., Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, Judgment of 23 July 1968, Series A 1968, para. 10.

[FN37] Legal Status and Human Rights of the Child, supra note 1, para. 46.

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90. In this respect, the European Court has also indicated that:

"It is important, then, to look for the criteria which enable a determination to be made as to whether or not a given difference in treatment, concerning of course the exercise of one of the rights and freedoms set forth, contravenes Article 14 (art. 14). On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the

exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 (art. 14) is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.
In attempting to find out in a given case, whether or not there has been an arbitrary distinction, the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the rôle of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention. The national authorities remain free to choose the measures which they consider appropriate in those matters which are governed by the Convention. Review by the Court concerns only the conformity of these measures with the requirements of the Convention." [FN38]

[FN38] Eur. Court H.R., Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium, Judgment of 23 July 1968, Series A 1968, para. 10.

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91. Likewise, the Inter-American Court has established that:

[n]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind. [FN39]

[FN39] Legal Status and Human Rights of the Child, supra note 1, para. 47; and Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, supra note 32, para. 57.

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92. The United Nations Committee on Human Rights has defined discrimination as:

[…] any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [FN40]

[FN40] U.N., Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, para. 7.

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93. Likewise, this Committee has indicated that:

[…] the enjoyment of rights and freedoms on an equal footing, however, does not mean identical treatment in every instance. [FN41]

[FN41] U.N., Human Rights Committee, General Comment 18, Non-discrimination, 10/11/89, CCPR/C/37, para. 8.

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94. The Human Rights Committee has also stated that:

[...] each State party must ensure the rights in the Covenant to "all individuals within its territory and subject to its jurisdiction" [...]. In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. […]
Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike. Exceptionally, some of the rights recognized in the Covenant are expressly applicable only to citizens (art. 25), while article 13 applies only to aliens. However, the Committee's experience in examining reports shows that in a number of countries other rights that aliens should enjoy under the Covenant are denied to them or are subject to limitations that cannot always be justified under the Covenant. […]
The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate. […]
Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant. [FN42]

[FN42] U.N., Human Rights Committee, General Comment 15, The situation of aliens in accordance with the Covenant, 11/04/86, CCPR/C/27, paras. 1, 2, 4, 7, 8 and 9.

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95. With regard to the principle of equality and non-discrimination, the African Commission of Human and Peoples' Rights has established that this:

[m]eans that citizens should expect to be treated fairly and justly within the legal system and be assured of equal treatment before the law and equal enjoyment of the rights available to all other citizens. The right to equality is important for a second reason. Equality or lack of it affects the capacity of one to enjoy many other rights. [FN43]

[FN43] African Commission of Human and Peoples´ Rights, Communication No: 211/98 - Legal Resources Foundation v. Zambia, decision taken at the 29th Ordinary Session held in Tripoli, Libya, from 23 April to 7 May 2001, para. 63.
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96. In accordance with the foregoing, States must respect and ensure human rights in light of the general basic principle of equality and non-discrimination. Any discriminatory treatment with regard to the protection and exercise of human rights entails the international responsibility of the State.

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The fundamental nature of the principle of equality and non-discrimination

97. The Court now proceeds to consider whether this is a jus cogens principle.

98. Originally, the concept of jus cogens was linked specifically to the law of treaties. As jus cogens is formulated in Article 53 of the Vienna Convention on the Law of Treaties, "[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law." Likewise, Article 64 of the Convention refers to jus cogens superviniente, when it indicates that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates." Jus cogens has been developed by international case law and legal writings. [FN44]

[FN44] Cf. I.C.T.Y., Trial Chamber II: Prosecutor v. Anto Furundzija, Judgment of 10 December 1998, Case No. IT-95-17/1-T, paras. 137-146, 153-157; Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595; Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 3, and Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951, p. 15.
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99. In its development and by its definition, jus cogens is not limited to treaty law. The sphere of jus cogens has expanded to encompass general international law, including all legal acts. Jus cogens has also emerged in the law of the international responsibility of States and, finally, has had an influence on the basic principles of the international legal order.

100. In particular, when referring to the obligation to respect and ensure human rights, regardless of which of those rights are recognized by each State in domestic or international norms, the Court considers it clear that all States, as members of the international community, must comply with these obligations without any discrimination; this is intrinsically related to the right to equal protection before the law, which, in turn, derives "directly from the oneness of the human family and is linked to the essential dignity of the individual." [FN45] The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle

may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons.

[FN45] Legal Status and Human Rights of the Child, supra note 1, para. 45; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, supra note 32, para. 55.

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101. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.

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Effects of the principle of equality and non-discrimination

102. This general obligation to respect and guarantee human rights, without any discrimination and on an equal footing, has various consequences and effects that are defined in specific obligations. The Court will now refer to the effects derived from this obligation.

103. In compliance with this obligation, States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of de jure or de facto discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons.

104. In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.

105. Because of the effects derived from this general obligation, States may only establish objective and reasonable distinctions when these are made with due respect for human rights and in accordance with the principle of applying the norm that grants protection to the individual.

106. Non-compliance with these obligations gives rise to the international responsibility of the State, and this is exacerbated insofar as non-compliance violates peremptory norms of international human rights law. Hence, the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status.

107. One of the results of the foregoing is that, in their domestic laws, States must ensure that all persons have access, without any restriction, to a simple and effective recourse that protects them in determining their rights, irrespective of their migratory status.

108. In this respect, the Inter-American Court has indicated that:

[…] the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy [FN46].

[FN46] "Five Pensioners" case, supra note 27, para. 136; and cf. The case of the Mayagna (Sumo) Awas Tingni Community, supra note 27, para. 113; Ivcher Bronstein case. Judgment of February 6, 2001. Series C No. 74, paras. 136 and 137; and Judicial Guarantees in States of Emergency, supra note 17, para. 24.

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109. This general obligation to respect and ensure the exercise of rights has an erga omnes character. The obligation is imposed on States to benefit the persons under their respective jurisdictions, irrespective of the migratory status of the protected persons. This obligation encompasses all the rights included in the American Convention and the International Covenant on Civil and Political Rights, including the right to judicial guarantees. In this way, the right of access to justice for all persons is preserved, understood as the right to effective jurisdictional protection.

110. Finally, as regards the second part of the fourth question of the request for an advisory opinion (supra para. 4), the contents of the preceding paragraphs are applicable to all the OAS

Member States. The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of jus cogens and is of a peremptory character, entails obligations erga omnes of protection that bind all States and give rise to effects with regard to third parties, including individuals.

VII. APPLICATION OF THE PRINCIPLE OF EQUALITY AND NON-DISCRIMINATION TO MIGRANTS

111. Now that the jus cogens character of the principle of equality and non-discrimination and the effects that derive from the obligation of States to respect and guarantee this principle have been established, the Court will refer to migration in general and to the application of this principle to undocumented migrants.

112. Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability has an ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations. This leads to the establishment of differences in their access to the public resources administered by the State.

113. Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity.

114. In this respect, the resolution on "Protection of migrants" of the General Assembly of the United Nations is pertinent, when it indicates that it is necessary to recall "the situation of vulnerability in which migrants frequently find themselves, owing, inter alia, to their absence from their State of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation." [FN47] The General Assembly also expressed its concern "at the manifestations of violence, racism, xenophobia and other forms of discrimination and inhuman and degrading treatment against migrants, especially women and children, in different parts of the world." [FN48] Based on these considerations, the General Assembly reiterated:

> the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status, and to provide humane treatment, particularly with regard to assistance and protection […]. [FN49]

[FN47] United Nations General Assembly, Resolution A/RES/54/166 on "Protection of migrants" of February 24, 2000.
[FN48] United Nations General Assembly, Resolution A/RES/54/166 on "Protection of migrants" of 24 February 2000.
[FN49] United Nations General Assembly, Resolution A/RES/54/166 on "Protection of migrants" of 24 February 2000.

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115. The Court is aware that, as the General Assembly of the United Nations also observed, "among other factors, the process of globalization and liberalization, including the widening economic and social gap between and among many countries and the marginalization of some countries in the global economy, has contributed to large flows of peoples between and among countries and to the intensification of the complex phenomenon of international migration." [FN50]

[FN50] United Nations General Assembly, Resolution A/RES/54/212 on "International migration an development" of 1 February 2000.

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116. With regard to the foregoing, the Programme of Action of the International Conference on Population and Development held in Cairo in 1994 indicated that:

International economic imbalances, poverty and environmental degradation, combined with the absence of peace and security, human rights violations and the varying degrees of development of judicial and democratic institutions are all factors affecting international migration. Although most international migration flows occur between neighbouring countries, interregional migration, particularly that directed to developed countries, has been growing. [FN51]

[FN51] United Nations, A/CONF.171/13, 18 October 1994, Report on the International Conference on Population and Development held in Cairo from 5 to 13 September 1994, Programme of Action, Chapter X.A.10.1.

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117. In accordance with the foregoing, the international community has recognized the need to adopt special measures to ensure the protection of the human rights of migrants. [FN52]

[FN52] Cf. United Nations, World Summit on Social Development held in Copenhagen in March 1995, Programme of Action, paras. 63, 77 and 78; United Nations, A/CONF.171/13, 18 October 1994, Report on the International Conference on Population and Development held in Cairo from 5 to 13 September 1994, Programme of Action, Chapter X.A.10(2) to 10(20); United Nations General Assembly, A/CONF. 157/23, 12 July 1993, World Conference on Human Rights held in Vienna, Austria, from 14 to 25 June 1993, Declaration and Programme of Action, I.24 and II.33-35.

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118. We should mention that the regular situation of a person in a State is not a prerequisite for that State to respect and ensure the principle of equality and non-discrimination, because, as mentioned above, this principle is of a fundamental nature and all States must guarantee it to their citizens and to all aliens who are in their territory. This does not mean that they cannot take

any action against migrants who do not comply with national laws. However, it is important that, when taking the corresponding measures, States should respect human rights and ensure their exercise and enjoyment to all persons who are in their territory, without any discrimination owing to their regular or irregular residence, or their nationality, race, gender or any other reason.

119. Consequently, States may not discriminate or tolerate discriminatory situations that prejudice migrants. However, the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity. In this respect, the African Commission on Human and Peoples' Rights has indicated that it:

does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is however of the view that it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter [the African Charter of Human and Peoples' Rights] and international law. [FN53]

[FN53] African Commission of Human and Peoples´ Rights, Communication No: 159/96 - Union Inter-Aficaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola, decision of 11 November, 1997, para. 20.

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120. When dealing with the principle of equality and non-discrimination, the continuing development of international law should be borne in mind. In this respect, the Inter-American Court has indicated, in its Advisory Opinion OC-16/99 on The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law, that:

The corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law in affirming and building up the latter's faculty for regulating relations between States and the human beings within their respective jurisdictions. This Court, therefore, must adopt the proper approach to consider this question in the context of the evolution of the fundamental rights of the human person in contemporary international law. [FN54]

[FN54] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 115.

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121. Due process of law is a right that must be ensured to all persons, irrespective of their migratory status. In this respect, in the above-mentioned Advisory Opinion on The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process of Law, this Court indicated that:

[…] for "the due process of law" a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

and that:

To accomplish its objectives, the judicial process must recognize and correct any real disadvantages that those brought before the bar might have, thus observing the principle of equality before the law and the courts and the corollary principle prohibiting discrimination. The presence of real disadvantages necessitates countervailing measures that help to reduce or eliminate the obstacles and deficiencies that impair or diminish an effective defense of one's interests. Absent those countervailing measures, widely recognized in various stages of the proceeding, one could hardly say that those who have the disadvantages enjoy a true opportunity for justice and the benefit of the due process of law equal to those who do not have those disadvantages. [FN55]

[FN55] The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law, supra note 1, para. 117 and 119; and cf. Legal Status and Human Rights of the Child, supra note 1, paras. 97 and 115; and Hilaire, Constantine and Benjamin et al. case, supra note 28, para. 146.

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122. The Court considers that the right to due process of law should be recognized within the framework of the minimum guarantees that should be provided to all migrants, irrespective of their migratory status. The broad scope of the preservation of due process applies not only ratione materiae but also ratione personae, without any discrimination.

123. As this Court has already indicated, due legal process refers to the:

all the requirement that must be observed in the procedural stages in order for an individual to be able to defend his rights adequately vis-à-vis any [...] act of the State that could affect them. That it to say, due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature. [FN56]

[FN56] Baena Ricardo et al. case, supra note 27, para. 124; and cf. Ivcher Bronstein case, supra note 46, para. 102; the Constitutional Court case. Judgment of January 31, 2001. Series C No. 71, para. 69; and Judicial Guarantees in States of Emergency, supra note 17, para. 27.
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124. Likewise, the Court has observed [FN57] that the list of minimum guarantees of due legal process applies when determining rights and obligations of "civil, labor, fiscal or any other nature." [FN58] This shows that due process affects all these areas and not only criminal matters.

[FN57] Cf. Ivcher Bronstein case, supra note 46, para. 103; Baena Ricardo et al. case, supra note 27, para. 125; and the Constitutional Court case, supra note 56, para. 70.
[FN58] Cf. Article 8.1 of the American Convention on Human Rights.
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125. In addition, it is important to establish, as the Court has already done, that "[i]t is a human right to obtain all the guarantees which make it possible to arrive at fair decisions, and the administration is not exempt from its duty to comply with this obligation. The minimum guarantees must be observed in administrative processes whose decision may affect the rights of persons." [FN59]

[FN59] Cf. Baena Ricardo et al. case, supra note 27, para. 127.
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126. The right to judicial protection and judicial guarantees is violated for several reasons: owing to the risk a person runs, when he resorts to the administrative or judicial instances, of being deported, expelled or deprived of his freedom, and by the negative to provide him with a free public legal aid service, which prevents him from asserting the rights in question. In this respect, the State must guarantee that access to justice is genuine and not merely formal. The rights derived from the employment relation subsist, despite the measures adopted.

127. Now that the Court has established what is applicable for all migrants, it will examine the rights of migrant workers, in particular those who are undocumented.

VIII. RIGHTS OF UNDOCUMENTED MIGRANT WORKERS

128. As established in the glossary (supra para. 69), a migrant worker is any persons who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or

she is not a national. This definition is embodied in the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (Article 2(1)).

129. Migrant workers who are documented or in a regular situation are those who have been "authorized to enter, stay and engage in a remunerated activity in the State of employment [FN60] pursuant to the law of the State and to international agreements to which that State is a party." [FN61] Workers who are undocumented or in an irregular situation do not comply with the conditions that documented workers do; in other words, they are not authorized to enter, stay and engage in a remunerated activity in a State of which they are not nationals.

[FN60] U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990, Article 6(b), according to which, the employer State is "a State where the migrant worker is to be engaged, is engaged or has been engaged in a remunerated activity [...].

[FN61] U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990, Article 5(a).

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130. In continuation, the Court will rule on undocumented migrant workers and their rights.

131. The vulnerability of migrant workers as compared to national workers must be underscored. In this respect, the preamble to the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families refers to "the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment."

132. Nowadays, the rights of migrant workers "have not been sufficiently recognized everywhere" [FN62] and, furthermore, undocumented workers "are frequently employed under less favorable conditions of work than other workers and [...] certain employers find this an inducement to seek such labor in order to reap the benefits of unfair competition." [FN63]

[FN62] U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990, Preamble.

[FN63] U.N., International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 18 December 1990, Preamble.

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133. Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person

who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination.

134. In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.

135. It is important to clarify that the State and the individuals in a State are not obliged to offer employment to undocumented migrants. The States and individuals, such as employers, can abstain from establishing an employment relationship with migrants in an irregular situation.

136. However, if undocumented migrants are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation. This is very important, because one of the principal problems that occurs in the context of immigration is that migrant workers who lack permission to work are engaged in unfavorable conditions compared to other workers.

137. It is not enough merely to refer to the obligations to respect and ensure the labor human rights of all migrant workers, but it should be noted that these obligations have different scopes and effects for States and third parties.

138. Employment relationships are established under both public law and private law and, in both spheres, the State plays an important part.

139. In the context of an employment relationship in which the State is the employer, the latter must evidently guarantee and respect the labor human rights of all its public officials, whether nationals or migrants, documented or undocumented, because non-observance of this obligation gives rise to State responsibility at the national and the international level.

140. In an employment relationship regulated by private law, the obligation to respect human rights between individuals should be taken into consideration. That is, the positive obligation of the State to ensure the effectiveness of the protected human rights gives rise to effects in relation to third parties (erga omnes). This obligation has been developed in legal writings, and particularly by the Drittwirkung theory, according to which fundamental rights must be respected by both the public authorities and by individuals with regard to other individuals.

141. As of the first contentious cases on which it ruled, the Inter-American Court has outlined the application of the effects of the American Convention in relation to third parties (erga omnes), having indicated that:

Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent,

investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention. [FN64]

[FN64] Velásquez Rodríguez case. Judgment of July 29, 1988. Series C No. 4, para. 172; and cf. Godínez Cruz case. Judgment of January 20, 1989. Series C No. 5, paras. 181, 182 and 187.

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142. Likewise, by means of provisional measures, this Court has ordered the protection of members of communities and persons that provide services to them, from threats of death and harm to personal safety allegedly caused by the State and third parties. [FN65] Likewise, on another occasion, it ordered the protection of persons detained in prison, owing to deaths and threats in that prison, many of which were allegedly perpetrated by the prisoners themselves. [FN66]

[FN65] Cf. Case of the Peace Community of San José de Apartadó, Provisional Measures. Order of the Inter-American Court of June 18, 2002. Series E No. 3; and Case of the Communities of the Jiguamiandó and the Curbaradó, Provisional Measures. Order of the Inter-American Court of March 6, 2003.

[FN66] Urso Branco Prison case, Provisional Measures. Order of the Inter-American Court of June 18, 2002.

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143. The European Court of Human Rights recognized the applicability of the European Convention for the Protection of Human Rights and Fundamental Freedoms to relationships between individuals, when it declared that the State had violated this Convention because it had restricted freedom of association, by establishing that membership in determined trade unions was a necessary condition for the petitioners in the case to be able to continue their employment in a company, since the restriction imposed was not “necessary in a democratic society.” [FN67] In another case, the European Court considered that, although the object of Article 8 of this Convention (the right to respect of private and family life) was essentially that of protecting the individual against arbitrary interference by the public authorities, the State must abstain from such interference; in addition to this obligation to abstain, there are positive obligations inherent in effective respect for private or family life that may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals among themselves. In this case, the European Court found that the State had violated the right to private and family life of a young mentally disabled woman who had been sexually assaulted, because she could not file criminal proceedings against her aggressor due to a vacuum in the criminal legislation. [FN68]

[FN67] Eur. Court H.R., Case of Young, James and Webster v. The United Kingdom, (Merits) Judgement of 13 August 1981, Series A no. 44, paras. 48 to 65.
[FN68] Eur. Court H.R., Case of X and Y v. The Netherlands, (Merits) Judgement of 26 March 1985, Series A no. 91, para. 23.
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144. The United Nations Committee on Human Rights has considered that the right to freedom and personal safety, embodied in article 9 of the International Covenant on Civil and Political Rights, imposes on the State the obligation to take adequate steps to ensure the protection of an individual threatened with death. In other words, an interpretation of this article that authorized States parties to ignore threats against the life of persons subject to their jurisdiction, even though they have not been detained or arrested by State agents, would deprive the guarantees established in the Covenant of any effectiveness. [FN69] The Committee also considered that the State has the obligation to protect the rights of members of minorities against attacks by individuals. Likewise, in its General Comments Nos. 18 and 20 on non-discrimination and article 7 of the said Covenant, the Committee has indicated that States parties must punish public officials, other persons acting in the name of the State, and individuals, who carry out torture and cruel, inhuman or degrading treatment or punishment, and should also "take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant."

[FN69] Cf. U.N., Human Rights Committee. Delgado Páez v. Colombia. Decision of 12 July 1990. No. 195/85, para. 5.5.
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145. In addition, in a decision on the obligation to investigate acts of racial discrimination and violence against persons of another color or ethnic origin committed by individuals, the Committee for the Elimination of Racial Discrimination indicated that "when threats of racial violence are made, and especially when they are made in public and by a group, it is incumbent upon the State to investigate with due diligence and expedition." [FN70]

[FN70] Cf. U.N., Committee on the Elimination of Racial Discrimination, Communication No. 4/1991, L.K. v. The Netherlands, paras. 6.3 and 6.6; and also cf., inter. alia, International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention No. 111 concerning Discrimination in respect of Employment and Occupation of the International Labor Organization (ILO).
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146. In this way, the obligation to respect and ensure human rights, which normally has effects on the relations between the State and the individuals subject to its jurisdiction, also has effects on relations between individuals. As regards this Advisory Opinion, the said effects of the obligation to respect human rights in relations between individuals is defined in the context of

the private employment relationship, under which the employer must respect the human rights of his workers.

147. The obligation to respect and guarantee the human rights of third parties is also based on the fact that it is the State that determines the laws that regulate the relations between individuals and, thus, private law; hence, it must also ensure that human rights are respected in these private relationships between third parties; to the contrary, the State may be responsible for the violation of those rights.

148. The State is obliged to respect and ensure the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that prejudice the latter in the employment relationships established between individuals (employer-worker). The State should not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

149. This State obligation arises from legislation that protects workers – legislation based on the unequal relationship between both parties – which therefore protects the workers as the more vulnerable party. In this way, States must ensure strict compliance with the labor legislation that provides the best protection for workers, irrespective of their nationality, social, ethnic or racial origin, and their migratory status; therefore they have the obligation to take any necessary administrative, legislative or judicial measures to correct de jure discriminatory situations and to eradicate discriminatory practices against migrant workers by a specific employer or group of employers at the local, regional, national or international level.

150. On many occasions migrant workers must resort to State mechanisms for the protection of their rights. Thus, for example, workers in private companies have recourse to the Judiciary to claim the payment of wages, compensation, etc. Also, these workers often use State health services or contribute to the State pension system. In all these cases, the State is involved in the relationship between individuals as a guarantor of fundamental rights, because it is required to provide a specific service.

151. In labor relations, employers must protect and respect the rights of workers, whether these relations occur in the public or private sector. The obligation to respect the human rights of migrant workers has a direct effect on any type of employment relationship, when the State is the employer, when the employer is a third party, and when the employer is a natural or legal person.

152. The State is thus responsible for itself, when it acts as an employer, and for the acts of third parties who act with its tolerance, acquiescence or negligence, or with the support of some State policy or directive that encourages the creation or maintenance of situations of discrimination.

153. In summary, employment relationships between migrant workers and third party employers may give rise to the international responsibility of the State in different ways. First, States are obliged to ensure that, within their territory, all the labor rights stipulated in its laws – rights deriving from international instruments or domestic legislation – are recognized and applied. Likewise, States are internationally responsible when they tolerate actions and practices

of third parties that prejudice migrant workers, either because they do not recognize the same rights to them as to national workers or because they recognize the same rights to them but with some type of discrimination.

154. Furthermore, there are cases in which it is the State that violates the human rights of the workers directly. For example, when it denies the right to a pension to a migrant worker who has made the necessary contributions and fulfilled all the conditions that were legally required of workers, or when a worker resorts to the corresponding judicial body to claim his rights and this body does not provide him with due judicial protection or guarantees.

155. The Court observes that labor rights are the rights recognized to workers by national and international legislation. In other words, the State of employment must respect and guarantee to every worker the rights embodied in the Constitution, labor legislation, collective agreements, agreements established by law (convenios-ley), decrees and even specific and local practices, at the national level; and, at the international level, in any international treaty to which the State is a party.

156. This Court notes that, since there are many legal instruments that regulate labor rights at the domestic and the international level, these regulations must be interpreted according to the principle of the application of the norm that best protects the individual, in this case, the worker. This is of great importance, because there is not always agreement either between the different norms or between the norms and their application, and this could prejudice the worker. Thus, if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied. To the contrary, if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him.

157. In the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as: the prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation. The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which "[a]ll 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."

158. This Court considers that the exercise of these fundamental labor rights guarantees the enjoyment of a dignified life to the worker and to the members of his family. Workers have the right to engage in a work activity under decent, fair conditions and to receive a remuneration that allows them and the members of their family to enjoy a decent standard of living in return for their labor. Likewise, work should be a means of realization and an opportunity for the worker to

develop his aptitudes, capacities and potential, and to realize his ambitions, in order to develop fully as a human being.

159. On many occasions, undocumented migrant workers are not recognized the said labor rights. For example, many employers engage them to provide a specific service for less than the regular remuneration, dismiss them because they join unions, and threaten to deport them. Likewise, at times, undocumented migrant workers cannot even resort to the courts of justice to claim their rights owing to their irregular situation. This should not occur; because, even though an undocumented migrant worker could face deportation, he should always have the right to be represented before a competent body so that he is recognized all the labor rights he has acquired as a worker.

160. The Court considers that undocumented migrant workers, who are in a situation of vulnerability and discrimination with regard to national workers, possess the same labor rights as those that correspond to other workers of the State of employment, and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Workers, as possessors of labor rights, must have the appropriate means of exercising them.

IX. STATE OBLIGATIONS WHEN DETERMINING MIGRATORY POLICIES IN LIGHT OF THE INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS

161. The Court will now refer to State obligations when determining migratory policies solely in light of international instruments for the protection of human rights.

162. In this section of the Advisory Opinion, the Court will consider whether the fact that the American States subordinate and condition the observance of human rights to their migratory policies is compatible with international human rights law; it will do so in light of the international obligations arising from the International Covenant on Civil and Political Rights and other obligations of an erga omnes nature.

163. The migratory policy of a State includes any institutional act, measure or omission (laws, decrees, resolutions, directives, administrative acts, etc.) that refers to the entry, departure or residence of national or foreign persons in its territory.

164. In this respect, the Durban Declaration and Programme of Action adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance urged all States to "[t]o review and, where necessary, revise their immigration laws, policies and procedures with a view to eliminating any element of racial discrimination and make them consistent with State obligations by virtue of international human rights instruments." [FN71] Likewise, in paragraph 9 of the Commission on Human Rights resolution 2001/5 on racism, racial discrimination, xenophobia and related intolerance, "States were asked to review and, where necessary, revise any immigration policies which are inconsistent with international human rights instruments, with a view to eliminating all discriminatory policies and practices against migrants."

[FN71] Cf. Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance, held in Durban South African, from August 31 to September 8, 2001, paras. 38 y 30.b), respectively.

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165. This Court considers it essential to mention the provisions of Article 27 of the Vienna Convention on the Law of Treaties, which, when referring to domestic law and the observance of treaties, provides that: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

166. In other words, when ratifying or acceding to an international treaty, States manifest their commitment in good faith to guarantee and respect the rights recognized therein. In addition, the States must adapt their domestic law to the applicable international law.

167. In this regard, the Inter-American Court has indicated that the general obligation set forth in Article 2 of the American Convention implies the adoption of measures to eliminate norms and practices of any nature that entail the violation of the guarantees set forth in the Convention, and the issuance of norms and the development of practices leading to the effective observance of the said guarantees. [FN72] In this respect, the Court has indicated that:

Under the law of nations, a customary rule prescribes that a State that has concluded an international agreement must introduce in its domestic laws whatever changes are needed to ensure execution of the obligations it has undertaken. This principle has been accepted universally, and is supported by case law. The American Convention establishes the general obligation of each State Party to adapt its domestic laws to the provisions of the said Convention, so as to guarantee the rights embodied therein. This general obligation of the State Party implies that measures of domestic law must be effective (the "effet utile" principle). This means that the State must adopt all necessary measures to ensure that the provisions of the Convention are complied with effectively in its domestic laws, as required by Article 2 of the Convention. Such measures are only effective when the State adapts its actions to the protective norms of the Convention. [FN73]

[FN72] Cf. "Five Pensioners" case, supra note 27, para. 165; Baena Ricardo et al. case, supra note 27, para. 180; and Cantoral Benavides case, supra note 29, para. 178.

[FN73] "Five Pensioners" case, supra note 27, para. 164; and cf. "The Last Temptation of Christ" case (Olmedo Bustos et al). Judgment of February 5, 2001. Series C No. 73, para. 87; Baena Ricardo et al. case, supra note 27, para. 179; Durand and Ugarte case. Judgment of August 16, 2000. Series C No. 68, para. 136; and cf. also "principe allant de soi"; Exchange of Greek and Turkish populations. Advisory Opinion. 1925, P.I.C.J., Collection of Advisory Opinions. Series B. No. 10.

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168. The goals of migratory policies should take into account respect for human rights. Likewise, migratory policies should be implemented respecting and guaranteeing human rights.

As indicated above (supra paras. 84, 89, 105 and 119), the distinctions that the States establish must be objective, proportionate and reasonable.

169. Considering that this Opinion applies to questions related to the legal aspects of migration, the Court deems it appropriate to indicate that, in the exercise of their power to establish migratory policies, it is licit for States to establish measures relating to the entry, residence or departure of migrants who will be engaged as workers in a specific productive sector of the State, provided this is in accordance with measures to protect the human rights of all persons and, in particular, the human rights of the workers. In order to comply with this requirement, States may take different measures, such as granting or denying general work permits or permits for certain specific work, but they must establish mechanisms to ensure that this is done without any discrimination, taking into account only the characteristics of the productive activity and the individual capability of the workers. In this way, the migrant worker is guaranteed a decent life, he is protected from the situation of vulnerability and uncertainty in which he usually finds himself, and the local or national productive process is organized efficiently and adequately.

170. Therefore, it is not admissible for a State of employment to protect its national production, in one or several sectors by encouraging or tolerating the employment of undocumented migrant workers in order to exploit them, taking advantage of their condition of vulnerability in relation to the employer in the State or considering them an offer of cheaper labor, either by paying them lower wages, denying or limiting their enjoyment or exercise of one or more of their labor rights, or denying them the possibility of filing a complaint about the violation of their rights before the competent authority.

171. The Inter-American Court has established the obligation of States to comply with every international instrument applicable to them. However, when referring to this State obligation, it is important to note that this Court considers that not only should all domestic legislation be adapted to the respective treaty, but also State practice regarding its application should be adapted to international law. In other words, it is not enough that domestic laws are adapted to international law, but the organs or officials of all State powers, whether the Executive, the Legislature or the Judiciary, must exercise their functions and issue or implement acts, resolutions and judgments in a way that is genuinely in accordance with the applicable international law.

172. The Court considers that the State may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature. This general principle must be respected and guaranteed always. Any act or omission to the contrary is inconsistent with the international human rights instruments.

X. OPINION

173. For the foregoing reasons,

THE COURT,

DECIDES

unanimously,

that it is competent to issue this Advisory Opinion.

AND IS OF THE OPINION

unanimously,

1. That States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.
2. 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.
3. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.
4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of jus cogens.
5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations erga omnes of protection that bind all States and generate effects with regard to third parties, including individuals.
6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.
7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.
8. That the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed These rights are a result of the employment relationship.
9. That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.
10. That workers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in

the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.

11. That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

Judges Cançado Trindade, García Ramírez, Salgado Pesantes and Abreu Burelli informed the Court of their Concurring Opinions, which accompany this Advisory Opinion.

Done at San José, Costa Rica, on September 17, 2003, in the Spanish and the English language, the Spanish text being authentic.

Antônio A. Cançado Trindade
President

Sergio García-Ramírez
Hernán Salgado-Pesantes
Oliver Jackman
Alirio Abreu-Burelli
Carlos Vicente de Roux-Rengifo

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption of the present Advisory Opinion of the Inter-American Court of Human Rights, which in my view constitutes a significant contribution to the evolution of the International Law of Human Rights. Four years ago, the Inter-American Court delivered the historical Advisory Opinion n. 16, on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 01.10.1999), truly pioneering, which has served as inspiration for the international case-law in statu nascendi on the matter [FN74]. Today, in the same line of reasoning oriented to the needs and imperatives of protection of the human person, and at the end of an advisory procedure which has generated the greatest mobilization of all its history [FN75], the Inter-American Court adopts another Advisory Opinion, of great transcendence and again pioneering, on The Juridical Condition and the Rights of Undocumented Migrants, becoming the first international tribunal to pronounce on this matter as a central theme.

[FN74] The Inter-American Court, by means of its Advisory Opinion n. 16 referred to, - delivered at the end of an advisory procedure which generated a wide mobilization (with eight intervening States, besides the Inter-American Commission of Human Rights and several non-governmental organizations and individuals), - was in fact the first international tribunal to warn that non-compliance with Article 36(1)(b) of the Vienna Convention on Consular Relations of 1963 took place to the detriment not only of a State Party to such Convention but also to the affected human beings.

[FN75] Besides a considerable volume of written documents, such procedure counted on two public hearings, the first one having taken place at the headquarters of the Inter-American Court in San José of Costa Rica, in February 2003, and the second one having been held for the first time in its history outside its headquarters, in Santiago of Chile, in June 2003. The procedure counted on the participation of twelve accredited States (among which five intervening States in the public hearings), the Inter-American Commission of Human Rights, one agency of the United Nations (the United Nations High Commissioner for Refugees - UNHCR), and nine entities of civil society and of the Academy of several countries in the region, besides the Central American Council of Attorneys-General (Procuradores) of Human Rights.

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2. Even more significant is the fact that the matter dealt with in the present Advisory Opinion, requested by Mexico and adopted by the Court by unanimity, is of direct interest of wide segments of the population in distinct latitudes, - in reality, of millions of human beings [FN76], - and constitutes in our days a legitimate preoccupation of the whole international community, and - I would not hesitate to add, - of the humanity as a whole. Given the transcendental importance of the points examined by the Inter-American Court in the present Advisory Opinion, I feel obliged to leave on the records, as the juridical foundation of my position on the matter, the reflections which I allow myself to develop in this Concurring Opinion, particularly in relation with the aspects which appear to me to deserve special attention.

[FN76] According to the International Organization for Migrations (I.O.M.), from 1965 to 2000 the total of migrants in the world more than doubled, raising from 75 millions to 175 millions of persons; and the projections for the future are in the sense that this total will increase even much further in the following years; I.O.M., World Migration 2003 - Managing Migration: Challenges and Responses for People on the Move, Geneva, I.O.M., 2003, pp. 4-5; and cf. also, in general, P. Stalker, Workers without Frontiers, Geneva/London, International Labour Organization (I.L.O.)/L. Rienner Publs., 2000, pp. 26-33.

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3. Such aspects correspond to those which I see it fit to name as follows: a) the civitas maxima gentium and the universality of the human kind; b) the disparities of the contemporary world and the vulnerability of the migrants; c) the reaction of the universal juridical conscience; d) the construction of the individual subjective right of asylum; e) the position and the role of the general principles of Law; f) the fundamental principles as substratum of the legal order itself; g) the principle of equality and non-discrimination in the International Law of Human Rights; h) the

emergence, the content and the scope of the jus cogens; e i) the emergence and the scope of the obligations erga omnes of protection (their horizontal and vertical dimensions). I proceed to present my reflections on each of those aspects.

I. The Civitas Maxima Gentium and the Universality of the Human Kind.

4. The consideration of a question such as the one with which the present Advisory Opinion is concerned cannot make abstraction of the teachings of the so-called founding fathers of International Law, in whose thinking one can find reflections which remain remarkably up-to-date, and are of importance to the legal settlement also of contemporary problems. Francisco de Vitoria, for example, in his pioneering and decisive contribution to the notion of prevalence of the rule of law, upheld, in his acclaimed Relecciones Teológicas (1538-1539), that the legal order binds everyone - both the rulers as well as the ruled ones, and that the international community (totus orbis) has primacy over the will of each individual State [FN77]. In the conception of Vitoria, the great preacher of Salamanca, the droit des gens rules an international community constituted of human beings organized socially in States and coextensive with humanity itself [FN78]; the reparation of the violations of (human) rights reflects an international necessity fulfilled by the droit des gens, with the same principles of justice applying both to the States and to the individuals or peoples who form them [FN79].

[FN77] Cf. Francisco de Vitoria, Relecciones - del Estado, de los Indios, y del Derecho de la Guerra, México, Porrúa, 1985, pp. 1-101; A. Gómez Robledo, op. cit. infra n. (15), pp. 30-39; W.G. Grewe, The Epochs of International Law, Berlin, W. de Gruyter, 2000, pp. 189-190.

[FN78] Cf., in particular, Francisco de Vitoria, De Indis - Relectio Prior (1538-1539), in: Obras de Francisco de Vitoria - Relecciones Teológicas (ed. T. Urdanoz), Madrid, BAC, 1960, p. 675.

[FN79] A.A. Cançado Trindade, "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights (At Global and Regional Levels)", 202 Recueil des Cours de l'Académie de Droit International de La Haye (1987) p. 411; J. Brown Scott, The Spanish Origin of International Law - Francisco de Vitoria and his Law of Nations, Oxford/London, Clarendon Press/H. Milford - Carnegie Endowment for International Peace, 1934, pp. 282-283, 140, 150, 163-165 and 172.

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5. In the outlook of Francisco Suárez (author of the treatise De Legibus ac Deo Legislatore, 1612), the droit des gens reveals the unity and universality of the human kind; the States have necessity of a legal system which regulates their relations, as members of the universal society [FN80]. To Suárez, the droit des gens comprised, besides the nations and the peoples, the human kind as a whole, and the law fulfilled the needs of regulation of all the peoples and human beings. Both Suárez and Vitoria formulated the bases of the international duties of the States vis-à-vis also the foreigners, in the framework of the general principle of the freedom of circulation and of communications, in the light of the universality of the human kind [FN81]. The human sociability and solidarity were present in the whole doctrinal construction and the contribution of the Spanish theologians to the formation of the droit des gens.

[FN80] Cf. Association Internationale Vitoria-Suarez, Vitoria et Suarez - Contribution des Théologiens au Droit International Moderne, Paris, Pédone, 1939, pp. 169-170.
[FN81] Cf. ibid., pp. 40-46, and cf. pp. 5-6 and 11-12.

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6. In its turn, the conception of the jus gentium of Hugo Grotius - whose work, above all the De Jure Belli ac Pacis (1625), lies in the origins of the international law, as the discipline came to be known, - was always attentive to the role of civil society. To Grotius, the State is not an end in itself, but rather a means to secure the social order in conformity with human intelligence, so as to improve the "common society which embraces all mankind" [FN82]. In Grotian thinking, every legal norm - whether of domestic law or of the law of nations - creates rights and obligations for the persons to whom they are directed; the forerunning work of Grotius, already in the first half of the XVIIth century, thus admits the possibility of the international protection of human rights against the State itself [FN83].

[FN82] P.P. Remec, The Position of the Individual in International Law according to Grotius and Vattel, The Hague, Nijhoff, 1960, pp. 216 and 203. The subjects have rights vis-à-vis the sovereign State, which cannot demand obedience from its citizens in an absolute way (imperative of the common good); thus, in the vision of Grotius, the raison d'État has limits, and the absolute conception of this latter becomes applicable in the international as well as internal relations of the State. Ibid., pp. 219-220 and 217.
[FN83] Ibid., pp. 243 and 221. One has, thus, to bear always in mind the true legacy of the Grotian tradition of international law. The international community cannot pretend to base itself on the voluntas of each State individually. In face of the historical necessity to regulate the relations of the emerging States, Grotius sustained that international relations are subject to legal norms, and not to the "raison d'État", which is incompatible with the very existence of the international community: this latter cannot do without Law. (Cf., in this respect, the classical study by Hersch Lauterpacht, "The Grotian Tradition in International Law", 23 British Year Book of International Law (1946) pp. 1-53).

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7. Pursuant to the Grotian outlook, the human being and his welfare occupy a central position in the system of international relations; the standards of justice apply vis-à-vis both the States and the individuals [FN84]. To Grotius, natural law derives from human reason, is a "dictate of the recta ratio", and imposes limits to the "unrestricted conduct of the rulers of the States" [FN85]. The States are subjected to Law, and International Law has "an objective, independent foundation, and above the will of the States" [FN86]. The considerations of justice thus permeate the legal rules and foster their evolution [FN87].

[FN84] Hersch Lauterpacht, "The Law of Nations, the Law of Nature and the Rights of Man", 29 Transactions of the Grotius Society (1943) pp. 7 and 21-31.
[FN85] E. Jiménez de Aréchaga, "El Legado de Grocio y el Concepto de un Orden Internacional Justo", in Pensamiento Jurídico y Sociedad Internacional - Libro-Homenaje al Profesor A. Truyol y Serra, vol. I, Madrid, Universidad Complutense de Madrid, 1986, pp. 608 and 612-613.

[FN86] Ibid., p. 617.
[FN87] Ibid., pp. 619-621.

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8. Even before Grotius, Alberico Gentili (author of De Jure Belli, 1598) sustained, by the end of the XVIth century, that it is Law that governs the relationship among the members of the universal societas gentium [FN88]. Samuel Pufendorf (author of De Jure Naturae et Gentium, 1672), in his turn, defended "the subjection of the legislator to the higher law of human nature and of reason" [FN89]. On his part, Christian Wolff (author of Jus Gentium Methodo Scientifica Pertractatum, 1749), pondered that just as the individuals ought, in their association in the State, promote the common good, in its turn the State has the correlative duty to seek its perfection [FN90].

[FN88] A. Gómez Robledo, Fundadores del Derecho Internacional, Mexico, UNAM, 1989, pp. 48-55.
[FN89] Ibid., p. 26.
[FN90] César Sepúlveda, Derecho Internacional, 13th. ed., Mexico, Ed. Porrúa, 1983, pp. 28-29. Wolff beheld the nation-States as members of a civitas maxima, a concept which Emmerich de Vattel (author de Le Droit des Gens, 1758), subsequently, invoking the necessity of "realism", intended to replace by a "society of nations" (a less advanced concept); cf. F.S. Ruddy, International Law in the Enlightenment - The Background of Emmerich de Vattel's Le Droit des Gens, Dobbs Ferry/N.Y., Oceana, 1975, p. 95; for a criticism to this step backwards (incapable of providing the foundation of the principle of obligation in international law), cf. J.L. Brierly, The Law of Nations, 6th. ed., Oxford, Clarendon Press, pp. 38-40.

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9. Regrettably, the reflections and the vision of the so-called founding fathers of international law, which conceived it as a truly universal system [FN91], were to be overtaken by the emergence of legal positivism, which, above all as from the XIXth century, personified the State conferring upon it a "will of its own", reducing the rights of the human beings to those that the State "granted" to them. The consent or the "will" of the States (voluntarist positivism) became the criterion predominant in international law, denying jus standi to the individuals, to the human beings [FN92]. This rendered difficult the understanding of the international society, and debilitated the International Law itself, reducing it to an inter-State law, no more above but between sovereign States [FN93]. The disastrous consequences of this distortion are widely known.

[FN91] C. Wilfred Jenks, The Common Law of Mankind, London, Stevens, 1958, pp. 66-69; and cf. also René-Jean Dupuy, La communauté internationale entre le mythe et l'histoire, Paris, Economica/UNESCO, 1986, pp. 164-165.
[FN92] P.P. Remec, The Position of the Individual..., op. cit. supra n. (9), pp. 36-37.
[FN93] Ibid., p. 37.

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10. The great legacy of the juridical thinking of the second half of the XXth century, in my view, has been, by means of the emergence and evolution of the International Law of Human Rights, the rescue of the human being as subject of both domestic and international law, endowed with international juridical capacity [FN94]. But this advance comes together with new needs of protection, to require new answers on the part of the corpus juris of protection itself. This is the case, in our days, of the persons affected by the problems raised in the present advisory procedure before the Inter-American Court of Human Rights.

[FN94] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. III, Porto Alegre/Brazil, S.A. Fabris Ed., 2003, pp. 447-497.

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11. To face these problems, one has, in my understanding, to keep in mind the most valuable legacy of the founding fathers of Internacional Law. Already in the epoch of the elaboration and dissemination of the classic works by F. Vitoria and F. Suárez (supra), the jus gentium had liberated itself from its origins of private law (of Roman law), so as to apply universally to all human beings: the societas gentium was expression of the fundamental unity of the human kind, forming a true societas ac communicatio, as no State was self-sufficient [FN95]. The new jus gentium, thus conceived also to fulfil human needs, paved the way to the conception of a universal international law [FN96].

[FN95] P. Guggenheim, "Contribution à l'histoire des sources du droit des gens", 94 Recueil des Cours de l'Académie de Droit International de La Haye (1958) pp. 21-22.
[FN96] J. Moreau-Reibel, "Le droit de société interhumaine et le jus gentium - Essai sur les origines et le développement des notions jusqu'à Grotius", 77 Recueil des Cours de l'Académie de Droit International de La Haye (1950) pp. 506-510.

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12. The belief came to prevail - expressed in the work of H. Grotius - that it was possible to capture the content of this law by means of reason: natural law, from which the law of nations derived, was a dictate of reason [FN97]. In the framework of the new universalist conception the jus communicationis was affirmed, as from F. Vitoria, erecting the freedom of movement and of commercial exchange as one of the pillars of the international community itself [FN98]. The controls of the ingress of aliens were to become manifest only in a much more recent historical epoch (cf. par. 35, infra), pari passu with the great migratory fluxes and the development of the law of refugees and displaced persons [FN99].

[FN97] G. Fourlanos, Sovereignty and the Ingress of Aliens, Stockholm, Almqvist & Wiksell, 1986, p. 17.
[FN98] Ibid., pp. 19-23, and cf. pp. 79-81.
[FN99] Cf. ibid., pp. 160-161 and 174-175.

II. The Disparities of the So-Called "Globalized" World, the Forced Displacements and the Vulnerability of the Migrants.

13. Nowadays, in an era of great migrations, an increasingly greater distance from the universalist ideal of the societas gentium of the founding fathers of International Law can regrettably be found. The migrations and the forced displacements, intensified in the decade of the nineties [FN100], have been characterized particularly by the disparities in the conditions of living between the place of origin and that of destiny of the migrants. Their causes are multiple: economic colapse and unemployment, colapse in the public services (education, health, among others), natural disasters, armed conflicts, repression and persecution, systematic violations of human rights, ethnic rivalries and xenophobia, violence of distinct forms, personal insecurity [FN101].

[FN100] The forced displacements of the nineties (after the so-called end of the cold war) encompassed roughly nine million persons; UNHCR, The State of the World's Refugees - Fifty Years of Humanitarian Action, Oxford, UNHCR/Oxford University Press, 2000, p. 9.
[FN101] N. Van Hear, New Diasporas - The Mass Exodus, Dispersal and Regrouping of Migrant Communities, London, UCL Press, 1998, pp. 19-20, 29, 109-110, 141, 143 y 151-252, and cf. p. 260; F.M. Deng, Protecting the Dispossessed - A Challenge for the International Community, Washington D.C., Brookings Institution, 1993, pp. 3-20.

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14. The migrations and forced displacements, with the consequent uprootedness 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 [FN102]. 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.

[FN102] As Simone Weil warned already in the mid-XXth century, "to be rooted is perhaps the most important and least recognized need of the human sould. It is one of the hardest to define"; S. Weil, The Need for Roots, London/N.Y., Routledge, 1952 (reprint 1995), p. 41; and cf. also the considerations by H. Arendt, La tradition cachée, Paris, Ch. Bourgois Éd., 1987 (ed. orig. 1946), pp. 58-59 and 125-127.

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15. Migrants, - particularly the undocumented ones, - as pointed out by the Inter-American Court in the present Advisory Opinion n. 18 (pars. 112-113 and 131-132), - are often in a situation of great vulnerability, in face of the risk of precarious employment (in the so-called "informal economy"), of labour exploitation, of unemployment itself and the perpetuation in

poverty (also in the receiving country) [FN103]. 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 undocumented migrants can only be effectively dealt with amidst a spirit of true human solidarity towards the victimized [FN104]. 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.

[FN103] H. Domenach and M. Picouet, Les migrations, Paris, PUF, 1995, pp. 58-61, 66 and 111, and cf. pp. 48 and 82-85.

[FN104] J. Ruiz de Santiago, "Derechos Humanos, Migraciones y Refugiados: Desafios en los Inicios del Nuevo Milenio", Memoria del III Encuentro de Movilidad Humana: Migrante y Refugiado, San José of Costa Rica, ACNUR/IIDH, 2001, pp. 37-72.

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16. In times of the so-called "globalization" (the misleading and false neologism which is en vogue in our days), the frontiers have been opened to the capitals, goods and services, but have sadly closed themselves to human beings. The neologism which suggests the existence of a process which would comprise everyone and in which everyone would participate, in reality hides the fragmentation of the contemporary world, and the social exclusion and marginalization of increasingly greater segments of the population. The material progress of some has been accompanied by the contemporary (and clandestine) forms of labour exploitation of many (the exploitation of undocumented migrants, forced prostitution, traffic of children, forced and slave labour), amidst the proven increase of poverty and social exclusion and marginalization [FN105].

[FN105] Cf., e.g., M. Lengellé-Tardy, L'esclavage moderne, Paris, PUF, 1999, pp. 8-13, 21-32 and 73-98.

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17. As aggravating circumstances, the State abdicates from its ineluctable social function, and irresponsibly handles to the "market" the essential public services (education and health, among others), transforming them in merchandises to which the access becomes increasingly more difficult for the majority of the individuals. These latter come to be regarded as mere agents of economic production [FN106], amidst the sad mercantilization of human relations. Moreover, one detects today, together with an aggravation of the intolerance and xenophobia, a regrettable erosion of the right of asylum [FN107] (cf. infra, pars. 36-42). All these dangerous developments point towards a new world without values, which adheres to, without further reflection, to an unsustainable model.

[FN106] Already in the mid-XXth century, distinct trends of the philosophical thinking of the time rebelled themselves against the dehumanization of social relations and the depersonalization of the human being, generated by the technocratic society, which treats the individual as a simple agent of material production; cf., e.g., inter alia, Roger Garaudy, Perspectivas do Homem, 3rd. ed., Rio de Janeiro, Ed. Civilização Brasileira, 1968, pp. 141-143 and 163-165.

[FN107] Cf., e.g., F. Crepeau, Droit d'asile - de l'hospitalité aux contrôles migratoires, Bruxelles, Bruylant/Éd. Univ. de Bruxelles, 1995, pp. 17-353; Ph. Ségur, La crise du droit d'asile, Paris, PUF, 1998, pp. 5-171; A.A. Cançado Trindade and J. Ruiz de Santiago, La Nueva Dimensión de las Necesidades de Protección del Ser Humano en el Inicio del Siglo XXI, 2nd. ed., San José of Costa Rica, UNHCR, 2003, pp. 23-123.

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18. Within the Inter-American Court of Human Rights, in my Concurring Opinion in the case of the Haitians and Dominicans of Haitian Origin in the Dominican Republic (Provisional Measures of Protection, Resolution of 18.08.2000) I pointed out that, in this beginning of the XXIst century, "the human being has been placed by himself in a scale of priority inferior to that attributed to the capitals and goods, - in spite of all the struggles of the past, and of all the sacrifices of the previous generations" (par. 4). With the uprootedness, - I proceeded, - one loses his spontaneous means of expression and of communication with the outside world, as well as the possibility of developing a project of life: "it is, thus, a problem which concerns the whole human kind, which encompasses the totality of human rights, and, above all, which has a spiritual dimension which cannot be forgotten, with all more reason in the dehumanized world of our days" (par. 6).

19. And, on this first aspect of the problem, I concluded that "the problem of uprootedness ought to be considered in a framework of action oriented towards the erradication of social exclusion and extreme poverty, - if one indeed wishes to reach its causes and not only to fight its symptoms. One ought to develop responses to the new needs of protection, even if they are not literally contemplated in the international instruments in force of protection of the human being" (par. 7). I added my understanding to the effect that "the question of the uprootedness ought to be dealt with not in the light of State sovereignty, but rather as a problem of a truly global dimension that it is (requiring a concert at universal level), bearing in mind the obligations erga omnes of protection" (par. 10).

20. In spite of the uprootedness being "a problem which affects the whole international community", - I kept on warning, -

"continues to be treated in an atomized way by the States, with the outlook of a legal order of a purely inter-State character, without apparently realizing that the Westphalian model of such international order is, already for a long time, definitively exhausted. It is precisely for this reason that the States cannot exempt themselves from responsibility in view of the global character of the uprootedness, since they continue to apply to this latter their own criteria of domestic legal order. (...) The State ought, thus, to respond for the consequences of the practical application of the norms and public policies that it adopts in the matter of migration, and in particular of the procedures of deportations and expulsions" (pars. 11-12).

III. The Reaction of the Universal Juridical Concience (Opinio Juris Communis).

21. On this last point, it may be recalled that, in 1986, the International Law Association adopted (in its 62nd. session, in Seoul), by consensus, the Declaration of Principles of International Law on Mass Expulsion, in which, inter alia, it expressed its "deep concern" with

"the vulnerabilidad and precarious position of many minorities", including migrant workers (preamble). It sustained that the principle of non-refoulement, as the "cornerstone of the protection of refugees", is applicable, even if these latter have been legally admitted in the receiving State, and independently of having arrived individually or massively (principle 12). And it urged the States to put an end to any expulsion of a massive character and to establish systems of "early warning" (principle 19) [FN108]. Four years later, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) came to prohibit measures of collective expulsion, and to determine that each case of expulsion should be "examined and decided individually", in accordance with the law (Article 22).

[FN108] The Declaration referred to was to relate mass expulsion in given circumstances to the concept of "international crime" (principle 9).

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22. Moreover, one ought to underline that the common denominator of the cycle of the World Conferences of the United Nations of the end of the XXth century [FN109] has been precisely the special attention dedicated to the conditions of living of the population (particularly of the vulnerable groups, in special necessity of protection, which certainly include undocumented migrants), it resulting therefrom the universal recognition of the necessity to place human beings, definitively, in the centre of all process of development [FN110]. In the present Advisory Opinion n. 18, the Inter-American Court has taken into account the final documents of two of those Conferences (pars. 116 and 164), namely, the Programme of Action of the International Conference on Population and Development (Cairo, 1994), and the Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001).

[FN109] United Nations Conference on Environment and Development, Rio de Janeiro, 1992; II World Conference on Human Rights, Vienna, 1993; International Conference on Population and Development, Cairo, 1994; World Summit for Social Development, Copenhagen, 1995; IV World Conference on Women, Beijing, 1995; II United Nations Conference on Human Settlements, Habitat-II, Istanbul, 1996. To these followed, more recently, the Rome Conference on the Statute of the International Criminal Court, 1998; and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, 2001.

[FN110] A.A. Cançado Trindade, "Desarrollo Humano y Derechos Humanos en la Agenda Internacional del Siglo XXI", in Memoria - Foro Desarrollo Humano y Derechos Humanos (August 2000), San José of Costa Rica, UNDP/Inter-American Court of Human Rights, 2001, pp. 25-42.

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23. The final documents of the recent World Conferences of the United Nations (held in the period from 1992 until 2001) reflect the reaction of the universal juridical conscience to the attempts against, and affronts to, the dignity of the human person all over the world. In reality, the aforementioned cycle of World Conferences has consolidated the recognition of "the

legitimacy of the concern of the whole international community with the violations of human rights everywhere and at any moment" [FN111]. As I saw it fit to point out in my Concurring Opinion in the Advisory Opinion n. 16 of the Inter-American Court of Human Rights on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (1999),

"the very emergence and consolidation of the corpus juris of the International Law of Human Rights are due to the reaction of the universal juridical conscience to the recurrent abuses committed against human beings, often warranted by positive law: with that, the Law (el Derecho) came to the encounter of the human being, the ultimate addressee of its norms of protection" (pars. 3-4).

[FN111] A.A. Cançado Trindade, El Derecho Internacional de los Derechos Humanos en el Siglo XXI, Santiago, Editorial Jurídica de Chile, 2001, p. 413, and cf. p. 88.

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24. Further on, in the aforementioned Concurring Opinion in the Advisory Opinion n. 16, I mentioned the recognition, in our days, of the necessity to restitute to the human being the central position, "as subject of domestic as well as international law" (par. 12), and added:

- "With the dismystification of the postulates of voluntarist positivism, it became evident that one can only find an answer to the problem of the foundations and the validity of general international law in the universal juridical conscience, starting with the assertion of the idea of an objetive justice. As a manifestation of this latter, the rights of the human being have been affirmed, emanating directly from international law, and not subjected, thereby, to the vicissitudes of domestic law" (par. 14).

25. In fact, the atrocities and abuses which have victimized in the last decades millions of human beings everywhere, increasing the contingents of refugees, displaced persons and undocumented migrants in search of survival, have definitively awakened the universal juridical conscience for the pressing need to reconceptualize the very bases of the international legal order. But it is urgently necessary, in our days, to stimulate this awakening of the universal juridical conscience to intensify the process of humanization of contemporary international law [FN112]. Also in the case Bámaca Velásquez versus Guatemala (Judgment as to the merits, of 25 November 2000), I saw it fit to insist on the point; in my Separate Opinion, I reaffirmed that:

"(..) the existence of a universal juridical conscience (corresponding to the opinio juris comunis) (...) constitutes, in my understanding, the material source par excellence (beyond the formal sources) of the whole law of nations (droit des gens), responsible for the advances of the human kind not only at the juridical level but also at the spiritual one" (par. 16, and cf. par. 28).

[FN112] As I stressed in my already mentioned Concurring Opinion in the case of the Haitians and Dominicans of ‘Haitian Origin in the Dominican Republic (Provisional Measures of Protection, 2000) before the Inter-American Court (par. 12).

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26. There is pressing need to seek, therefrom, the reconstruction of the law of nations, in this beginning of the XXIst century, on the basis of a new paradigm, no longer State-centered, but rather placing the human being in a central position [FN113] and bearing in mind the problems which affect the humanity as a whole. The existence of the human person, which has its root in the spirit, was the point of departure, e.g., of the reflections of Jacques Maritain, to whom the true progress meant the ascent of conscience, of the equality and communion of all in human nature, thus accomplishing the common good and justice [FN114]. The conceptual evolution examined herein gradually moved, as from the sixties, from the international to the universal dimension, under the great influence of the development of the International Law of Human Rights itself. The recognition of certain fundamental values, on the basis of a sense of objective justice, has much contributed to the formation of the opinio juris communis [FN115] in the last decades of the XXth century, which one ought to keep on developing in our days in order to face the new necessities of protection of the human being.

[FN113] It is a true reconstruction; more than half a century ago, Maurice Bourquin warned that "ni au point de vue de son objet, ni même au point de vue de sa structure, le droit des gens ne peut se définir comme un droit inter-étatique. (...) L'être humain (...) y occupe une place de plus en plus considérable"; M. Bourquin, "L'humanisation du droit des gens", in La technique et les principes du Droit public - Études en l'honneur de Georges Scelle, vol. I, Paris, LGDJ, 1950, pp. 53-54.

[FN114] J. Maritain, Los Derechos del Hombre y la Ley Natural, Buenos Aires, Ed. Leviatan, 1982 (reprint), pp. 12, 18, 38, 43 and 94-96, and cf. p. 69. The liberation from material servitudes was necessary, for the development above all of the life of the spirit; in his vision, humankind only progresses when it advances towards human emancipation (ibid., pp. 50 and 105-108). In affirming that "the human person transcends the State", as it has "a destiny superior to time", he added that "each human person has the right to decide by herself as to what concerns her personal destiny (...)" (ibid., pp. 79-82, and cf. p. 104).

[FN115] Maarten Bos, A Methodology of International Law, Amsterdam, North-Holland, 1984, p. 251, and cf. pp. 246 and 253-255.

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27. Despite the fact that the international legal order of this beginning of the XXIst century is, in fact, far too distant from the ideals of the founding fathers of the droit des gens (supra), instead of capitulating before this reality, one has rather to face it. It could be argued that the contemporary world is entirely distinct from that of the epoch of F. Vitoria, F. Suárez and H. Grotius, who supported a civitas maxima ruled by the droit des gens, the new jus gentium reconstructed by them. But even if one is before two different world scenarios (no one would deny it), the human aspiration is the same, that is, that of the construction of an international order applicable both to the States (and international organizations) and to human beings (the droit des gentes), in conformity with certain universal standards of justice, without whose observance there cannot be social peace. One has, thus, to endeavour in a true return to the origins of the law of nations, whereby the current historical process of humanization of International Law will be fostered.

28. If it is certain that the drama of the numerous refugees, displaced persons and undocumented migrants presents today an enormous challenge to the labour of international protection of the rights of the human person, it is also certain that the reactions to the violations of their fundamental rights are today immediate and forceful, by virtue precisely of the awakening of the universal juridical consciencie for the necessity of prevalence of the dignity of the human person in any circumstances. The emergence and assertion of jus cogens in contemporary International Law (cf. infra) constitute, in my view, an unequivocal manifestation of this awakening of the universal juridical conscience.

29. In the course of the procedure before the Inter-American Court of Human Rights pertaining to the present Advisory Opinion, the requesting State, Mexico, singled out with pertinence the importance of the so-called Martens clause as an element of interpretation of Law (above all humanitarian), which could also provide support to the migrants. In this respect, I believe it possible to go even further: at least one trend of the contemporary legal doctrine has come to characterize the Martens clause as source of general international law itself [FN116]; and no one would dare today to deny that the "laws of humanity" and the "dictates of the public conscience" invoked by the Martens clause belong to the domain of jus cogens [FN117]. The aforementioned clause, as a whole, has been conceived and reiteratedly affirmed, ultimately, to the benefit of the whole human kind, remaining thus quite up-to-date. It can be considered, - as I have affirmed in a recent work, - as expression of the raison de l'humanité imposing limits to the raison d'État [FN118].

[FN116] F. Münch, "Le rôle du droit spontané", in Pensamiento Jurídico y Sociedad International - Libro-Homenaje al Profesor Dr. A. Truyol Serra, vol. II, Madrid, Universidad Complutense, 1986, p. 836.

[FN117] S. Miyazaki, "The Martens Clause and International Humanitarian Law", Études et essais sur le Droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de J. Pictet (ed. Christophe Swinarski), Genève/La Haye, ICRC/Nijhoff, 1984, pp. 438 and 440.

[FN118] A.A. Cançado Trindade, Tratado de Direito Internacional..., op. cit. supra n. (21), vol. III, p. 509, and cf. pp. 497-509.

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30. One of the significant contributions of the present Advisory Opinion n. 18 on The Juridical Condition and the Rights of Undocumented Migrants lies in its determination of the wide scope of the due process of law (par. 124). In its earlier Advisory Opinion n. 16 on The Rights to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, the Inter-American Court underlined the historical evolution of the due process of law in the sense of its expansion ratione materiae (pars. 117 and 119), whilst, in the present Advisory Opinion n. 18, it examines such expansion ratione personae, and determines that "the right to the due process ought to be recognized in the framework of the minimal guarantees which ought to be granted to every migrant, irrespective of its migratory status" (par. 122). The correct conclusion of the Court, in the sense that "the wide scope of the intangibility of the due process comprises all matters and all persons, without any discrimination" (resolutory point n. 7), fulfills effectively the exigencies and the imperatives of the common good.

III. The Construction of the Individual Subjective Right to Asylum.

31. The very notion of the common good ought to be considered not in relation to a social milieu in abstracto, but rather to the totality of human beings who compose it, irrespectively of the political or migratory status of each one. Human rights much transcend the so-called "rights of the citizenship", "granted" by the State. The common good, as Jacques Maritain used to rightly sustain, is erected upon the human person herself (rather than individuals or citizens), and the concept of personality encompasses the deepest dimension of the being or of the spirit [FN119]. The common good is "common" because it projects and reflects itself in the human persons [FN120]. If it were require of certain individuals to capitulate before the social whole, to deprive themselves of the rights which are inherent to them (as a result, e.g., of their political or migratory status), to entrust their destiny entirely to the artificial social whole, in such circumstances the very notion of common good would completely disappear [FN121].

[FN119] J. Maritain, The Person and the Common Good, Notre Dame, University of Notre Dame Press, 2002 [reprint], pp. 29-30, 40 and 105.
[FN120] Ibid., pp. 49, 76 and 103-104. Any understanding to the contrary would most probably lead to abuses (proper of authoritarianism and of the repressive regimes) and violations of human rights; ibid., p. 50, and cf. pp. 95-97.
[FN121] Cf. ibid., pp. 92-93.

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32. In spite of the recognition nowadays of the right to emigrate, as a corolary of the right to freedom of movement, the States have not yet recognized the correlative right to immigrate, creating thus a situation which has generated incongruencies and arbitrarinesses, very often affecting negatively the due process of law [FN122]. In perpetuating, in this way, the uncertainties and inconsistencies, the States responsible for this situation have failed to act at the level of their responsibilities as subjects of International Law, the droit des gens. And have created more problems not only for numerous individuals directly affected but also, ultimately, for themselves, in contributing indirectly to the formation of the fluxes of "illegal" immigrants.

[FN122] A.A. Cançado Trindade, Elementos para un Enfoque de Derechos Humanos del Fenómeno de los Flujos Migratorios Forzados, op. cit. infra n. (105), pp. 15-16 and 18.

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33. On the other hand, there are also the States which have sought solutions to the problem. The fact that 12 accredited States participated in the advisory procedure before the Inter-American Court which preceded the adoption of the present Advisory Opinion on The Juridical Condition and the Rights of Undocumented Migrants is symptomatic of the common purpose of the search for such solutions. From the analysis of the arguments presented, throughout the procedure referred to, by Mexico, Honduras, Nicaragua, El Salvador, Costa Rica and Canada, one detects, in a reassuring way, as common denominator, the recognition that the States have the obligation to respect and to ensure respect for the human rights of all persons under their

respective jurisdictions, in the light of the principle of equality and non-discrimination, irrespectively of whether such persons are nationals or foreigners.

34. Moreover, in the same procedure before the Inter-American Court pertaining to the present Advisory Opinion, the United Nations High Commissioner for Refugees (UNHCR), in emphasizing the situation of vulnerability of the migrants, referred to the existing link between migration and asylum, and added with lucidity that the nature and complexity of the contemporary displacements render it difficult to establish a clear line of distinction between refugees and migrants. This situation, encompassing millions of human beings [FN123], reveals a new dimension of the protection of the human being in certain circumstances, and underlines the capital importance of the fundamental principle of equality and non-discrimination, to which I shall refer further on (cf. pars. 58-63, infra).

[FN123] Cf. notes (3) and (27), supra.

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35. It is, in reality, a great challenge to the safeguard of the rights of the human person in our days, at this beginning of the XXIst century. In this respect, it is not to pass unnoticed that, as already pointed out, the jus communicationis and the freedom of movement, proclaimed since the XVIth and XVIIth centuries, lasted for a long time, and only in a much more recent historical epoch restrictions to them began to manifest themselves (cf. par. 9, supra). In fact, only in the second half of the XIXth century, when immigration definitively penetrated in the sphere of domestic law, it came to suffer successive and systematic restrictions [FN124]. Hence the growing importance of the prevalence of certain rights, as the right of access to justice (the right to justice lato sensu), the right to private and family life (comprising family unity), the right not to be subjected to cruel, inhuman and degrading treatment; this is a theme which transcends the purely State or inter-State dimension [FN125], and that has to be approached in the light of the fundamental human rights of the migrant workers, including the undocumented ones.

[FN124] F. Rigaux, "L'immigration: droit international et droits fondamentaux", in Les droits de l'homme au seuil du troisième millénaire - Mélanges en hommage à P. Lambert, Bruxelles, Bruylant, 2000, pp. 693-696.

[FN125] Ibid., pp. 707-708, 710-713, 717-720 and 722.

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36. Nor is it to pass unnoticed, in the present context, the more lucid doctrine which led, in the past, to the configuration of the institute of the territorial asylum. In fact, the historia juris of the institute of asylum has been marked by the tension between its characterization as a discretionary faculty of the State, or rather as a subjective individual right. It is not my purpose to begin to examine in depth this institute in the present Concurring Opinion, but rather to refer to a pertinent aspect of the matter object of the present Advisory Opinion of the Inter-American Court. In recent years, with the growing restrictions in the use by the States of the self-attributed faculty of migratory control, it is the first trend which seems de facto to prevail [FN126], to the detriment of the thesis of the subjective individual right.

[FN126] In this, as in other areas of the international legal order, an underlying and recurring tension has persisted between the conventional obligations in force, undertaken by the States and the insistence of these latter on keeping on searching for themselves the satisfaction of their own interests, as perceived by them. Cf., e.g., J.-G. Kim and J.M. Howell, Conflict of International Obligations and State Interests, The Hague, Nijhoff, 1972, pp. 68 and 112.

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37. One may recall that the frustrated Conference of the United Nations on Territorial Asylum, held in Geneva in 1977, did not succeed to obtain a universal consensus as to the asylum as an individual right, and, ever since, State unilateralism has become synonymous of the precariousness of asylum [FN127]. The "protectionist" measures of the industrialized States (in relation to "undesirable" migratory fluxes) have moved away from the best legal doctrine and generated distortions in the practice relating to the institute of asylum [FN128].

[FN127] Ph. Ségur, La crise du droit d'asile, op. cit. supra n. (34), pp. 107 and 140. - On the frustrated Conference on Territorial Asylum of 1977, cf. the report "Diplomatic Conference on Territorial Asylum", 18 Review of the International Commission of Jurists (June 1977) pp. 19-24; and cf. P. Weis, "The Present State of International Law on Territorial Asylum", 31 Schweizerisches Jahrbuch für internationales Recht/Annuaire suisse de Droit international (1975) pp. 71-96.

[FN128] F. Crepeau, Droit d'asile - de l'hospitalité aux contrôles migratoires, op. cit. supra n. (34), pp. 306-317, 324-330 and 335-339.

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38. Nevertheless, the International Law of Human Rights has reacted to respond to the new necessities of protection. And it is perfectly possible that we are witnesssing the beginnings of formation of a true human right to the humanitarian assistance [FN129]. We are before two distinct approches to the international legal order, one centered in the State, the other (which I firmly sustain) centred in the human person. It would be in conformity with this latter the characterization of the right of asylum as a subjective individual right. The corpus juris of the International Law of Human Rights contains, in fact, elements which can lead to the construction (or rather the reconstruction) of a true individual right to asylum [FN130].

[FN129] Cf. Inter-American Court of Human Rights, case of the Communities of the Jiguamiandó and of the Curbaradó, Provisional Measures of Protection of 06.03.2003, Concurring Opinion of Judge A.A. Cançado Trindade, par. 6.

[FN130] Cf., e.g., Universal Declaration of Human Rights, Article 14(1); American Convention on Human Rights, Article 22(7); OAU Convention (of 1969) Governing Specific Aspects of the Refugee Problems in Africa, Article II(1) and (2).

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39. It ought to be kept in mind that the institute of asylum is much wider than the meaning attributed to asylum in the ambit of Refugee Law (i.e., amounting to refuge). Furthermore, the institute of asylum (general kind to which belongs the type of territorial asylum, in particular) precedes historically for a long time the corpus juris itself of Refugee Law. The aggiornamento and a more integral comprehension of territorial asylum, - which could be achieved as from Article 22 of the American Convention on Human Rights, - could come in aid of undocumented migrant workers, putting an end to their clandestine and vulnerable situation. To that end, it would have to be (or again to become) recognized precisely as a subjective individual right [FN131], and not as a discretionary faculty of the State.

[FN131] In the same year of the adoption of the Universal Declaration of Human Rights of 1948, whilst discussions within the Institut de Droit International were taking place as to whether asylum was a right of the State or of the individual (cf. Annuaire de l'Institut de Droit International (1948) pp. 199-201 and 204-205), in face of the uncertainties manifested G. Scelle comented that "asylum had become a question of universal ordre public" (ibid., p. 202). Two years later, the theme was again discussed in the same Institut (in the debates of 07-08.09.1950): on the basis of the impact of human rights in International Law (cf. Annuaire de l'Institut de Droit International (1950)-II, p. 228), the possibility was raised of the establishment de lege ferenda of an obligation of the States to grant asylum. Despite a certain opposition to the idea, fortunately there were those jurists who supported the establishment of such State obligation, or at least who took it seriously; cf. ibid., pp. 204 and 221 (F. Castberg), p. 200 (H. Lauterpacht), pp. 204-205 (P. Guggenheim), and p. 225 (A. de La Pradelle).

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40. Likewise, as to the refugees, one "recognizes", rather than "grants", their statute; it is not a simple "concession" on the part of the States. Nevertheless, the terminology nowadays commonly employed is a reflection of the steps backwards which we regrettably witness. For example, there are terms, like "temporary protection", which seem to imply a relativization of the integral protection granted in the past. Other terms (e.g., "refugees in orbit", "displaced persons in transit", "safe havens", "convention plus") seem to be endowed with a certain degree of surrealism, appearing frankly open to all sorts of interpretation (including the retrograde one), instead of attaching to that which is essentially juridical and to the conquests of law in the past. It is perhaps symptomatic of our days that one has to invoke the conquests of the past in order to stop or avoid even greater steps backwards in the present and in the future. At this moment - of shadows, rather than light - in which we live, one has at least to preserve the advances achieved by past generations in order to avoid a greater evil.

41. It is not to be forgotten, thus, that there have been doctrinal manifestations which sustain the process of gradual formation of the individual right of asylum, at the same time that they affirm the character of jus cogens of the principle of non-refoulement [FN132]. This posture appears in accordance with the thinking of the founding fathers of International Law: while Francisco de Vitoria sustained the jus communicationis, Francisco Suárez, in the same line of thinking, visualized a "subjective natural right", proper of the jus gentium, in a sense comparable to that utilized in our days [FN133] in the conceptual universe of the International Law of Human Rights.

[FN132] G. Fourlanos, Sovereignty and the Ingress of Aliens, op. cit. supra n. (24), pp. 143-144, 146, 149 and 172-173.
[FN133] Ibid., p. 23.

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42. There will of course always be the "realists" who will object that the subjective individual right of asylum is an utopia. To them I would retort that the alternative to utopia is desperation. More than three decades ago (and the situation of the millions of uprooted persons has only aggravated ever since) L. Legaz y Lacambra warned that:

"The existence of ‘proletarian peoples’ amounts to a nonsense if the idea of an international community is affirmed; and, above all, it constitutes an injustice when there already are peoples who have achieved a phase of maximum development and economic, social and cultural level, which sharply contrasts with the situation of misery of so many others. [...There is an] obligation of the international community towards their more destitute and needed members who, in this dimension, embody also the idea of the humanity as subject of Law.

Thus, in the evolution of Law, a human - humanist and humanitarian (...) - sense becomes evident: it ceases to be a coercive order of the State and it incorporates more and more some forms of social life open to the growing communication between all men (...). All that, and only that, is what gives meaning to the juridical personalization and subjectivization of humankind" [FN134].

[FN134] L. Legaz y Lacambra, "La Humanidad, Sujeto de Derecho", in Estudios de Derecho Internacional Público y Privado - Homenaje al Profesor L. Sela Sampil, vol. II, Oviedo, University of Oviedo, 1970, pp. 558-559.

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43. In his biography of Erasmus of Rotterdam (1467-1536), Stefan Zweig, one of the more lucid writers of the XXth century, singled out, in the precious legacy of the great humanist, the tolerance, to put and end, without violence, to the conflicts which divide the human beings and the peoples. Erasmus, pacifist and defender of the freedom of conscience, identified in the intolerance the hereditary evil of human society, which should be erradicated. Although the ideal of Erasmus has not been accomplished until now, it was not thereby devoid of value. In the penetrating words of S. Zweig,

"An idea which does not come to be materialized is, for that reason, invincible, since it is no longer possible to prove its falseness; that which is necessary, even though its realization is delayed, not therefore is less necessary; quite on the contrary, only the ideals which have not become worn-out and committed by the realization continue acting in each generation as an element of moral impulse. Only the ideas which have not been complied with return eternally. (...) What Erasmus, the disillusioned old man, and, notwithstanding, not excessively disillusioned, left to us as legacy (...) was not anything else but the renewed and dreamed of very

old wish of all the religions and myths of a future and continued humanization of humanity and of a triumph of the reason (...). And even if the cautious and cold calculating persons can turn to demonstrate always the lack of future of erasmism, and even if the reality seems to give them each time the reason, those spirits will always be necessary who point out that which links among themselves the peoples beyond that which separates them and that renews faithfully, in the heart of humankind, the idea of a future age of a higher human feeling" [FN135].

[FN135] S. Zweig, Triunfo y Tragedia de Erasmo de Rotterdam, 5th. ed., Barcelona, Ed. Juventud, 1986, pp. 205-207; S. Zweig, Érasme - Grandeur et décadence d'une idée, Paris, Grasset, 2002 (reed.), pp. 183-185.

IV. The Position and Role of the General Principles of Law.

44. Every legal system has fundamental principles, which inspire, inform and conform their norms. It is the principles (derived ethmologically from the Latin principium) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (prima principia) which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves. This is how I conceive the presence and the position of the principles in any legal order, and their role in the conceptual universe of Law.

45. The general principles of law entered into the legal culture, with historical roots which go back, e.g., to Roman law, and came to be linked to the very conception of the democratic State under the rule of law (Estado democrático de Derecho), above all as from the influence of the enlightenment thinking (pensée illuministe). Despite the apparent indifference with which they were treated by legal positivism (always seeking to demonstrate a "recognition" of such principles in the positive legal order), and despite the lesser attention dispensed to them by the shallow and reductionist legal doctrine of our days, nevertheless we will never be able to prescind from them.

46. From the prima principia the norms and rules emanate, which in them find their meaning. The principles are thus present in the origins of Law itself. The principles show us the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), the necessary primacy of law over force, the preservation of peace. Contrary to those who attempt - in my view in vain - minimize them, I understand that, if there are no principles, nor is there truly a legal system. Without the principles, the "legal order" simply is not accomplished, and ceases to exist as such.

47. The identification of the basic principles has accompanied pari passu the emergence and consolidation of all the domains of Law, and all its branches (civil, civil procedural, criminal, criminal procedural, administrative, constitutional, and so forth). This is so with Public International Law [FN136], with the International Law of Human Rights, with International Humanitarian Law [FN137], with the International Law of Refugees [FN138], with International

Criminal Law [FN139]. However circumscribed or specialized a legal regime may be, its basic principles can there be found, as, e.g., in International Environmental Law [FN140], in the Law of the Sea [FN141], in the Law of Outer Space [FN142], among many others. As pointed out before the Inter-American Court of Human Rights during the procedure pertaining to the present Advisory Opinion on The Legal Condition and the Rights of Undocumented Migrants, the International Labour Organization (ILO) itself has sought to identify the "fundamental principles and rights in work", by means of a Declaration adopted in June 1998.

[FN136] E.g., principle of the prohibition of the use or threat of force, principle of the peaceful settlement of international disputes, principle of non-intervention in inter-State relations, principle of the juridical equality of the States, principle of the equality of rights and the self-determination of peoples, principle of good faith in the compliance with the international obligations, principle of international cooperation. Cf. A.A. Cançado Trindade, O Direito Internacional em um Mundo em Transformação, Rio de Janeiro, Edit. Renovar, 2002, pp. 91-140.

[FN137] Principle of humanity, principle of proportionality, principle of distinction (between combatants and the civil population), principle whereby the election of methods or means of combat is not illimited, principle which requires avoiding unnecessary sufferings or superfluous evils.

[FN138] Principle of non-refoulement, principle of humanity.

[FN139] Principle of legality (nullum crimen sine lege, nulla poena sine lege), principle of individual penal responsibility, principle of the presumption of innocence, principle of non-retroactivity, principle of a fair trial.

[FN140] E.g., principle of precaution or due dilligence, principle of prevention, principle of the common but differentiated responsibility, principle of intergenerational equity, polluter-pay principle.

[FN141] E.g., principle of the common heritage of mankind (ocean floors), principle of the peaceful uses of the sea, principle of the equality of rights (in the high seas), principle of the peaceful settlement of disputes, principles of the freedom of navigation and of inocent passage, principles of equidistance and of special circumstances (delimitation of maritime spaces).

[FN142] E.g., principle of non-appropriation, principle of the peaceful uses and ends, principle of the sharing of benefits in space exploration.

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48. Some of the basic principles are proper of certain areas of Law, others permeate all areas. The corpus of legal norms (national or international) operates moved by the principles, some of them ruling the relations themselves between human beings and the public power (as the principles of natural justice, of the rule of law [Estado del Derecho], of the rights of the defence, of the right to the natural judge, of the independence of justice, of the equality of all before the law, of the separation of powers, among others). The principles enlighten the path of the legallity and the legitimacy. Hence the continuous and eternal "rebirth" of natural law, which has never disappeared.

49. It is no longer a return to the classic natural law, but rather the affirmation or restoration of a standard of justice, heralded by the general principles of law, whereby positive law is

evaluated [FN143]. In sustaining that opinio juris is above the will of the State, F. Castberg has correctly pondered that:

"the experiences of our own age, with its repellent cruelties and injustice under cover of positive law, have in fact confirmed the conviction that something - even though it is only certain fundamental norms - must be objectively valid. This may consist of principles which appear to be valid for every human community at any time (...). The law can and should itself move forward in the direction of greater expedience and justice, and to a higher level of humanity" [FN144].

This "eternal return" to jusnaturalism has been, thus, recognized by the jusinternationalists themselves [FN145], much contributing to the affirmation and consolidation of the primacy, in the order of the values, of the obligations pertaining to human rights, vis-à-vis the international community as a whole [FN146]. What is certain is that there is no Law without principles, which inform and conform the legal norms and rules.

[FN143] C.J. Friedrich, Perspectiva Histórica da Filosofia do Direito, Rio de Janeiro, Zahar Ed., 1965, pp. 196-197, 200-201 and 207; and cf., in general, e.g., Y.R. Simon, The Tradition of Natural Law - A Philosopher's Reflections (ed. V. Kuic), N.Y., Fordham Univ. Press, 2000 [reprint], pp. 3-189; A.P. d'Entrèves, Natural Law, London, Hutchinson Univ. Library, 1972 [reprint], pp. 13-203.

[FN144] F. Castberg, "Natural Law and Human Rights", 1 Revue des droits de l'homme / Human Rights Journal (1968) p. 37, and cf. pp. 21-22.

[FN145] Cf., e.g., L. Le Fur, "La théorie du droit naturel depuis le XVIIe. siècle et la doctrine moderne", 18 Recueil des Cours de l'Académie de Droit International de La Haye (1927) pp. 297-399; A. Truyol y Serra, "Théorie du Droit international public - Cours général", 183 Recueil des Cours de l'Académie de Droit International de La Haye (1981) pp. 142-143; A. Truyol y Serra, Fundamentos de Derecho Internacional Público, 4th. rev. ed., Madrid, Tecnos, 1977, pp. 69 and 105; J. Puente Egido, "Natural Law", in Encyclopedia of Public International Law (ed. R. Bernhardt/Max Planck Institute), vol. 7, Amsterdam, North-Holland, 1984, pp. 344-349.

[FN146] J.A. Carrillo Salcedo, "Derechos Humanos y Derecho Internacional", 22 Isegoría - Revista de Filosofía Moral y Política - Madrid (2000) p. 75.

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50. To the extent that a new corpus juris is formed, one ought to fulfill the pressing need of identification of its principles. Once identified, these principles ought to be observed, as otherwise the application of the norms would be replaced by a simple rhetoric of "justification" of the "reality" of the facts; if there is truly a legal system, it ought to operate on the basis of its fundamental principles, as otherwise we would be before a legal vacuum, before the simple absence of a legal system [FN147].

[FN147] G. Abi-Saab, "Cours général de Droit international public", 207 Recueil des Cours de l'Académie de Droit International de La Haye (1987) p. 378: "soit il existe un système normatif, et dans ce cas il doit être apte à remplir sa tâche, soit il n'y a pas de système de tout".

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51. The general principles of law have contributed to the formation of normative systems of protection of the human being. The recourse to such principles has taken place, at the substantive level, as a response to the new necessities of protection of the human being. No one would dare to deny their relevance, e.g., in the historical formation of the International Law of Refugees, or, more recently, in the emergence, in recent years, of the international normative framework pertaining to the (internally) displaced persons [FN148]. No one would dare to deny their incidence - to quote another example - in the legal regime applicable to foreigners. In this respect, it has been suggested that certain general principles of law apply specifically or predominantly to foreigners, e.g., the principle of the unity of the family, and the principle of the prohibition of extradition whenever this latter presents risks of violations of human rights [FN149].

[FN148] Cf. W. Kälin, Guiding Principles on Internal Displacement - Annotations, Washington D.C., ASIL/Brookings Institution, 2000, pp. 6-74; and cf. F.M. Deng, Protecting the Dispossessed - A Challenge for the International Community, Washington D.C., Brookings Institution, 1993, pp. 1-148.

[FN149] C. Pierucci, "Les principes généraux du droit spécifiquement applicables aux étrangers", 10 Revue trimestrielle des droits de l'homme (1999) n. 37, pp. 8, 12, 15, 17, 21, 24 and 29-30. Among such principles, applicable to foreigners, there are those set forth initially at international level (e.g., in the framework of the law of extradition, and the law of asylum and or refuge) which have projected at the levelof domestic law; cf. ibid., pp. 7-32, esp. pp. 8, 15-21 and 30-32.

V. The Fundamental Principles as Substratum of the Legal Order Itself.

52. The general principles of law have thus inspired not only the interpretation and the application of the legal norms, but also the law-making process itself of its elaboration. They reflect the opinio juris, which, in its turn, lies on the basis of the formation of Law [FN150], and is decisive for the configuration of the jus cogens [FN151] (cf. infra). Such principles mark presence at both national and international levels. If, in the framework of this latter, one has insisted, in the chapter of the (formal) "sources" of international law on the general principles "recognized" in foro domestico, this was due to an endeavour to proceed with juridical security [FN152], as such principles are present in every and any legal system (cf. supra), at national or international levels. In sum, in every legal system (of domestic or international law) the general principles mark presence, assuring its coherence and disclosing its axiological dimension. When one moves away from the principles, one incurs into distorsions, and grave violations of the legal order including the positive one.

[FN150] On the wide scope of the opinio juris in the formation of contemporary International Law, cf. A.A. Cançado Trindade, "A Formação do Direito Internacional Contemporâneo:

Reavaliação Crítica da Teoria Clássica de Suas `Fontes'", 29 Curso de Derecho Internacional Organizado por el Comité Jurídico Interamericano (2002) pp. 54-57, and cf. pp. 51-65.
[FN151] B. Simma, "International Human Rights and General International Law: A Comparative Analysis", 4 Collected Courses of the Academy of European Law - Florence (1993)-II, pp. 226-229.
[FN152] Ibid., p. 224.
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53. There are general principles of law which appear truly fundamental, to the point of identifying themselves with the very foundations of the legal system [FN153]. Such fundamental principles reveal the values and ultimate ends of the international legal order, guide it and protect it against the incongruencies of the practice of States, and fulfill the necessities of the international community [FN154]. Such principles, as expression of the "idea of justice", have a universal scope; they do not emanate from the "will" of the States, but are endowed with an objective character which impose them to the observance of all the States [FN155]. In this way, - as lucidly points out A. Favre, - they secure the unity of Law, as from the idea of justice, to the benefit of the whole humanity [FN156].

[FN153] G. Cohen-Jonathan, "Le rôle des principes généraux dans l'interprétation et l'application de la Convention Européenne des Droits de l'Homme", in Mélanges en hommage à L.E. Pettiti, Bruxelles, Bruylant, 1998, pp. 192-193; F. Sudre, "Existe t-il un ordre public européen?", in Quelle Europe pour les droits de l'homme?, Bruxelles, Bruylant, 1996, pp. 57-59.
[FN154] M. Koskenniemi, "General Principles: Reflexions on Constructivist Thinking in International Law", in Sources of International Law (ed. M. Koskenniemi), Aldershot, Ashgate/Dartmouth, 2000, pp. 360-365, 377, 381, 387, 390 and 395-398.
[FN155] A. Favre, "Les principes généraux du droit, fonds commun du Droit des gens", in Recueil d'études de Droit international en hommage à Paul Guggenheim, Genève, IUHEI, 1968, pp. 374-374, and cf. p. 369.
[FN156] Ibid., pp. 375-376, and cf. p. 379.
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54. It is evident that these principles of law do not depend on the "will", nor on the "agreement", nor on the consent, of the subjects of law; the fundamental rights of the human person being the "necessary foundation of every legal order", which knows no frontiers, the human being is titulaire of inalienable rights, which do not depend on his statute of citizenship or any other circumstance [FN157]. In the domain of the International Law of Human Rights, an example of general principles of law lies in the principle of the dignity of the human being; another lies in that of the inalienability of the rights inherent to the human being. In the present Advisory Opinion on The Juridical Condition and the Rights of Undocumented Migrants, the Inter-American Court has expressly referred to both principles (par. 157).

[FN157] Ibid., pp. 376-380, 383, 386 and 389-390.
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55. Moreover, in it jurisprudence constante, the Inter-American Court, in interpreting and applying the American Convention, has also always resorted to the general principles of law [FN158]. Among these principles, those which are endowed with a truly fundamental character, which I here refer to, in reality form the substratum of the legal order itself, revealing the right to the Law of which are titulaires all human beings [FN159], independently of their statute of citizenship or any other circumstance. And it could not be otherwise, as human rights are universal and inherent to all human beings, while the rights of citizenship vary from country to country and encompass only those which the positive law of the State considers citizens, not protecting, thus, undocumented migrants. As vehemently proclaimed, in a rare moment of enlightenment, the Universal Declaration of Human Rights of 1948 (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".

[FN158] Cf. Inter-American Court of Human Rights (IACtHR), case of the Five Pensioners versus Peru (Judgment of 28.02.2003), par. 156; IACtHR, case Cantos versus Argentina (Prel. Obj., Judgment of 07.09.2001), par. 37; IACtHR, case Baena Ricardo and Others versus Panama (Judgment of 02.02.2001), par. 98; IACtHR, case Neira Alegría versus Peru (Prel. Obj., Judgment of 11.12.1991), par. 29; IACtHR, case Velásquez Rodríguez versus Honduras (Judgment of 29.07.1988), par. 184; and cf. also IACtHR, Advisory Opinion n. 17, on the Juridical Condition and Human Rights of the Child (of 28.08.2002), pars. 66 and 87; IACtHR, Advisory Opinion n. 16, on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (of 01.10.1999), pars. 58, 113 and 128; IACtHR, Advisory Opinion n. 14, on the International Responsibility for the Promulgation and Enforcement of Laws in Violation of the American Convention on Human Rights (of 09.12.1994), par. 35.
[FN159] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, op. cit. supra n. (21), vol. III, pp. 524-525.
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56. The safeguard and prevalence of the principle of respect of the dignity of the human person human are identified with the end itself of Law, of the legal order both national and international. By virtue of this fundamental principle, every person ought to be respected by the simple fact of belonging to the human kind, independently of her condition, of her statute of citizenship, or any other circumstance [FN160]. The principle of the inalienability of the rights inherent to the human being, in its turn, is identified with a basic premise of the construction of the whole corpus juris of the International Law of Human Rights.

[FN160] B. Maurer, Le principe de respect de la dignité humaine et la Convention Européenne des Droits de l'Homme, Paris, CERIC/Univ. d'Aix-Marseille, 1999, p. 18.
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57. There can be no doubts as to the extent of the fundamental principles referred to, and, if by chance there were doubts, it is the function of the jurist to clarify them and not to perpetuate

them, so that Law may accomplish its fundamental function of giving justice [FN161]. It is here that the ineluctable recourse to the general principles of Law can help to dispel any doubt which may be raised as to the scope of the individual rights. It is certain that the norms are the ones juridically binding, but when they move away from the principles, their application leads to breaches of individual rights and to serious injustices (e.g., the discrimination de jure).

[FN161] M. Chemillier-Gendreau, "Principe d'égalité et libertés fondamentales en Droit international", in Liber Amicorum Judge Mohammed Bedjaoui (eds. E. Yakpo and T. Boumedra), The Hague, Kluwer, 1999, pp. 659-669.

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58. In reality, when we recognize the fundamental principles which conform the substratum of the legal order itself, we enter into the domain of the jus cogens, of the peremptory law (cf. infra). In fact, it is perfectly possible to visualize the peremptory law (the jus cogens) as identified with the general principles of law of material order which are guarantors of the legal order itself, of its unity, integrity and cohesion [FN162]. Such principles are indispensable (the jus necessarium), are prior and superior to the will; in expressing an "idea of objective justice" (the natural law), they are consunstantial to the international legal order itself [FN163].

[FN162] R. Kolb, Théorie du jus cogens international, Paris, PUF, 2001, p. 98.
[FN163] Ibid., pp. 104-105 and 110-112.

VI. The Principle of Equality and Non-Discrimination in the International Law of Human Rights.

59. In the ambit of the International Law of Human Rights, another of the fundamental principles, although not sufficiently developed by doctrine to date, but which permeates its whole corpus juris, is precisely the principle of equality and non-discrimination. Such principle, set forth, as recalled by the Inter-American Court in the present Advisory Opinion (par. 86), in numerous international instruments of human rights, assumes special importance in relation with the protection of the rights of the migrants in general, and of undocumented migrant workers in particular. Besides the constitutive element of equality, - essential to the rule of law (Estado de Derecho) itself [FN164], - the other constitutive element, that of non-discrimination, set forth in so many international instruments [FN165], assumes capital importance in the exercise of the protected rights. The discrimination is defined, in the sectorial Conventions aiming at its elimination, essentially as any distinction, exclusion, restriction or limitation, or privilege, to the detriment of the human rights enshrined therein [FN166]. The prohibition of discrimination comprises both the totality of those rights, at sustantive level, as well as the conditions of their exercise, at procedural level.

[FN164] G. Pellissier, Le principe d'égalité en droit public, Paris, LGDJ, 1996, p. 17.
[FN165] Universal Declaration of Human Rights, Article 2; Covenant on Civil and Political Rights, Articles 2(1) and 26; Covenant on Economic, Social and Cultural Rights, Article 2;

European Convention of Human Rights, Article 14; American Convention on Human Rights, Article 1(1); African Charter on Human and Peoples Rights, Article 2); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Articles 1(1) and 7; besides the corpus juris of the Convention on the Elimination of All Forms of Racial Discrimination, of the Convention on the Elimination of All Forms of Discrimination against Women, of the ILO Convention on Discrimination in Matter of Employment and Occupation (1958), of the UNESCO Convention against Discrimination in Education (1960), as well as of the Declaration of the United Nations on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Beliefs (1981).

[FN166] Cf., e.g., Convention on the Elimination of All Forms of Racial Discrimination, Article 1(1); Convention on the Elimination of All Forms of Discrimination against Women, Article 1; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 7; Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (of 1999), Article 1(2); among others.

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60. On this point the contemporary doctrine is settled, in considering the principle of equality and non-discrimination as one of the pillars of the International Law of Human Rights [FN167], and also as an element integrating general or costumary international law [FN168]. Ultimately, the corpus juris of International Law, "must, by definition, be the same for all subjects of the international community" [FN169]. It is not my intention to dwell into greater depth, in this Concurring Opinion, upon the international case-law on the matter, as it is already analyzed in details in one of my works [FN170]. I here limit myself, thus, to point out, in sum, that the case-law of the organs of international supervision of human rights has oriented itself, in a general way, - like the present Advisory Opinion n. 18 of the Inter-American Court (pars. 84 and 168), - in the sense of considering discriminatory any distinction which does not have a legitimate purpose, or an objective and reasonable justification, and which does not keep a relation of proportionality between its purpose and the means employed.

[FN167] A. Eide and T. Opsahl, Equality and Non-Discrimination, Oslo, Norwegian Institute of Human Rights (publ. n. 1), 1990, p. 4, and cf. pp. 1-44 (study reproduced in T. Opsahl, Law and Equality - Selected Articles on Human Rights, Oslo, Notam Gyldendal, 1996, pp. 165-206). And, for a general study, cf. M. Bossuyt, L'interdiction de la discrimination dans le droit international des droits de l'homme, Bruxelles, Bruylant, 1976, pp. 1-240.

[FN168] Y. Dinstein, "Discrimination and International Human Rights", 15 Israel Yearbook on Human Rights (1985) pp. 11 and 27.

[FN169] H. Mosler, "To What Extent Does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice?", in International Law and the Grotian Heritage (Hague Commemorative Colloquium of 1983 on the Occasion of the Fourth Centenary of the Birth of Hugo Grotius), The Hague, T.M.C. Asser Instituut, 1985, p. 184.

[FN170] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. II, Porto Alegre/Brazil, S.A. Fabris Ed., 1999, pp. 76-82.

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61. Under the Covenant on Civil and Political Rights of the United Nations, the Human Rights Committee has effectively pointed out the wide scope of Article 26 of the Covenant, which sets forth the basic principle of equality and non-discrimination: in its general comment n. 18 (of 1989), the Committee sustained, on that principle, the understanding in the sense Article 26 of the Covenant provides for an "autonomous right", and the application of that principle contained in it is not limited to the rights stipulated in the Covenant [FN171]. This posture advanced by the Human Rights Committee, added to the determination by the European Court of Human Rights of a violation of Article 14 of the European Convention on Human Rights in the Gaygusuz versus Austria case (1996), as well as the requisites established in the legal doctrine that the "distinctions" ought to be reasonable and in accordance with justice (so as not to incur into discriminations), have led to the suggestion to the emergence and evolution of a true right to equality [FN172].

[FN171] Paragraph 12 of the general comment general n. 18; the Committee underlined the fundamental character of that principle (pars. 1 and 3); cf. text reproduced in: United Nations, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. doc. HRI/GEN/1/Rev.3, of 1997, pp. 26-29.

[FN172] Cf. A.H.E. Morawa, "The Evolving Human Right to Equality", 1 European Yearbook of Minority Issues (2001-2002) pp. 163, 168, 190 and 203.

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62. But despite the search, by international doctrine and case-law, of the identification of illegitimate bases of discrimination, this does not appear sufficient to me; one ought to go beyond that, as discrimination hardly occurs on the basis of a sole element (e.g., race, national or social origin, religion, sex, among others), being rather a complex mixture of several of them (and there also being cases of discrimination de jure). Moreover, when the clauses of non-discrimination of the international instruments of human rights contain a list illegitimate bases referred to, what they really aim at thereby is to eliminate a whole discriminatory social structure, having in mind the distinct component elements [FN173].

[FN173] E.W. Vierdag, The Concept of Discrimination in International Law with Special Reference to Human Rights, The Hague, Nijhoff, 1973, pp. 129-130.

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63. It is perfectly possible, besides being desirable, to turn the attentions to all the areas of discriminatory human behaviour, including those which have so far been ignored or neglected at international level (e.g., inter alia, social status, income, medical state, age, sexual orientation, among others) [FN174]. In reality, the causes of forced migrations (in search of survival, work and better conditions of living - cf. supra) are not fundamentally distinct from those of population displacement, and it is not merely casual that the basic principle of equality and non-discrimination occupies a central position in the document adopted by the United Nations in 1998 containing the Guiding Principles on Internal Displacement [FN175].

[FN174] D. Türk (special rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities), The Realization of Economic, Social and Cultural Rights - Final Report, U.N. doc. E/CN.4/Sub.2/1992/16, of 03.07.1992, p. 48, and cf. p. 55; and cf. also, e.g., T. Clark and J. Niessen, "Equality Rights and Non-Citizens in Europe and America; The Promise, the Practice and Some Remaining Issues", 14 Netherlands Quarterly of Human Rights (1996) pp. 245-275.
[FN175] Cf. ONU, document E/CN.4/1998/L.98, of 14.04.1998, p. 5; cf. principles 1(1), 4(1), 22 and 24(1). Principle 3(2), in its turn, affirms the right of the internally displaced persons to humanitarian assistance.
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64. The basic idea of the whole document is in the sense that the internally displaced persons do not lose the rights which are inherent to them as human beings as a result of their displacement, and are protected by the norms of the International Law of Human Rights and of International Humanitarian Law [FN176]. In the same line of reasoning, the basic idea underlying the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) is in the sense that all the workers qualified as migrants under their provisions ought to enjoy their human rights irrespectively of their juridical situation; hence the central position occupied, also in this context, by the principle of non-discrimination [FN177]. In sum, the migrant workers, including the undocumented ones, are titulaires of the fundamental human rights, which are not conditioned by their legal situation (irregular or not) [FN178]. In conclusion on this point, to the fundamental principle of equality and non-discrimination is reserved, from the Universal Declaration of 1948, a truly central position in the ambit of the International Law of Human Rights.

[FN176] R. Cohen and F. Deng, Masses in Flight: The Global Crisis of Internal Displacement, Washington D.C., Brookings Institution, 1998, p. 74.
[FN177] Such as enunciated in its Article 7.
[FN178] A.A. Cançado Trindade, Elementos para un Enfoque de Derechos Humanos del Fenómeno de los Flujos Migratorios Forzados, Guatemala City, OIM/IIDH (Cuadernos de Trabajo sobre Migración n. 5), 2001, pp. 13 and 18.

VII. Emergence, Content and Scope of the Jus Cogens.

65. In the present Advisory Opinion on The Juridical Condition and the Rights of Undocumented Migrants, the Inter-American Court has significantly recognized that the aforementioned fundamental principle of equality and non-discrimination, in the present stage of evolution of International Law, "has entered into the domain of the jus cogens"; on such principle, which "permeates every legal order", - has correctly added the Court, - "rests the whole juridical structure of the national and international public order" (par. 101, and cf. resolutory points ns. 2 and 4). The Court, moreover, has not abstained itself from referring to the evolution of the concept of jus cogens, transcending the ambit of both the law of treaties and of the law of the international responsibility of the States, so as to reach general international law and the very

foundations of the international legal order (pars. 98-99). In support of this important pronouncement of the Court I see it fit to add some reflections.

66. The emergence and assertion of jus cogens in contemporary International Law fulfill the necessity of a minimum of verticalization in the international legal order, erected upon pillars in which the juridical and the ethical are merged. The jus cogens was definitively incorporated to the conceptual universe of contemporary international law as from the inclusion, among the bases of invalidity and termination of treaties, of the peremptory norms of general international law, in Articles 53 and 64 of the Vienna Convention of 1969 on the Law of Treaties [FN179]. The Convention set forth the concept of jus cogens, without thereby adopting the thesis - defended in the past by A. McNair [FN180] - that a treaty could generate a regime of objective character erga omnes in derrogation of the classic principle pacta tertiis nec nocent nec prosunt [FN181]. The concept seems to have been recognized by the Vienna Convention of 1969 as a whole; if this latter did not adopt the notion of treaties establishing "legal regimes of objective character", on the other hand it set forth the concept of jus cogens [FN182], i.e., of peremptory norms of general internacional law [FN183]. The provisions on jus cogens became the object of analysis of a wide specialized bibliography [FN184].

[FN179] More than three decades earlier, the expression "jus cogens" was utilized by Judge Schücking, in his well-known Separate Opinion in the Oscar Chinn case (United Kingdom versus Belgium); Permanent Court of International Justice (PCIJ), Series A/B, n. 63, 1934, pp. 148-150, esp. p. 149. One year later, in his course at the Hague Academy of International Law, Alfred Verdross also utilized the expression "jus cogens", and referred himself to the aforementioned Separate Opinion of Judge Schücking; cf. A. Verdross, "Les principes généraux du Droit dans la jurisprudence internationale", 52 Recueil des Cours de l'Académie de Droit International de La Haye (1935) pp. 206 and 243.

[FN180] Cf. A.D. McNair, «Treaties Producing Effects `Erga Omnes'», Scritti di Diritto Internazionale in Onore di T. Perassi, vol. II. Milano, Giuffrè, 1957, pp. 23-36.

[FN181] S. Rosenne, «Bilateralism and Community Interest in the Codified Law of Treaties», Transnational Law in a Changing Society - Essays in Honour of Ph. C. Jessup (ed. W. Friedmann, L. Henkin, and O. Lissitzyn), N.Y./London, Columbia University Press, 1972, p. 207; and cf. Ph. Cahier, «Le problème des effets des traités à l'égard des États tiers», 143 Recueil des Cours de l'Académie de Droit International de La Haye (1974) pp. 589-736. - During the travaux préparatoires of the Convention undertaken by the International Law Commission of the United Nations, the notion of «community interest» was made present: at first utilized by J.-M. Yepes in 1950, the idea was later to appear in the 1st. report by J.L. Brierly (the first rapporteur on the subject), in the 1st. report by H. Lauterpacht (the second rapporteur), becoming absent from the reports by G. Fitzmaurice (the third rapporteur), and reappeared at last in the 2nd. report by H. Waldock (the fourth and last rapporteur on the matter); S. Rosenne, op. cit. supra, pp. 212-219.

[FN182] For a historical account of the concept, going back to the old Roman law, but reappearing mainly as from the XIXth century, cf. Jerzy Sztucki, Jus Cogens and the Vienna Convention on the Law of Treaties - A Critical Appraisal, Viena, Springer-Verlag, 1974, pp. 6-11 and 97-108.

[FN183] The term, as such, appeared for the first time in the 3rd. report by G. Fitzmaurice, and was again to appear in the 2nd. report by H. Waldock; J. Sztucki, op. cit. supra n. (98), pp. 104-105 and 108. - In the preparatory work - of the debates of 1963 and 1966 of the VI Commission of the General Assembly of the United Nations, the necessity was pointed out of the establishment of criteria for the determination of the rules of International Law which could constitute jus cogens. Cf. I.M. Sinclair, «Vienna Conference on the Law of Treaties», 19 International and Comparative Law Quarterly (1970) pp. 66-69; I.M. Sinclair, The Vienna Convention on the Law of Treaties, Manchester, University Press/Oceana, 1973, pp. 124-129, and cf. pp. 129-131.

[FN184] Cf., e.g., Ch.L. Rozakis, The Concept of Jus Cogens in the Law of Treaties, Amsterdam, North Holland Publ. Co., 1976, pp. 1ss.; Ch. de Visscher "Positivisme et jus cogens", 75 Revue générale de Droit international public (1971) pp. 5-11; M. Virally, «Réflexions sur le jus cogens», 12 Annuaire français de Droit international (1966) pp. 5-29; A. Verdross, "Jus dispositivum and Jus Cogens in International Law", 60 American Journal of International Law (1966) pp. 55-63; J.A. Barberis, "La liberté de traiter des États et le jus cogens", 30 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht [Z.f.a.o.R.u.V.] (1970) pp. 19-45; U. Scheuner, "Conflict of Treaty Provisions with a Peremptory Norm of International Law", 27 and 29 Z.f.a.o.R.u.V. (1967 y 1969) pp. 520-532 and 28-38, respectively; H. Mosler, "Ius cogens im Völkerrecht», 25 Schweizerisches Jahrbuch für internationales Recht (1968) pp. 1-40; K. Marek, "Contribution à l'étude du jus cogens en Droit international", Recueil d'etudes de Droit International en hommage à P. Guggenheim, Geneva, I.U.H.E.I., 1968, pp. 426-459; M. Schweitzer, "Ius cogens im Völkerrecht", 15 Archiv des Völkerrechts (1971) pp. 197-223; G. Gaja, "Jus Cogens beyond the Vienna Convention", 172 Recueil des Cours de l'Académie de Droit International de La Haye (1981) pp. 279-313; L. Alexidze, "Legal Nature of Jus Cogens in Contemporary International Law", in ibid., pp. 227-268; and other sources referred to in notes (109), (115), (123), (124), (125) and (131).

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67. One and a half decades later, the concept of jus cogens was again set forth in the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986); in my intervention in the United Nations Conference which adopted it, I saw it fit to warn for the manifest incompatibility with the concept of jus cogens of the voluntarist conception of International Law [FN185], which appeared incapable to explain even the formation of rules of general international law and the incidence in the process of formation and evolution of contemporary International Law of elements independent of the free will of the States [FN186]. With the assertion of jus cogens in the two Vienna Conventions on the Law of Treaties (1969 and 1986), the next step consisted in determining in incidence beyond the law of treaties.

[FN185] Cf. U.N., United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, 1986) - Official Records, vol. I, N.Y., U.N., 1995, pp. 187-188 (intervention by A.A. Cançado Trindade).

[FN186] A.A. Cançado Trindade, "The Voluntarist Conception of International Law: A Re-Assessment", 59 Revue de droit international de sciences diplomatiques et politiques - Geneva (1981) pp. 201-240.

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68. On my part, I have always sustained that it is an ineluctable consequence of the affirmation and the very existence of peremptory norms of International Law their not being limited to the conventional norms, to the law of treaties, and their being extended to every and any juridical act [FN187]. Recent developments point out in the same sense, that is, that the domain of the jus cogens, beyond the law of treaties, encompasses likewise general international law [FN188]. Moreover, the jus cogens, in my understanding, is an open category, which expands itself to the extent that the universal juridical conscience (material source of all Law) awakens for the necessity to protect the rights inherent to each human being in every and any situation.

[FN187] Cf. A.A. Cançado Trindade, Tratado de Direito Internacional..., op. cit. supra n. (97), vol. II, pp. 415-416.

[FN188] For the extension of jus cogens to all possible juridical acts, cf., e.g., E. Suy, «The Concept of Jus Cogens in Public International Law», in Papers and Proceedings of the Conference on International Law (Langonissi, Greece, 03-08.04.1966), Geneva, C.E.I.P., 1967, pp. 17-77.

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69. The evolution of the International Law of Human Rights has emphasized the absolute character of the non-derogable fundamental rights. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the terra nova of the international jus cogens [FN189]. In the case A. Furundzija (Judgment of 10.12.1998), the ad hoc International Criminal Tribunal for the Former Yugoslavia (Trial Chamber) sustained that the prohibition of torture, established in an absolute way by International Law, both conventional (under certain human rights treaties) as well as customary, had the character of a norm of jus cogens (pars. 137-139, 144 and 160) [FN190]. This occurred by virtue of the importance of the protected values (par. 153). Such absolute prohibition of torture, - added the Tribunal, - imposes on the States obligations erga omnes (par. 151); the jus cogens nature of this prohibitión renders it "one of the most fundamental standards of the international community", incorporating "an absolute value from which no one should divert himself" (par. 154).

[FN189] A.A. Cançado Trindade, Tratado de Direito Internacional..., op. cit. supra n. (97), vol. II, p. 415.

[FN190] The Tribunal added that such prohibition was so absolute that it had incidence not only on actual, but also potential, violations (above all as from the Judgment of the European Court of Human Rights in the case Soering versus United Kingdom, 1989), thus impeding the expulsion, the return or the extradition of a person to another State in which he could run the risk of being subjected to torture; ibid., pars. 144 and 148. - In this respect, on the practice under the Covenant on Civil and Political Rights of the United Nations, cf. F. Pocar, "Patto Internazionale sui Diritti Civili e Politici ed Estradizione", in Diritti dell'Uomo, Estradizione ed Espulsione - Atti del

Convegno di Ferrara (1999) per Salutare G. Battaglini (ed. F. Salerno), Padova, Cedam, 2003, pp. 89-90.

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70. The concept of jus cogens in fact is not limited to the law of treaties, and is likewise proper to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the International Law Commission of the United Nations in 2001, bear witness of this fact. Among the passages of such Articles and their comments which refer expressly to jus cogens, there is one in which it is affirmed that "various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties" [FN191]. In my understanding, it is in this central chapter of International Law, that of the international responsibility (perhaps more than in the chapter on the law of treaties), that the jus cogens reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (including beyond the domain of State responsibility) on the very foundations of an international law truly universal.

[FN191] J. Crawford, The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries, Cambridge, University Press, 2002, p. 188, and cf. pp. 246 and 127-128.

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71. To the international objective responsibility of the States corresponds necessarily the notion of objective illegality [FN192] (one of the elements underlying the concept of jus cogens). In our days, no one would dare to deny the objective illegality of acts of genocide [FN193], of systematic practices of torture, of summary and extra-legal executions, and of forced disappearance of persons, - practices which represent crimes against humanity, - condemned by the universal juridical conscience [FN194], parallel to the application of treaties. Already in its Advisory Opinion of 1951 on the Reservations to the Convention against Genocide, the International Court of Justice pointed out that the humanitarian principles underlying that Convention were recognizedly "binding on States, even without any conventional obligation" [FN195].

[FN192] In its Advisory Opinion of 21.06.1971 on Namibia, the International Court of Justice in fact referred itself to a situation which it characterized as "illegal erga omnes"; ICJ Reports (1971) p. 56, par. 126.

[FN193] In its Judgment of 11 July 1996, in the case concerning the Application of the Convention against Genocide, the International Court of Justice affirmed that the rights and obligations set forth in that Convention were "rights and duties erga omnes"; ICJ Reports (1996) p. 616, par. 31.

[FN194] Inter-American Court of Human Rights, case Blake versus Guatemala (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, par. 25, and cf. pars. 23-24.

[FN195] ICJ, Advisory Opinion of 28 May 1951, ICJ Reports (1951) p. 23.

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72. Just as, in the ambit of the International Law of Refugees, the basic principle of non-refoulement was recognized as being of jus cogens [FN196], in the domain of the International Law of Human Rights the character of jus cogens of the fundamental principle of equality and non-discrimination was likewise recognized (cf. supra). The objective illegality is not limited to the aforementioned acts and practices. As the jus cogens is not a closed category (supra), I understand that no one either would dare to deny that the slave work, and the persistent denial of the most elementary guarantees of the due process of law would likewise affront the universal juridical conscience, and effectively collide with the peremptory norms of the jus cogens. This is particularly significant for the safeguard of the rights of undocumented migrant workers. All this doctrinal evolution points to the direction of the crystallization of the obligations erga omnes of protection (cf. infra). Without the consolidation of such obligations one will advance very little in the struggle against the violations of human rights.

[FN196] Cf. J. Allain, "The Jus Cogens Nature of Non-Refoulement", 13 International Journal of Refugee Law (2002) pp. 538-558.

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73. The manifestations of international jus cogens mark presence in the very manner whereby human rights treaties have been interpreted and applied: the restrictions, foreseen in them, to the human rights they set forth, are restrictively interpreted, safeguarding the État de Droit (Estado de Derecho), and demonstrating that human rights do not belong to the domain of jus dispositivum, and cannot be considered as simply "negotiable" [FN197]; on the contrary, they permeate the (national and international) legal order itself. In sum and conclusion on the point under examination, the emergence and assertion of jus cogens evoke the notions of international public order and of a hierarchy of legal norms, as well as the prevalence of the jus necessarium over the jus voluntarium; jus cogens presents itself as the juridical expression of the very international community as a whole, which, at last, takes conscience of itself, and of the fundamental principles and values which guide it [FN198].

[FN197] J.A. Pastor Ridruejo, "La Convención Europea de los Derechos del Hombre y el `Jus Cogens' Internacional", in Estudios de Derecho Internacional - Homenaje al Profesor Miaja de la Muela, tomo I, Madrid, Ed. Tecnos, 1979, pp. 581-590. - On the possibility of the incidence of jus cogens in the elaboration itself of drafts of international instruments, cf. discussion in G.M. Danilenko, "International Jus Cogens: Issues of Law-Making", 2 European Journal of International Law (1991) pp. 48-49 and 59-65.

[FN198] A. Gómez Robledo, El Jus Cogens Internacional (Estudio Histórico Crítico), Mexico, UNAM, 1982, pp. 20-21, 222-223 and 226, and cf. p. 140; and cf. also R.St.J. Macdonald, "Fundamental Norms in Contemporary International Law", 25 Annuaire canadien de Droit international (1987) pp. 133-134, 140-142 and 148.

VIII. Emergence and Scope of the Obligations Erga Omnes of Protection: Their Horizontal and Vertical Dimensions.

74. In the present Advisory Opinion on The Juridical Condition and the Rights of Undocumented Migrants, the Inter-American Court has pointed out that the fundamental principle of equality and non-discrimination, for belonging to the domain of jus cogens, "brings about obligations erga omnes of protection which bind all States and generate effects with regard to third parties, including individuals (private persons)" (par. 110, and cf. resolutory point n. 5) [FN199]. Also on this particular point I see it fit to present some reflections, in support of what was determined by the Inter-American Court. It is widely recognized, in our days, that the peremptory norms of jus cogens effectively bring about obligations erga omnes.

[FN199] And cf. also par. 146.

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75. In a well-known obiter dictum in its Judgment in the case of the Barcelona Traction (Second Phase, 1970), the International Court of Justice determined that there are certain international obligations erga omnes, obligations of a State vis-à-vis the international community as a whole, which are of the interest of all the States; "such obligations derive, for example, in contemporary International Law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (...); others are conferred by international instruments of a universal or quasi-universal character" [FN200]. The prohibitions mentioned in this obiter dictum are not exhaustive: to them new prohibitions are added, such as the ones referred to in paragraphs 71-72 of the present Concurring Opinion, precisely for not being the jus cogens a closed category (supra).

[FN200] ICJ, Judgment of 05 February 1970, ICJ Reports (1970) p. 32, pars. 33-34 (emphasis added). - The same Court had a unique opportunity to develop these considerations years later, in the East Timor case, but wasted it: in the Judgment of 30.06.1995, in which it reaffirmed the existence of the obligations erga omnes (in relation to the right of self-determination of peoples), it nevertheless related such obligations which something which is its antithesis, the consent of a third State (Indonesia); from a bilateralist and voluntarist perspective, it thus failed, unfortunately, to extract the consequences of the existence of such obligations erga omnes; cf. ICJ, East Timor case (Portugal versus Australia), ICJ Reports (1995) pp. 90-106.

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76. In the construction of the international legal order of the new century, we witness, with the gradual erosion of reciprocity, the emergence pari passu of superior considerations of ordre public, reflected in the conceptions of the peremptory norms of general international law (the jus cogens) and of the obligations erga omnes of protection (owed to everyone, and to the international community as a whole). The jus cogens, in bringing about obligations erga omnes, characterizes them as being endowed with a necessarily objective character, and thereby encompassing all the addressees of the legal norms (omnes), both those who integrate the organs of the public power as well as the individuals.

77. In my view, we can consider such obligations erga omnes from two dimensions, one horizontal and the other vertical, which complement each other. Thus, the obligations erga omnes of protection, in a horizontal dimension, are obligations pertaining to the protection of the human beings due to the international community as a whole [FN201]. In the framework of conventional international law, they bind all the States Parties to human rights treaties (obligations erga omnes partes), and, in the ambit of general international law, they bind all the States which compose the organized international community, whether or not they are Parties to those treaties (obligations erga omnes lato sensu). In a vertical dimension, the obligations erga omnes of protection bind both the organs and agents of (State) public power, and the individuals themselves (in the inter-individual relations).

[FN201] IACtHR, case Blake versus Guatemala (Merits), Judgment of 24.01.1998, Separate Opinion of Judge A.A. Cançado Trindade, par. 26, and cf. pars. 27-30.

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78. For the conformation of this vertical dimension have decisively contributed the advent and the evolution of the International Law of Human Rights. But it is surprising that, until now, these horizontal and vertical dimensions of the obligations erga omnes of protection have passed entirely unnoticed from contemporary legal doctrine. Nevertheless, I see them clearly shaped in the legal regime itself of the American Convention on Human Rights. Thus, for example, as to the vertical dimension, the general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, generates effects erga omnes, encompassing the relations of the individual both with the public (State) power as well as with other individuals (particuliers) [FN202].

[FN202] Cf., in this respect, in general, the resolution adopted by the Institut de Droit International (I.D.I.) at the session of Santiago de Compostela of 1989 (Article 1), in: I.D.I., 63 Annuaire de l'Institut de Droit International (1989)-II, pp. 286 and 288-289.

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79. In their turn, the obligations erga omnes partes, in their horizontal dimension, find expression also in Article 45 of the American Convention, which foresees the mechanism (not yet utilized in the practice of the inter-American system of human rights), of inter-State complaints or petitions. This mechanism, - as I pointed out in my Concurring Opinion (par. 3) in the case of the Community of Peace of San José of Apartadó (Provisional Measures of Protection of 18.06.2002), - constitutes not only a mechanism par excellence of action of collective guarantee, but also a true embryo actio popularis in International Law, in the framework of the American Convention. In any case, these dimensions, both horizontal and vertical, reveal the wide scope of the obligations erga omnes of protection.

80. The crystallization of the obligations erga omnes of protection of the human person represents, in reality, the overcoming of a pattern of conduct erected on the alleged autonomy of the will of the State, from which International Law itself sought gradually to liberate itself in

giving expression to the concept of jus cogens [FN203]. By definition, all the norms of jus cogens generate necessarily obligations erga omnes. While jus cogens is a concept of material law, the obligations erga omnes refer to the structure of their performance on the part of all the entities and all the individuals bound by them. In their turn, not all the obligations erga omnes necessarily refer to norms of jus cogens.

[FN203] Cf. A.A. Cançado Trindade, "The International Law of Human Rights at the Dawn of the XXIst Century", 3 Cursos Euromediterráneos Bancaja de Derecho Internacional - Castellón (1999) pp. 207-215.

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81. One ought to secure a follow-up to the endeavours of greater doctrinal and jurisprudencial development of the peremptory norms of international law (jus cogens) and of the corresponding obligations erga omnes of protection of the human being [FN204], moved above all by the opinio juris as a manifestation of the universal juridical conscience, to the benefit of all human beings [FN205]. By means of this conceptual development one will advance in the overcoming of the obstacles of the dogmas of the past and in the creation of a true international ordre public based upon the respect for, and observance of, human rights. Such development will contribute, thus, to a greater cohesion of the organized international community (the civitas maxima gentium), centred on the human person.

[FN204] On the relationship between jus cogens and erga omnes obligations of protection, cf.: M. Ragazzi, The Concept of International Obligations Erga Omnes, Oxford, Clarendon Press, 1997, pp. 135, 201-202 and 213; Y. Dinstein, "The Erga Omnes Applicability of Human Rights", 30 Archiv des Völkerrechts (1992) pp. 16-37; A.J.J. de Hoogh, "The Relationship between Jus Cogens, Obligations Erga Omnes and International Crimes: Peremptory Norms in Perspective", 42 Austrian Journal of Public and International Law (1991) pp. 183-214; C. Annacker, "The Legal Regime of Erga Omnes Obligations in International Law", 46 Austrian Journal of Public and International Law (1994) pp. 131-166; M. Byers, "Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules", 66 Nordic Journal of International Law (1997) pp. 211-239; J. Juste Ruiz, "Las Obligaciones `Erga Omnes' en Derecho Internacional Público", in Estudios de Derecho Internacional - Homenaje al Profesor Miaja de la Muela, vol. I, Madrid, Tecnos, 1979, p. 228.

[FN205] IACtHR, case Blake versus Guatemala (Merits), Judgment of 24.01.1998, Series C, n. 36, Separate Opinion of Judge A.A. Cançado Trindade, par. 28; IACtHR, case Blake versus Guatemala (Reparations), Judgment of 22.01.1999, Series C, n. 48, Separate Opinion of Judge A.A. Cançado Trindade, par. 40.

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82. As I saw it fit to point out in my Separate Opinion in the case Las Palmeras (Preliminary Objections, 2000, pars. 13-14) and in my Concurring Opinions in the case of the Community of Peace of San José of Apartadó (Provisional Measures of Protection, 18.06.2002, pars. 2-9) and in the case of the Communities of the Jiguamiandó and of the Curbaradó (Provisional Measures of Protection, 06.03.2003, pars. 4-6), at a more circumscribed level, the American Convention on

Human Rights itself contains mechanisms for application of the conventional obligations of protection erga omnes partes. This is endowed with particular relevance at both conceptual and operative levels. The general obligation, set forth in Article 1(1) of the American Convention, to respect and to ensure respect for the free exercise of the rights protected by it, has a character erga omnes [FN206].

[FN206] Cf., in this sense, the resolution adopted by the Institut de Droit International (I.D.I.) at the session of Santiago de Compostela of 1989 (Article 1), in: I.D.I., 63 Annuaire de l'Institut de Droit International (1989)-II, pp. 286 and 288-289.

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83. In my understanding, the obligations erga omnes partes are not to be minimized, nor at the conceptual level, as, by means of the exercise of collective guarantee, such obligations can serve as guide, or pave the way, for the crystallization, in the future, of the obligations erga omnes lato sensu, due to the international community as a whole. And, at the operative level, the obligations erga omnes partes under a human righs treaty such as the American Convention also assume special importance, in face of the current diversification of the sources of violations of the rights enshrined into the Convention, which requires the clear recognition of the effects of the conventional obligations vis-à-vis third parties (the Drittwirkung), including individuals (e.g., in labour relations).

84. A minimum of conventional protection can thereby be promptly secured, for example, to undocumented migrant workers, in their relations not only with the public power but also with other individuals, in particular their employers. One can, thus, sustain that migrant workers, including the undocumented ones, are titulaires of fundamental rights erga omnes. Ultimately, the State has the obligation to take positive measures to impede the unscrupulous labour exploitation, and to put an end to it. The State has the duty to secure the prevalence of the fundamental principle of equality and non-discrimination, which, as rightly establishes the present Advisory Opinion of the Inter-American Court, is a principle of jus cogens (par. 101, and resolutory point n. 4). To have clarified this basic point constitutes a valuable contribution of the present Advisory Opinion n. 18 of the Court.

85. The State is bound by the corpus juris of the international protection of human rights, which protects every human person erga omnes, independently of her statute of citizenship, or of migration, or any other condition or circumstance. The fundamental rights of the migrant workers, including the undocumented ones, are oposable to the public power and likewise to the private persons or individuals (e.g., employers), in the inter-individual relations. The State cannot prevail itself of the fact of not being a Party to a given treaty of human rights to evade the obligation to respect the fundamental principle of equality and non-discrimination, for being this latter a principle of general international law, and of jus cogens, which thus transcends the domain of the law of treaties.

IX. Epilogue.

86. The fact that the concepts both of the jus cogens and of the obligations (and rights) erga omnes already integrate the conceptual universe of International Law discloses the reassuring and necessary opening of this latter, in the last decades, to certain superior and fundamental values. This significant evolution of the recognition and assertion of norms of jus cogens and erga omnes obligations of protection ought to be fostered, seeking to secure its full practical application, to the benefit of all human beings. Only thus shall we rescue the universalist vision of the founding fathers of the droit des gens, and shall we move closer to the plenitude of the international protection of the rights inherent to the human person. These new conceptions impose themselves in our days, and, of their faithful observance, in my view, will depend in great part the future evolution of the present domain of protection of the human person, as well as, ultimately, of the International Law itself as a whole.

87. It is not function of the jurist simply to take note of what the States do, particularly the most powerful ones, which do not hesitate to seek formulas to impose their "will", including in relation to the treatment to be dispensed to the persons under its jurisdiction. The function of the jurist is to show and to tell what the Law is. In the present Advisory Opinion n. 18 on The Juridical Condition and the Rights of Undocumented Migrants, the Inter-American Court of Human Rights has determined, firmly and with clarity, what the Law is. This latter does not emanate from the inscrutable "will" of the States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the opinio juris communis of all the subjects of International Law (the States, the international organizations, and the human beings). Above the will is the conscience.

88. The fact that, despite all the sufferings of past generations, persist in our days new forms of exploitation of man by man, - such as the exploitation of the labour force of undocumented migrants, forced prostitution, the traffic of children, forced and slave labour, amidst a proved increase of poverty and social exclusion and marginalization, the uprootedness and family disruption, - does not mean that "regulation is lacking" or that Law does not exist. It rather means that Law is being ostensibly and flagrantly violated, from day to day, to the detriment of millions of human beings, among whom undocumented migrants all over the world. In reacting against these generalized violations of the rights of undocumented migrants, which affront the juridical conscience of humankind, the present Advisory Opinion of the Inter-American Court contributes to the current process of the necessary humanization of International Law.

89. In so doing, the Inter-American Court bears in mind the universality and unity of the human kind, which inspired, more than four and a half centuries ago, the historical process of formation of the droit des gens. In rescuing, in the present Advisory Opinion, the universalist vision which marked the origins of the best doctrine of International Law, the Inter-American Court contributes to the construction of the new jus gentium of the XXIst century, oriented by the general principles of law (among which the fundamental principle of equality and non-discrimination), characterized by the intangibility of the due process of law in its wide scope, crystallized in the recognition of jus cogens and instrumentalized by the consequent obligations erga omnes of protection, and erected, ultimately, on the full respect for, and guarantee of, the rights inherent to the human person.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

REASONED CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO ADVISORY OPINION OC-18/03 ON "LEGAL STATUS AND RIGHTS OF UNDOCUMENTED MIGRANTS" OF SEPTEMBER 17, 2003 ISSUED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS

1. The Inter-American Court rendered Advisory Opinion OC-18/03 on September 17, 2003, under the heading "Legal Status and Rights of Undocumented Migrants." Consequently, it covers a wide spectrum of situations regarding undocumented migrants in general; that is, those persons who leave a State to migrate to another State and stay there, but who do not have authorization to do so from the State in which the seek to reside. This description is clear from the "Glossary" in Chapter V of the Advisory Opinion (para. 69). Many individuals are in this situation, regardless of the motive for their move, their particular conditions, and the activity they perform or wish to perform.

2. One specific category within this spectrum corresponds to undocumented migrant workers; that is, persons who are not authorized to enter the State of employment and engage in a remunerated activity there, according to the laws of the State and the international agreements to which that State is a party, but who, nevertheless, engage in that activity, as the 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families has understood, and as is recognized in the "Glossary" cited in the preceding paragraph. It is with regard to the latter, working in urban and rural areas, that the request submitted by the United Mexican States to the Inter-American Court of Human Rights refers principally – although not exclusively. It is necessary to examine the rights of millions of human beings, women and men, who have migrated or who migrate in all parts of the world – and especially in the countries of the Americas – moved by different factors, but all driven by the same expectation: to earn their living outside the country in which they were born.

3. This issue is extremely important and, consequently, has merited prominent mention in the request for the opinion and in the briefs of the States and individuals who intervened in the consultation process – the latter as amici curiae. It is also underscored in the answers of the Inter-American Court, which could have be grouped under another heading emphasizing the universe that concerns the requesting State and the participants and is being examined by the Inter-American Court: "Legal status and rights of undocumented migrant workers".

4. The issue to which this Advisory Opinion refers is of fundamental importance today. The increasing interrelation between nations, the process of globalization that has an impact in diverse areas, and the different conditions of the national, regional and global economies have been determining factors in the appearance and growth of migratory flows that have particular characteristics and require coherent solutions. In its resolution on "International migration and development" (A/RES/54/212, of 1 February 2000) - mentioned in OC-18, the General

Assembly of the United Nations indicated that “among other factors, the process of globalization and liberalization, including the widening economic and social gap between and among many countries and the marginalization of some countries in the global economy, has contributed to large flows of peoples between and among countries and to the intensification of the complex phenomenon of international migration.”

5. In a recent publication, it is recalled that “most individuals migrate in order to improve their living conditions, seek new opportunities or escape poverty”; although we should not overlook other reasons, such as: family reunion, war and other conflicts, human rights violations, expulsion, and discrimination. At the “end of the 20th century, there were an estimated 175 million international migrants, nearly 3% of the world's people and twice the number in 1975. Some 60% of the international migrants, about 104 million, are in developing countries” (Commission on Human Security, Human Security, New York, 2003, p. 41).

6. The new migratory flows, which are the focal point of Advisory Opinion OC-18/2003, reflect the situation of the economy in the countries of origin and destination of migrants. In the latter there is a factor of attraction that requires the contribution of the labor of those workers, who play a role in wealth creation and – as those who study these processes have acknowledged – make a very significant contribution to the welfare and development of the receiving countries. A study on this issue by the International Labour Office (ILO) – cited in the brief submitted by the Center for Justice and International Law (CEJIL) – mentions, with regard to a universe of 152 countries, that between 1970 and 1990 the number of countries classified as major recipients of immigrants seeking work increased from 39 to 67, while the number of those considered major originators of migrants increased from 29 to 55. The conditions in which some of these processes occur and their results produce a form of subsidy for the most developed economies, in addition to their importance as a source of income for the migrants who provide their services in those economies and for their families who reside in their countries of origin.

7. These processes cannot – or rather, should not – be exempt from scrupulous respect for the human rights of migrants. This is the central thesis of Advisory Opinion OC-18/2003, which extends to the different areas it covers. It is a thesis that corresponds to the best expressions of the guiding principle of contemporary national and international law, to legal writings and practice of the rule of law in a democratic society, and to the principles that govern international human rights law and the implementation of its norms by the States that compose the legal community and the corresponding international jurisdictions.

8. Evidently, it is not possible to reduce a phenomenon of this nature to a question of border policy, or approach it from the simple perspective of the legal or illegal, regular or irregular status of the residence of aliens in a specific territory. This viewpoint does not permit us to understand and regulate rationally and constructively the offer of licit and creative work and the demand that keeps the economic processes operating, to the benefit of those who provide their services and to those who employ them. The phenomenon goes beyond these reductionist perspectives, which often lead to the adoption of inadmissible and harmful measures for migrant workers, and even for the economy in which they are established. Moreover, this limited and flawed vision frequently entails problems in relations with neighboring countries.

9. Those who form part of these migratory flows are very often almost totally helpless, owing to their lack of social, economic and cultural knowledge of the country in which they work, and to the lack of instruments to protect their rights. In these circumstances, they constitute an extremely vulnerable sector that has suffered the consequences of this vulnerability by the implementation of laws, the adoption and execution of policies, and the proliferation of discriminatory and abusive practices in their labor relations with the employers who use their services and the authorities of the country where they reside. This vulnerability is structural in character. Its cultural aspect, of an endogenous nature, is associated – as the amicus curiae brief presented by an academic of the Juridical Research Institute of the Universidad Nacional Autónoma de México states – with "conditions that are sufficient to result in extreme impunity for those who violate the human rights of aliens/ immigrants."

10. It is well known that there have been many cases of aggression against undocumented migrants by public authorities, who fail to comply with or distort the exercise of their attributes, and by individuals who take advantage of the vulnerable situation of undocumented migrants and subject them to ill-treatment or convert them into victims of crimes. The latter include different kinds of violent crime and arbitrary treatment, which regularly remain unpunished or are only penalized by light measures, utterly disproportionate to the gravity of the illegal acts that have been committed. In a resolution on "Protection of migrants" (A/RES/54/166, of 24 February 2000) – mentioned in the Advisory Opinion – the General Assembly of the United Nations expressed its concern for "the manifestations of violence, racism, xenophobia and other forms of discrimination and inhuman and degrading treatment to which migrants are subjected, particularly women and children, in different parts of the world."

11. The vulnerability of migrant workers increases, reaching dramatic extremes that move the universal moral conscience, when they lack official authorization to enter and remain in a country and, consequently, form part of the category of those persons who are instantly identified as "undocumented," "irregular" or, worse still "illegal," workers. What should be an administrative description with well-defined effects becomes a "label" that results in many disadvantages and exposes the bearer to innumerable abuses. This sector is grouped under a significant heading: it is a "suspected category," as the Inter-American Commission on Human Rights indicates – another amicus curiae brief alludes to "suspect category" – a concept elaborated on the basis of European case law and comparative law. In brief, it refers to "persons under suspicion," with all that this implies and, furthermore, with all that it suggests and even allows.

12. Although it should be borne in mind, I will not go into detail about the nature of the treatment usually meted out to undocumented workers. It includes abuse and arbitrariness of different kinds in the workplace, but also outside of it, because of the lack of security that they endure, the treatment they receive, and other very diverse aspects of their personal and family life, even its most intimate and delicate aspects. Reports on this situation, which observers of different countries provide from time to time on conditions prevailing on different continents, illustrate this matter amply.

13. This is the situation in which millions of persons live, work and suffer in many countries in the world, some of which have historically been in the forefront of human rights and

democracy. Thus, when alluding to the problem of undocumented migrant workers, the focus of OC-18/2003, reference is being made to a large number of human beings in different countries, as noted in the statistical contributions made by those who took part, as representatives of States or amici curiae, in the process of reflection which led to this Advisory Opinion.

14. OC-18/2003 is based on the acceptance of the human rights recognized to all persons and required of all States. This corresponds, moreover, to the basic concept of fundamental rights in the words used in national declarations as of the eighteenth century and in the most important international instruments of the twentieth century. This recognition, which is based on human dignity and transcends all political borders, is the most relevant moral, juridical and political fact in the current stage of law. The violations committed during the last century and in the one which is just beginning do not diminish the contemporary status of the individual, product of a long and eventful evolution, nor eliminate the enforceability of human rights before all States. To the contrary, they reinforce a concern shared by innumerable persons and underline the need to continue the struggle to ensure to everyone the most extensive enjoyment and exercise of those rights. We may add that this is the philosophy that sustains the major international organizations, such as the United Nations and the Organization of American States, in the words of their Charters, and it therefore binds the States that form part of them and have accepted their values and the commitments that the latter represent.

15. Thinking behind the declarations of rights and their contemporary expression cites the freedom and equality of all human beings. This entails, first implicitly, then explicitly in numerous documents – as indicated in this Advisory Opinion – the most complete and conclusive rejection of discrimination whatever the motive. This profound conviction is the source of the historic struggles of the individual against different forms of oppression – struggles that have culminated in the establishment of a successive series of fundamental rights – and the foundation on which the modern legal system is built.

16. Equality before the law and rejection of all forms of discrimination is at the forefront of texts that stipulate, regulate and guarantee human rights. They could be said to represent reference points, constructive elements, interpretation criteria, and options for the protection of all rights. Because of the degree of acceptance they have achieved, they are clear expressions of jus cogens, with the peremptory nature that this has over and above general or specific conventions, and with its effects for the determination of obligations erga omnes.

17. That idea, stated in OC-18/2003, was expressed during the preparatory work. Thus, the amicus curiae participation of the Central American Council of Ombudsmen, with the support of its Technical Secretariat, the Inter-American Institute of Human Rights, mentions, in its brief, that “owing to the progressive development of international human rights law, the principle of non-discrimination and the right to equal and effective protection of the law, must be considered norms of jus cogens and, in this respect, they are norms of peremptory international law that form part of an international public order (ordre public) which cannot be validly opposed by the other norms of international law, and much less the domestic norms of States.” Finally, in the absence of the embodiment and exercise of equality before the law and the rejection of discrimination, it would not be possible to understand human development and assess the present development of law.

18. True equality before the law is not measured by the mere declaration of equality in the law, but must take into account the true conditions of those who are subject to the law. There is no equality when, for example, in order to enter an employment relationship, an agreement is reached by an employer, who has ample resources and knows that he is supported by the law, and the worker, who only has his hands and perceives – or knows perfectly well – that the law does not offer him the support it provides to his counterpart. There is no equality either when there is a powerful defendant, armed with the means to defend himself, and a weak litigant, who lacks instruments to prove and argue his defense, regardless of the reasons and rights that support their respective claims.

19. In such cases, the law must introduce compensation or correction factors. This is what the Inter-American Court stated when, for the purposes of Advisory Opinion OC-16/99, it examined the concept of due process – which upholds setting those who are unequal for other reasons on an equal footing and permits just solutions to be reached in both material and procedural relations. I believe that it would be useful to quote a phrase of Francisco Rubio Llorente here, which can be applied to the point that I am making, without detriment to its more general scope. According to this Spanish scholar, all "law is intended to be fair and it is the idea of justice that leads directly to the principle of equality which, in some ways, constitutes its essential content." Nevertheless, "equality is not a point of departure, but a an end" ("La igualdad en la jurisprudencia del Tribunal Superior," in La forma del poder (Estudios sobre la Constitución), Centro de Estudios Constitucionales, Madrid, 1993, pp. 644 and 656). The laws that regulate relationships between parties that are socially or economically unequal and the norms and practices of all aspects of judicial proceedings should tend towards and respond to this end.

20. The prohibition to discriminate does not admit exceptions or areas of tolerance that would shelter violations; discrimination is always rejected. In this respect, it is does not matter that the prohibition relates to rights that are considered fundamental, such as those that refer to life, physical integrity or personal freedom, or to rights to which some assign a different ranking or a different importance. It is discriminatory to establish different sanctions for the same offences because the authors belong to determined social, religious or political groups. It is discriminatory to deny access to education to members of an ethnic group and to provide it to members of another group; and it is discriminatory – following the same reasoning – to provide some individuals with all measures of protection that the performance of lawful work merits and deny such measures to other individuals who perform the same activity, on grounds that are unrelated to the work itself, such as those arising from their migratory status.

21. The principles of equality before the law and non-discrimination are put to the test when there is contact between different human groups, that are called on to take part in legal and economic relationships which imperil the rights of those who are weakest or least well equipped, owing to their circumstances and the way in which such relationships are established and developed. This has been seen – and is still seen – in many cases, for the most diverse reasons. Nationals and aliens, men and women, adults and minors, ethnic, cultural, political and religious majorities and minorities, winners and losers in domestic and international conflicts, deeply-rooted groups and displaced groups, are only some examples. This occurs among those who form part of the workforce in their own country and those who participate in the same economic

processes alongside them, but lack the status of nationals. This status is a protective shield for some; and its absence is frequently the factor that leads to the exclusion or harm of others.

22. The permanent and uncompromising purpose of the human rights system, and also the ideas on which it is based and the goals it seeks, is to eliminate distances, combat abuses, and guarantee rights; in brief, to establish equality and see that justice is done, not merely for ethical reasons, which would in themselves be relevant, but also in strict compliance with the peremptory norms that do not admit exceptions and oblige all States: jus cogens and obligations erga omnes. In some cases, valuable although insufficient progress has been made; for example, legal equality between men and women – even though this is not yet a reality for all – and, in others, such as the area of labor relations, where national and alien workers are involved, there is still much to be done.

23. OC-18/2003 rejects the opinion suggesting there should be restrictions and reductions in the rights of the individual when he crosses the borders of his own country and moves abroad, as if this journey eroded his human condition and took away a migrant's dignity and, therefore, his rights and freedoms. The United Nations Inter-governmental Working Group of Experts on the Human Rights of Migrants – cited in the amicus curiae brief of the Center for Legal and Social Studies (CELS), the Ecumenical Service for the Support and Orientation of Refugees and Immigrants (CAREF) and the Legal Clinic for the Rights of Immigrants and Refugees of the Law School of the Universidad de Buenos Aires – pointed out that "[a]ll persons, regardless of their place of residence, have a right to the full enjoyment of all the rights established in the Universal Declaration of Human Rights. States must respect the fundamental human rights of migrants, irrespective of their legal status." It added: "[a] basic principle of human rights is the fact of entering a foreign country, violating the immigration laws of that country, does not lead to losing the human rights of an 'immigrant with an irregular status; nor does it eliminate the obligation of a Member State (in an international instrument) to protect them." However, this is not always acknowledged. To the contrary, as the representative of the United Nations High Commissioner for Refugees (UNHCR) indicated in his amicus curiae statement, when a person is classified as a migrant, "this means that he has no rights and therefore the State, exercising its sovereignty, may expel him, deport him, or violate his basic rights."

24. This Advisory Opinion does not deny the possibility of establishing differences between categories of subjects: reasonable differences, based on objective information, with a view to attaining lawful objectives by legitimate means. Evidently, when regulating access to its territory and permanence in it, a State may establish conditions and requirements that migrants must fulfill. Non-compliance with migratory provisions would entail the relevant consequences, but should not produce effects in areas that are unrelated to the matter of the entry and residence of migrants.

25. In view of the above, it would be unacceptable, for example, to deprive an undocumented person of freedom of thought and expression, merely because he is undocumented. Likewise, it is unacceptable to punish non-compliance with migratory provisions by measures relating to other areas, disregarding the situations created in those areas and the potential effects, completely unrelated to the migratory offence. Taking any other course would, as has indeed occurred, deprive a person of the benefits of work already performed, alleging administrative

errors: an expropriation, lato sensu, of what the worker has obtained for his work – through an agreement entered into with a third party, which has already produced certain benefits to the latter – which would become undue profit if the different forms of remuneration for the work performed are eliminated.

26. Taking into consideration the characteristics of the general obligations of States under general international law and international human rights law, specifically, with regard to these extremes of jus cogens, States must develop, as stated in OC-18/2003, specific actions of three mutually complementary types: a) they must ensure, by legislative and other measures – in other words, in every sector of State attributes and functions – the effective (and not only nominal) exercise of the human rights of workers on an equal footing and without any discrimination; b) they must eliminate provisions, whatever their scope and extent, that lead to undue inequality or discrimination; and c) lastly, they must combat public or private practices that have this same consequence. Only then, can it be said that a State complies with its obligations of jus cogens in this area, which, as we have said, does not depend on the State being a party to a specific international convention; and only then would the State be protected from international responsibility arising from non-compliance with international obligations.

27. OC-18/2003 focuses on rights arising from employment and thus concerning workers. Such rights belong to the category of "economic, social and cultural rights, which some scholars have classified as "second-generation" rights. Nevertheless, whatever their status, bearing in mind their subject matter and also the moment in which they were included, first in constitutional and then in international texts, the truth is they have the same status as the so-called "civil and political" rights. Mutually dependent or conditioned, they are all part of the contemporary statute of the individual; they form a single extensive group, part of the same universe, which would disintegrate if any of them were excluded.

28. Among these rights, the only difference relates to their subject matter, the identity of the property they protect, and the area in which they emerge and prosper. They have the same rank and demand equal respect. They should not be confused with each other; however, it is not possible to ignore their interrelationship, owing to circumstances. For example, let us say that, although the right to work cannot be confused with the right to life, work is a condition of a decent life, and even of life itself: it is a subsistence factor. If access to work is denied, or if a worker is prevented from receiving its benefits, or if the jurisdictional and administrative channels for claiming his rights are obstructed, his life could be endangered and, in any case, he would suffer an impairment of the quality of his life, which is a basic element of both economic, social and cultural rights, and civil and political rights.

29. The human rights of workers, namely, the fundamental labor rights, arise from two sources, which function together: a) the human condition of the owner, which, as I have already said, excludes inadmissible inequalities and discriminations; and b) the employment relationship established between the owner of those rights and the legal person, individual or group, to which he will provide, is about to provide or has provided his services; a relationship that arises from the very fact of providing, being about to provide or having provided a service, regardless of what has been formalized in a contract, which does not exist in many – probably, most – cases,

although if it exists – and this is what is really important – it is the determining factor of the employment relationship, which is also a source of rights and obligations.

30. It is necessary to draw attention to these considerations with regard to all those who engage in activities in exchange for remuneration, but principally – since it is the issue being examined in OC-18/2003 – with regard to those classified as workers, according to the usual description of this category in labor law: persons who provide dependent and subordinate services, and who form part of the most extensive sector of the vulnerable group owing to their migratory status, principally undocumented migrants.

31. The different international instruments, as well as the most progressive national texts, contain lists of labor rights that must be respected and guaranteed; for example, the Universal Declaration of Human Rights, the American Declaration on the Rights and Duties of Man, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and the ILO Declaration on Fundamental Principles and Rights at Work (86th Session, Geneva, 1998).

32. These and other instruments coincide in establishing the international standards for labor rights cited in this Advisory Opinion and applicable to the law and practice of States, according to this Opinion. Such standards are the product of constant and well-documented development, express the shared opinion of the members of the international juridical community, and are therefore doubly important owing to this circumstance and to the nature of the instruments in which they are enshrined.

33. Certain rights mentioned in the considerations of OC-18/2003 are particularly important because they are the ones that are generally included in national and international norms, often constitute conditions or elements of other labor rights and, owing to their characteristics, determine the general framework for the provision of services and for the protection and welfare of those who provide them. The corresponding list – which is not exhaustive – includes the prohibition of obligatory or forced labor, the elimination of discriminations in the provisions of labor, the abolition of child labor, the protection of women workers and the rights corresponding to remuneration, the working day, rest and holidays, health and security in the workplace, association to form trade unions and collective negotiation.

34. In the “Programme of Action” issued by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (Durban, 2001) States were urged to ensure the full equality of migrants in the law, “including labor legislation”, and “to eliminate barriers, where appropriate, to their participation in vocational training, collective bargaining, employment, contracts and trade union activity; access to judicial and administrative tribunals dealing with grievances; seeking employment in different parts of their country of residence; and working in safe and healthy conditions” (Programme para. 28). They were also urged to “take all possible measures to promote the full enjoyment by all migrants of all human rights, including those related to fair wages and equal remuneration for work of equal value without distinction of any kind, and to the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond their control, social

security, including social insurance, access to education, health care, social services and respect for their cultural identity" (Programme, para. 30(g)).

35. The mention of these rights in Advisory Opinion OC-18 is not intended to establish a specific ranking of the human rights of workers, as one group of rights that could constitute the "hard core" and another that might have another nature, in some way secondary or non-essential. The Opinion merely highlights certain rights that are important for the employment relationship and for the needs and expectations of undocumented migrant workers and to which special attention should be paid to ensure that they are respected and guaranteed, without lessening the attention that should be paid to other rights not mentioned in the list.

36. Announcing rights without providing guarantees to enforce them is useless. It becomes a sterile formulation that sows expectations and produces frustrations. Therefore, guarantees must be established that permit: demanding that rights should be recognized, claiming them when they have been disregarded, re-establishing them when they have been violated, and implementing them when their exercise has encountered unjustified obstacles. This is what the principle of equal and rapid access to justice means; namely, the real possibility of access to justice through the means that domestic law provides to all persons, in order to reach a just settlement of a dispute; in other words, formal and genuine access to justice.

37. This access is facilitated by due process, which the Inter-American Court of Human Rights has examined fully in the exercise of its advisory and contentious competence. Strictly speaking, due process is the means to ensure the effective exercise of human rights that is consistent with the most advanced concept of such rights: a method or factor to ensure the effectiveness of law as a whole and of subjective rights in specific cases. Due process – a dynamic concept guided and developed under a guarantee model that serves individual and social interests and rights, and also the supreme interest of justice – is a guiding principle for the proper resolution of legal actions and a fundamental right of all persons. It is applied to settle disputes of any nature – including labor disputes – and to the claims and complaints submitted to any authority: judicial or administrative.

38. Due process, for the purpose that interests us in OC-18/2003, entails, on the one hand, the greatest equality – balance, "equality of weapons" – between the litigants, and this is particularly important when on one side of the dispute is the vulnerable migrant worker and on the other the employer endowed with ample and effective rights, an equality that is only obtained – in most cases that reflect the true dimension of the collective problem – when the public authorities incorporate the elements of compensation or correction that I have mentioned above, through laws and criteria for interpretation and implementation; and, on the other hand, clear and flexible compliance with the State's obligation to provide a service of justice without distinction, much less discrimination, which would entail the defeat of the weaker party at the very outset.

39. The clarifications in OC-18/2003 have particular relevance. Indeed, undocumented workers usually face severe problems of effective access to justice. These problems are due not only to cultural factors and lack of adequate resources or knowledge to claim protection from the authorities with competence to provide it, but also to the existence of norms or practices that obstruct or limit delivery of justice by the State. This happens because the request for justice can

lead to reprisals against the applicants by authorities or individuals, measures of coercion or detention, threats of deportation, imprisonment or other measures that, unfortunately, are frequently experienced by undocumented migrants. Thus, the exercise of a fundamental human right – access to justice – culminates in the denial of many rights. It should be indicated that even where coercive measures or sanctions are implemented based on migratory provisions – such as deportation or expulsion – the person concerned retains all the rights that correspond to him for work performed, because their source is unrelated to the migratory problem and stems from the work performed.

40. The Advisory Opinion, with which I agree in this separate opinion, deals with the issue of public policies posed in the questions raised by the requesting State. In this respect, it is acknowledged that States have the authority to adopt public policies – which are expressed in laws, regulations and other norms, plans, programs and different acts – in order to achieve legitimate collective goals. These policies include those relating to demographic processes, which involve migratory issues, in addition to those relating to the management of the economy, the use of the workforce, the promotion of certain productive activities, the protection of specific sectors of agriculture, industry, commerce and services, and others.

41. There is a problem, however, when some specific aspects of State policy enter into conflict with the human rights of a certain sector of the population. Obviously, this should never occur. It is one of the State's functions – which responds to its democratic vocation and recognizes and guarantees the human rights of its inhabitants – to implement the various public policies so that these rights are preserved and, at the same time, the legitimate objectives for which those policies were designed are achieved. Let me repeat that achieving a commendable end does not justify using unlawful means. In such cases, the State's essential commitment to human rights prevails, because the guarantee of human rights is an underlying principle of the political structure, as has been stated constantly in the principal political texts of the modern era, produced by the major rebel and revolutionary movements of the United States and France in the latter part of the eighteenth century. If this is the essential ethical and legal basis of politics, a State cannot violate the human rights of the persons subject to its jurisdiction on the basis of specific policies.

42. On these grounds, Advisory Opinion OC-18/2003 refers to several agreements of the international community – evidently based on profound convictions – with regard to migratory policies, the subject of the request submitted by the United Mexican States. In this respect, the "Declaration" and the "Programme of Action" resulting from the Durban Conference, and the corresponding resolution of the United Nations Human Rights Commission (Res. 2001/5) should be underscored; they are all mentioned by the Inter-American Court in the Advisory Opinion. The Declaration affirms the right of States to adopt their own migration policies and also that "these policies should be consistent with applicable human rights instruments, norms and standards" (Declaration, para. 47).

43. It would be unrealistic to believe that the opinion of a jurisdictional body – even though it is supported by the convictions and decisions of States representing hundreds of millions of individuals in this hemisphere – and the trend towards progress with justice that inspires many men and women of good will, could, in the short-term, reverse obsolete tendencies that are

rooted in deep prejudices and sizeable interests. However, when combined, these forces can play their role in man's effort to move mountains. Making this effort and succeeding requires the adoption – as was said in Durban – of strategies, policies, programs and measures that are part of the "responsibility of all the States, with the full participation of civil society, at the national, regional and international level" (Declaration, para. 122). OC-18/2003 fulfills its particular mandate in this effort. It does so, as corresponds to this Court, from its own specific position: the legal one, based on the principles that are at the root of the international human rights system.

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE HERNÁN SALGADO PESANTES

This Advisory Opinion, requested by the State of Mexico and enhanced by the opinions of other States and the intellectual contribution of non-governmental organizations, allowed us to reflect on numerous issues, some of which I would like to take up again in support of the opinions expressed therein.

1. In light of the interrelation and indivisibility of human rights, equality and non-discrimination are rights that form a platform on which others are erected, particularly economic, social and cultural rights, whose content cannot omit the former. The same is true in the case of freedom.

2. Non-discrimination is inseparable from equality and determines the scope of the former. At the current stage in the development of human rights, I believe that equality and non-discrimination are two rights with an autonomous content that have a separate existence within this framework of indivisible interrelation.

3. In recognition of the diversity of human beings, it is acknowledged that equality accepts and promotes certain distinctions, provided they tend to increase rather than prevent the enjoyment and exercise of all rights, including equality itself. Consequently, such distinctions do not affect the right to non-discrimination; nor do they restrict the concept of equality.

4. In the context of this Opinion, the Court has differentiated between distinction and discrimination (paragraph 84) and has indicated the characteristic elements of the former, on which I would like to insist.

5. The concept of distinction refers to a treatment that is different from the one generally applied; in other words, a specific situation is singularized for certain reasons. To ensure that distinction does not become discrimination, the following requirements, established by human rights case law and theory, must be fulfilled.

6. It should pursue a legitimate goal and it should be objective, in the sense that there is a substantial and not merely formal difference, because, as this Court has indicated, distinction in treatment should be founded on "substantial factual differences and [...] a reasonable relationship of proportionality between these differences and the aims of the legal rule under review." [FN207]

[FN207] ICourtHR., Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, para. 57.

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7. In addition, the difference must be relevant, have sufficient importance to justify a different treatment, and be necessary and not merely convenient or useful. For example, the difference between a man and a woman is not sufficient to impose a different treatment in the workplace, but the fact of pregnancy and maternity is.

8. There must be proportionality between the factual and juridical difference, between the chosen means and the ends; disproportion between the content of the different treatment and the proposed goal leads to discrimination. For example, in order to sustain a labor policy, it is decided that undocumented workers should be stripped of their fundamental rights.

9. Together with proportionality, appropriateness and relevance are usually indicated, as regards the desired juridical consequences of the differentiated treatment, taking into account the concrete and actual circumstances in which the distinction will be applied.

10. But there is a common denominator with regard to the preceding elements, which fine tunes the content and scope of the other elements, and that is reasonableness. The use of these elements allows us to identify the presence of discrimination in a "suspect category," represented in this case by undocumented migrant workers.

11. Undocumented migrant workers have – as has any human being – the rights to equality before the law and not to be discriminated against.

12. Equality before the law means that they must be treated in the same way as documented migrants and nationals before the law of the receiving country. The prohibition to work has to be considered in this context. The condition of undocumented worker can never become grounds for not having access to justice and due process of law, for failing to receive earned salaries, for not having social security benefits and for being the object of various forms of abuse and arbitrariness.

13. Such situations illustrate the existence of a series of discriminatory treatments that those responsible seek to found on the distinction between documented and undocumented.

14. As the Advisory Opinion states, this difference in treatment is neither justified, necessary nor proportionate, and its effects are not reasonable; it is at odds with the State's main function,

which is to respect and ensure the rights of every individual who, for labor-related reasons, and with or without documents, is subject to its jurisdiction.

15. It should be borne in mind that grave violations of rights, as in the case of undocumented migrant workers, end up by seriously affecting the right to life. In this respect, the Inter-American Court has stated that life includes, "not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence." [FN208]

[FN208] ICourtHR., the Case of the "Street Children" (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 144.

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16. It is worth emphasizing that, as in the case of the other rights, the obligation to respect and ensure equality and non-discrimination embodied in international human rights law – with its treaties and case law – is also a non-derogable obligation in the domestic law of constitutional and democratic States.

17. I consider that an extremely important point in this Advisory Opinion is that of establishing clearly the effectiveness of human rights with regard to third parties, in a horizontal conception. These aspects, as is acknowledged, have been amply developed in German legal writings (Drittwirkung) and are contained in current constitutionalism.

18. It is not only the State that has the obligation to respect human rights, but also individuals in their relationships with other individuals. The environment of free will that prevails in private law cannot become an obstacle that dilutes the binding effectiveness erga omnes of human rights.

19. The possessors of human rights – in addition to the State (the public sphere) – are also third parties (the private sphere), who may violate such rights in the ambit of individual relationships. For the purposes of this Opinion, we are limiting ourselves basically to the workplace where it has been established that the rights to equality and non-discrimination are being violated.

20. Labor rights as a whole acquire real importance in relationships between individuals; consequently, they must be binding with regard to third parties. To this end, all States must adopt legislative or administrative measures to impede such violations and procedural instruments should be effective and prompt.

21. At the level of international responsibility, any violation of rights committed by individuals will be attributed to the State, if the latter has not taken effective measures to prevent such violation or tolerates it or permits the authors to remain unpunished.

22. The foregoing signifies that international human rights instruments also produce binding effects with regard to third parties. Likewise, the responsibility of the individual has a bearing on and affects that of the State.

I have participated in this Advisory Opinion, like my colleagues, aware of its importance for the countries of our hemisphere.

Hernán Salgado-Pesantes
Judge

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE ALIRIO ABREU BURELLI

While being of the same opinion as the other judges of the Inter-American Court of Human Rights in rendering this Advisory Opinion, I wish to submit the following considerations separately:

I.

On this occasion, the Court has defined the scope of the obligation of the member States of the Organization of American States to respect and guarantee the labor rights of undocumented migrant workers, irrespective of their nationality, by establishing that the principle of equality and non-discrimination, which is fundamental for the safeguard of those rights, belongs to ius cogens [FN209].

This definition also leads the Court to declare that, regardless of whether or not States are party to a specific international treaty, they are obliged to protect the right to equality and non-discrimination and that this obligation has effects erga omnes, not only with regard to the States, but also with regard to third parties and individuals. Consequently, States must respect and guarantee the labor rights of workers, whatever their migratory status and, at the same time, must prevent private employers from violating the rights of undocumented migrant workers and the employment relationship from violating minimum international standards. For the protection of the labor rights of undocumented migrants to be effective, such workers must be guaranteed access to justice and due process of law [FN210].

A State’s observance of the principle of equality and non-discrimination and the right to due process of law cannot be subordinated to its policy goals, whatever these may be, including those of a migratory character.

By voting in favor of the adoption of this Opinion, I am aware of its particular importance in endeavoring to provide legal answers, in international law, to the grave problem of the violation of the human rights of migrant workers. In general, despite their non-contentious nature, Advisory Opinions have indisputable effects on both the legislative and administrative acts of States and on the interpretation and application of laws and human rights treaties by judges,

owing to their moral authority and the principle of good faith on which the international treaties that authorize them are based.

[FN209] According to the European Court of Human Rights, the affirmation that the principle of equality and non-discrimination belongs to the domain of ius cogens has several legal effects: recognition that the norm ranks higher than any norm of international law, except other norms of ius cogens; in case of dispute, the norm of ius cogens would prevail over any other norm of international law, and the provision that contradicts the peremptory norm would be null or lack legal effects. (Taken from the arguments of the Legal Clinics of the College of Jurisprudence of the Universidad San Francisco, Quito).

[FN210] In Advisory Opinion OC-16/99 of October 1, 1999, the Inter-American Court of Human Rights indicated that "for 'the due process of law' a defendant must be able to exercise his rights and defend his interests effectively and in full procedural equality with other defendants. It is important to recall that the judicial process is a means to ensure, insofar as possible, an equitable resolution of a difference. The body of procedures, of diverse character and generally grouped under the heading of the due process, is all calculated to serve that end. To protect the individual and see justice done, the historical development of the judicial process has introduced new procedural rights. An example of the evolutive nature of judicial process are the rights not to incriminate oneself and to have an attorney present when one speaks. These two rights are already part of the laws and jurisprudence of the more advanced legal systems. And so, the body of judicial guarantees given in Article 14 of the International Covenant on Civil and Political Rights has evolved gradually. It is a body of judicial guarantees to which others of the same character, conferred by various instruments of international law, can and should be added.

II.

In this Opinion, the Court has ruled on the rights that States must recognize and apply to workers who, due to different circumstances, emigrate from their countries in search of economic well-being, and who, because they do not have legal migratory status, may become victims of violations of such rights as their labor rights, and their rights to decent treatment, equality and non-discrimination. In this respect, the State that requested the Court to render an Opinion referred specifically to the fact that almost six million Mexican workers are outside national territory; and, of these, approximately two and a half million are undocumented migrant workers. It added that "in less than five months (in 2002), the Government of Mexico had to intervene, through its consular representatives, in the defense of the human rights of Mexican nationals in approximately 383 cases, in order to protect migrant workers with regard to employment-related discrimination, unpaid wages, and compensation for occupational illnesses and accidents, among others matters."

Likewise, Judge Antonio Cançado Trindade, in a study on enforced migratory flows, indicated that "... migrants seeking work and better living conditions amount to 80 million human beings today... The causes of forced migrations are basically no different from those of population displacement. In a 1992 analytical report on internally displaced persons, the Secretary General of the United Nations identified natural disasters, armed conflict, generalized violence and

systematic human rights violations among the causes of massive involuntary migrations within State borders." [FN211]

According to Judge Cançado Trindade, other causes of massive migrations are, "the multiple internal conflicts, of an ethnic and religious nature, repressed in the past but set in motion in recent years. These are supplemented by the increase in chronic poverty, which, according to the United Nations Development Programme, today affects more than 270 million persons in Latin America alone... ." According to a report of the United Nations human rights body [FN212], the causes of contemporary migrations in search of work are fundamentally poverty and the inability to earn or produce enough for personal or family subsistence in the country of origin. These reasons characterize not only migration from poor States to rich ones; poverty also encourages movement from developing countries to other countries where the work prospects appear to be better, at least from a distance. According to this report, there are other reasons that explain the departure abroad in search of work. War, civil conflict, insecurity or persecution derived from discrimination due to race, ethnic origin, color, religion, language or political opinions are all factors that contribute to the flow of migrant workers.

[FN211] Cançado Trindade, Antônio A. "Elementos para un Enfoque de Derechos Humanos del Fenómeno de los Flujos Migratorios Forzados". Publication of the International Organization for Migrations and the Inter-American Institute of Human Rights. Guatemala 2001, p. 11.
[FN212] Cited by Antônio Cançado Trindade, ob. cit., p. 12.

III.

Limited to the strictly juridical sphere, established by regulatory, statutory and convention-related instruments that govern its proceedings, in exercise of its competence, the Court cannot go beyond the interpretation and application of legal norms in its judgments and advisory opinions. However, it is impossible to prevent the human tragedy underlying the cases it hears from being reflected in the Court's proceedings and reports. Frequently, the statements of the victims or of their next of kin, who resort to the Court seeking justice, have moved the judges profoundly. The arbitrary death of children, of youth or, in general, of any person; enforced disappearance; torture; illegal imprisonment, and other human rights violations, submitted to the Court's consideration and decision, cannot be resolved by mere legal concepts; not even bearing in mind the Court's efforts to try and provide reparations for the damages suffered by the victims that go beyond monetary compensation. It continues to be an ideal – whose achievement depends on the development of a new collective conception of justice – that these violations should never be repeated and that, if they are, their authors should be severely punished. In this Opinion, stated in concrete legal – but also humanistic – terms, and taking into account the international obligations assumed by States, the Court has defined the conduct that States should observe in order to respect and guarantee the rights of undocumented migrants, to prevent them from becoming victims of exploitation or discrimination in the enjoyment and exercise of their labor rights. It is a ruling of the Court on the interpretation and application of norms that are in force and that are universally accepted because they are grounded on principles of ius cogens, that

obliges all States equally; however, this ruling also contains an implicit call for social justice and human solidarity.

IV.

In particular – and due to the possibility of doing so in this separate opinion – I consider that the tragedy represented in each case of forced migration, whatever its cause, cannot be bypassed for mere juridical considerations. Thus, the tragedy of all those who, against their will, abandon their country of origin, their home, their parents, their spouse, their children, their memories, in order to confront generally hostile conditions and become the target of human and labor exploitation owing to their particularly vulnerable situation, should gives us cause for reflection. In addition to trying to repair the consequences of forced migrations, through instruments of international law, the creation of courts, migratory policies and administrative or other measures, the international community should also concern itself with investigating the real causes of migration and ensure that people are not forced to emigrate.In this way, it would be discovered that, apart from inevitable natural events, on many occasions migrations are the result of the impoverishment of countries, due to erroneous economic policies, which exclude numerous sectors of the population, together with the generalized fact of corruption. Other factors include dictatorships or populist regimes; irrational extraction from poor countries of raw materials for processing abroad by transnational companies, and the exploitation of workers with the tolerance and complicity of Governments; vast social and economic imbalances and injustice; lack of national educational policies that cover the entire population, guaranteeing professional development and training for productive work; excessive publicity which leads to consumerism and the illusion of well-being in highly developed countries; absence of genuine international cooperation in the national development plans; and macro-economic development policies that ignore social justice.

Faced with the magnitude of these problems, proposals have been formulated, some addressed at the construction of a new international order based on justice and the strengthening of democracy. In his book “El derecho Internacional de los Derechos Humanos en el siglo XXI”, Judge Cançado Trindade considers that “... according to recent information from UNDP and CEPAL, the current phenomenon of impoverishment, and of the significant growth of contingents of “new poor” in so many Latin American countries, reveals the failure to observe, and even the generalized violation of, economic, social and cultural rights. Certain rights, of an economic and social nature, such as the rights not to be submitted to forced labor or to discrimination in relation to employment, and also freedom of association to form labor unions, are closely linked to the so-called civil liberties... The 1992 Human Development Report of the United Nations Development Programme (UNDP) indicates that ‘democracy and freedom depend on much more than the vote’. The expansion of democracy has been complemented by a greater acknowledgment of human rights. In brief, there are no human rights without democracy, as there is no democracy without human rights... Participative democracy and, in the final analysis, human development itself, are only possible within the framework of human rights... Today, the concept of democracy embraces both political democracy (with an emphasis on formal democratic processes) and “development democracy; in the latter, ‘civil and political rights are considered vehicles for the advancement of the equality of conditions, and not merely

opportunities.' ...The interrelation of human rights and democracy nowadays finds expression in the provisions of general human rights instruments at the global and regional level." [FN213]

In Advisory Opinion OC-9/87 of October 6, 1987, the Court indicated, as it had in previous Opinions (OC-5/85, OC-6/86, OC-8/87), that the rule of law, democracy and personal freedom are consubstantial with the regime of human rights protection contained in the Convention and added: "In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning."

It is possible that the establishment of a just society begins with the strengthening of a genuine democracy that fully guarantees the dignity of the human being.

[FN213] Cançado Trindade, Antônio A. "El Derecho Internacional de los Derechos Humanos en el siglo XXI", Editorial Jurídica de Chile, 2001.

Alirio Abreu-Burelli
Judge

Manuel E. Ventura-Robles
Secretary