

**UNDOCUMENTED MIGRANT WORKER'S HUMAN RIGHT:
SHOULD BE PROTECTED? INTERNATIONAL LAW AND
TRAFFICKING LAW PERSPECTIVE**

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Abstract

Undocumented Migrant Workers violate immigration rules and can be detrimental to the host country. On the other hand, their illegality is often exploited by employers who exploit them. The two problems examined in this study are how the protection that International Law provides them and what solutions can be offered to migrant countries to cope with undocumented migrant workers. This research is normative research, with qualitative analysis. The results of this study show that International Law protects the rights of undocumented migrant workers who have carried out their work without discrimination. In the face of undocumented migrants' preventive measures are better taken by the state than enforcement.

Keywords: migrant workers, illegal, non-discrimination

Introduction

Migrant workers or often referred to as migrant workers are "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" The year 2015 based on data from the World Bank says that the number of people living outside the country where they were born is estimated to reach a record¹ this year by passing the figure of 250 million worldwide. The World Bank says the world's migrants sent more than \$600 trillion to their family members in their home countries in 2015. By 2020 it is estimated that figure has risen very sharply. Migrant workers are in all sectors of the economy. They play an

¹*International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 1990. The convention, popularly known as the Migrant Workers Convention, came into force on July 1, 2003.

important role in economic growth for both the home² state and the country in which they work (host state).³

The number of migrant workers around the world will continue to rise rapidly if their home countries cannot provide jobs on a living wage. While in other countries (receiving countries) there are various jobs with higher wages than in the sending country or the country of origin of migrant workers. Not only is the problem of unavailable employment with a living wage⁴ in Negara the cause of the increasing number of migrant workers, but the factor of prolonged internal armed conflict in the home country is also one of the factors causing the increasing number of migrant workers. Ongoing armed conflicts in the regions of Afghanistan, Myanmar, Iraq, Iran, Somalia, Yemen, and other countries are forcing their citizens to migrate in search of a better livelihood as migrants survive.⁵

Furthermore, it is undeniable that there is a close relationship between economic globalization and international migration. The fact that there is a deep gulf between rich and poor countries, the lack of jobs in poor countries makes rich countries like magnets for citizens of poor countries migrants get jobs with a higher standard of salary than in their home countries. However, compared to the distribution of goods and services, the access to the migrant workers market is relatively tighter. Many countries as well as regional economic organizations greatly limit the cross-border flow of countries for migrant workers. *The North American Free Trade Agreement* (NAFTA) for example conducts very strict monitoring of the migration of migrant workers from Mexico to the United States. In its commitment to trade in the field of services Indonesia only opens access to the migrant market migrant workers who have expertise that has not been owned by Indonesia (experts). However, in 2020 the⁶ number of Foreign Workers (TKA) in Indonesia in 2020 reached 98,902 people. From the data, TKA from China ranked first, namely 35,781 people.

² https://www.bbc.com/indonesia/dunia/2015/12/151219_dunia_worldbank_migrasi., accessed on Saturday, 02 Januari 2021.

³ Koesrianti, "Obligation of the Sending Country and the Receiving Country for the protection of migrant workers", in *the Journal of Diplomacy*, Vol 2 No. 1, March 2010, p. 20

⁴ Connie de la Vega & Conchita Lozano-Batista, "Advocates Should use Applicable International Standards to Address Violation of Undocumented Migrant Workers Rights in The United States", *3 Hastings Race and Poverty Law Journal* 35, Tahun 2005, hlm. 36

⁵ Koesrianti, "Obligations of the Sending Country and The Receiving Country for the protection of migrant workers", in *the Journal of Diplomacy*, Vol. 2 No. 1, March 2010, p. 37

⁶ Laura Jakobowski, "International Commerce and Undocumented Workers: Using Trade to Secure Labor Rights", *14 Indiana Journal of Global Legal Studies* 509, summer 2007, hlm. 520

or the equivalent of 36.17%. Followed by Japan with 12,823 people, South Korea 9,097, India 7,356 people, Malaysia 4,816 people, Philippines 4,536 people, United States 2,596 people, Australia 2,540 people, England 2,176 people, Singapore 1,994 people and, 15,187 from other countries.⁷

Not all migrant workers can enter the territory of another country in a lawful manner in accordance with the rules of international law and national law of the destination country. As the rules apply to all foreigners, especially job seekers entering the territory of other countries must be equipped with various documents from the country of origin and from the destination country. The international convention on the protection of migrant workers and their families in 1990 stressed the importance of documents for the protection of migrant workers. For example, the document will guarantee that no minors become migrant workers. The document will also minimize the occurrence of human trafficking and smuggling practices.⁸

The strict requirements and the high cost of entering a legitimate migrant worker make it not easy for a migrant foreign national to obtain documents as a legitimate migrant worker. This makes many people willing to do everything possible to become migrant workers, including through smuggling as well as trafficking people so that *many undocumented migrant workers are found*. These categories of undocumented migrant workers are those who are completely undocumented, have documents but *have expired (overstay)*, *have documents* but not with migrant visas but migrant travelers, or have documents but fakes that do not match the data with the document holder, and include students who also work in the country where they study.

There are several terms that are often used by migrants to *refer to undocumented migrant workers*, *unauthorized migrant workers*, *irregular migrant workers*, *illegal migrant workers*, or also illegal migrants. Millions of undocumented migrant workers are scattered in various countries, especially countries that are available for jobs, a better livelihood than in the home country. In ⁹the United States it is still the largest migration corridor in the world with 13 million migrants, there are two other major routes between Russia and Ukraine, as well as between Bangladesh and India.

⁷ <https://nasional.kontan.co.id/news/jumlah-tenaga-kerja-asing-di-indonesia-98902-tka-china-terbesar-berikut-datanya>. Diakses pada hari sabtu, 02 januari 2021

⁸ Laura Fernandez Fetil, , caring for the Elderty undocumented workers.

⁹ Adnan, I. (2020). Kebijakan Non Penal Dalam Penanggulangan Tindak Pidana Perdagangan Orang Di Kabupaten Lombok Barat (Doctoral dissertation, Universitas Gadjah Mada).

¹⁰. In this superpower undocumented migrant workers are generally in the garment sector, construction, electronics, hotels, restaurants, *food processing*, buildings, and landscape *maintenance*.¹¹

One of the countries facing many problems related to undocumented migrant workers is Indonesia. Reliable sources such as the International Human Rights Commission, *Migrant Workers* and even the Ministry of Foreign Affairs' migrant workers division acknowledge that the number of undocumented Indonesian migrant workers is far greater than the documented. They are spread across the countries with the most positions in Malaysia. About 72% of these undocumented migrant workers work in the informal sector and most of them are women who come through illegal routes with no documents at all. In Malaysia there are estimated to be around two million undocumented migrant workers or illegal migrant workers. Meanwhile, according to Statistics of the Malaysian Immigration Department until September 2018, the number of migrant workers working in the country legally is 1.73 million people, the majority of Indonesia, Nepal, Bangladesh, Myanmar, Pakistan and China.¹² Meanwhile, the Ministry of Statistics estimates that the number of foreigners living legally in the country in 2018 is about 3.3 million people out of a total population of 32 million people in Malaysia.¹³

The stigma of illegal undocumented migrant workers or illegal migrant workers makes their positions very vulnerable to human rights violations because they are often likened to criminals. In Malaysia undocumented migrant workers are considered a burden of threat and harm to the country. Various studies have shown that they generally receive wages well below the standard wages of undocumented migrant workers. Ami, a waitress, an undocumented migrant worker, receives only 900-ringgit from the 1500-1600-ringgit she should receive as if she were undocumented. Sub-standard wages still must be reduced as migrants bribe Malaysian officials who know where they are as well as Indonesian thugs' migrant security money.¹⁴

Thus, undocumented migrant workers are often mistreated, exploited, and exploited by people who deliberately seek to profit from their illegal status. The mistreatment of undocumented

¹⁰https://www.bbc.com/indonesia/dunia/2015/12/151219_dunia_worldbank_migrasi. Retrieved Saturday, 02 January 2021. 6:21 PM MYT

¹¹ Laura Fernandez Feitl, *op.cit.*, hlm. 233

¹² imi.gov.my/portal2017/index.php/ms/

¹³ Adnan, I. Law Protection on Victims of Bullying Crime to Person With Disability in West Lombok Regency: Analysis of Victimology Perspective.

migrant workers is generally that they do not receive the standard of wages properly, do not enjoy the right to employment and reproductive health, are not given holidays, salaries are not paid by employers, should not leave the house, workplace conditions are alarming, and there is no chance of joining the union.

It is not only undocumented workers who are treated unfairly, undocumented migrant workers only get mistreatment from their employers. As the latest case experienced by a female worker from Indonesia with the initials MH aged 26 years, who received torture in the form of incisions in the body and burns to the face, in addition she was not given food and placed for 8 days outside the house without proper facilities.¹⁵

Although equally vulnerable to human rights abuses, undocumented migrant workers are worse in condition than men. For example, for the same jobs and hours worked, the wages of female workers are always lower than those of men. They are also vulnerable to sexual violence by fellow migrant workers, fore mans, Malaysian security forces or employers. According to National Women's Commission, undocumented female migrant workers in addition to being vulnerable to vertical and horizontal forms of exploitation are also vulnerable to other forms of exploitation due to their women.¹⁶

Vertical exploitation is carried out by Employer in the context of its working relations, and other parties such as touts, PJTKI, other persons in Malaysia. Meanwhile, horizontal exploitation occurs in fellow workers, namely from undocumented migrants to undocumented migrant workers. The mode and form of exploitation on the part of employers is to do their job indefinitely, pay sub-standard wages or not pay wages, and to report undocumented migrant workers if they claim their rights. The exploitation of fore mans in general is to cut the wages of migrant workers without a deal. While horizontal exploitation is carried out by documented labor against unedited workers by offering photocopies of identities in exchange for a certain amount of funds.¹⁷

The lack of attention and protection of human rights to undocumented migrant workers is not only occurring in the ASEAN region which is basically lacking attention to human rights

¹⁵ <https://www.bbc.com/indonesia/indonesia-55172153>. Diakses pada hari sabtu, tanggal 2 Januari 2021. Pukul 15.56 MYT.

¹⁶ [Komnas Perempuan](#), (2006), Pekerja migran Tak Berdokumen Sebuah Stratgei Perempuan Mempertahankan Kehidupan Studi Kasus li

¹⁷ *Ibid.* Halaman 60

issues, but also occurs in the United States, Negara which often heralds itself as the most democratic country, the country that respects human rights the most. In the case of *Hoffman Plastic Compound v NLRB*, the United States Supreme Court justified the disparity in treatment of undocumented migrant workers. The state does not want to give equal rights between undocumented and undocumented migrant workers for fear of abuse of confession that will actually encourage an increase in illegal immigrants.¹⁸ According to an American court, Jose Castro, an undocumented migrant worker who was unilaterally dismissed by his employer because he joined a union was not entitled to severance money and other facilities commonly given to laid off workers.¹⁹ Jose Castro was declared informed for all the rights that should be the right of a worker who is experiencing termination of employment due to his or her unauthorized status *as a migrant worker*. Even more concerning is that he was unilaterally dismissed simply for joining a union, an organization to fight for workers' rights. The ruling has had a significant impact on the domestic level because it means the court justified the mistreatment of undocumented migrant workers by employer employers. Based on the consideration that they obtained a job *illegally (unauthorized)*, they should not be entitled to the job then they are also considered not entitled to any *legitimate worker rights (authorized workers)*.²⁰

This United States Court ruling is understandable given that however undocumented migrant workers do indeed break the rule of law of the *host country's national state*. This relates to a country's territorial sovereignty.²¹ Undocumented migrant workers can harm Country hosts from the economic as well as socio-political side.²² They do not pay taxes that are supposed to be income for the state, pose a threat to domestic workers and could pose social problems.

¹⁸ Sarah H. Cleveland, "Legal Status and Rights of Undocu-mented Workers", *99 American Journal of International Law*, 460, 2005, hlm. 460

¹⁹ Faye M. Kolly, "The Right of association Enforcing In-ternational Labor Rights of Undocumented Workers via The Alien Tort Claim Act", dalam *Saint Louis University Public Law Review*, 23 St. Louis U. Pub. L. Rev. 669, tahun 2004, hlm. 669-670

²⁰ Connie de la Vega & Conchita Lozano-Batista, *op.cit*, hlm. 48-49

²¹ Ved P. Nanda, "Domestic and International Legal Res-ponses to Emerging Migration Issues: International Mig-ration: Trends, Challenges, and the need for Coopera-tion within an International Human Rights Framework, dalam *ILSA Journal of International and Comparative Law*, 17 *ILSA J. Int'l & Comp. L.* 355, tahun 2011, hlm. 360

²² Elisabeth J. Sweeney Yu, "Addressing The Economic Impact of The Undocumented Immigration on the American Worker: Private The Rico Litigation and Public Policy", dalam *20 Notre Dame J.L. Ethics & Pub. Pol'y* 909, 2006, hlm. 913

Undocumented migrant workers on the other hand are vulnerable to violations of human right, the abuse of power and power owned by more powerful *people*. They are exploited by people who exploit their illegal status. The illegal is not the work they do but the existence of those without documents that is illegal. In this case, the Government of Mexico fought hard for migrants to defend Human Right, its citizens who become undocumented migrant workers. According to Mexico, even though the citizens are undocumented migrants, they still have the right to protection and do not take discriminatory measures. These workers are already giving America economic benefits. Furthermore, the Government of Mexico also claims that discriminatory treatment of undocumented migrant workers violates the legal principles of Human Right, internationally considering the various instruments of International Human Right does not distinguish the status of workers between the undocumented and the undocumented. They are all entitled to protections and rights as workers, signed up to join the union.²³

According to the 1990 convention of migrant workers and their families, documents are a protective tool for migrant workers. However, the document has become a tool of legitimacy for migrants of various discriminated against and human rights violations in the name of their illegality.

Problems

There are two discussions discussed in this article. *First*, with regard to the legal ability of International Human right to provide protection to undocumented migrant workers; and *second*, about what solutions can be offered to countries where many undocumented migrant workers arrive so that on the one hand their national interests are preserved and on the other hand do not violate human right undocumented migrant workers.

Research Methods

This research is normative legal research, the type of data used is secondary data consisting of primary, secondary and tertiary legal materials. Primary legal materials include International Covenant on Civil and Political Right. Universal Declaration of Human Right and International Labor Organizations *conventions* and Conventions on the protections on the right of all migrant worker and member of family. Secondary legal materials in the form of research results, writings

²³*Ibid*,

and opinions of international law experts related to the subject matter. Tertiary materials in the form of dissertations and encyclopedias. The legal materials are obtained by library *research*. The research approach used is the statutory approach. The analysis carried out is qualitative analysis. The results of the study are presented descriptively analytically.

Discussion

Protection of Undocumented Migrants Under International Law

As stated in Article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members in 1990, a migrant worker is a person who will, is or has done paid work in a country where he is not a citizen. Article 5 (a) further makes it clear that migrant workers are considered to have been documented or are in ordinary situations if they are granted entry, residence and perform paid work in the country in which they work, in accordance with the laws of that country and international treaties under which the country is a party. On the contrary, migrant workers will be deemed undocumented or in unusual circumstances if they do not comply with the requirements set out in the above provisions.²⁴

There are two branches of international law that are close to the subject of the protection of undocumented migrant workers, namely international trade law and the International Human Rights Law. International Trade Law is considered important considering a worker or worker sells their services to those in need. Human Rights law is very relevant considering that workers belong to the category of *vulnerable* persons, vulnerable people experience human rights violations committed by superior parties.

Protection of Undocumented Migrant Workers in International Trade Law

International trade law is very relevant to review migrants, namely in terms of the protection of undocumented migrant workers considering the trade not only the goods sector but also the service sector. *General Agreement on Trade in Services* (GATS) that regulates service trade only protects skilled workers (*high skills*) such as experts in the financial services sector.²⁵ The GATS Annex, which *includes the Movement of Natural Persons*, does not provide rules on

²⁴ <https://www.ohchr.org/en/professionalinterest/pages/cmw.aspx>. Diakses pada hari Sabtu, 02 Januari 2021. Pukul 18.53 MYT

²⁵ https://www.wto.org/english/tratop_e/serv_e/movement_persons_e/movement_persons_e.htm.

the ratification of workers entering a country but only *requires* certain measures such as non-discrimination and national treatment *to authorized workers* entering GATS member states.²⁶

Little progress was made in the Doha round that began in 2001 when migrants first began *negotiating a trade* in services that did not require high skill (low skilled *labor migration*). It is necessary for migrants to help development in the developing and underdeveloped countries that are the *home state* of low skilled *undocumented migrant workers*. As ²⁷*is known undocumented migrant workers* generally exist in informal sectors that do not demand high skills such as factory workers, workers in plantations and mines as well as domestic workers and most of them are from developing and underdeveloped countries. Migrant negotiations to ease the authorization of migrant *workers* who are not protected by GATS have begun through GATS visas that have been practiced in several countries including India although it has not yet appeared to provide results for developing and underdeveloped countries.²⁸ Thus, although there has been progress but until now international trade law especially GATS does not provide enough protection to *undocumented migrant workers*. Proven from protection through non-criminalized treatment and national *treatment is* only given to high skill *labor authorized migrant workers* only.

Protection of Undocumented Migrant Workers in International Human Rights Law

As described in the introduction *because undocumented migrant workers* are illegal then they often do not get protection from domestic labor laws. Violations of their basic rights are ignored. On the other hand, undocumented migrant workers often have no choice but to accept lower-wage jobs, receive a variety of ill-treatment and be discriminated against because of their illegal status.²⁹ Returning to their home country is not the right choice for them even often considered suicide because the situation in the home country does not allow them migrants to get a job.

The National Human Rights Law protects those at risk of human rights violations including undocumented migrant workers. The following are the rights granted by international Human Rights Law to undocumented migrant workers. According to Beth Lyon, there are at least 3

²⁶ Sefriani, *Perlindungan hukum terhadap pekerja migran yang tidak berdokumen*, Jurnal Dinamika Hukum. Volume 13 No 2 Mei 2013. Page 249.

²⁷ Ibid

²⁸ Ibid

²⁹ Ibid, Page. 250

principles of human rights protection for undocumented migrant workers. *First, the right to equal protection and equality before the law dictates equal treatment under all employment laws regardless of immigration status; Second, remedies as well as worker rights must be equally granted regardless of immigration status; dan Third, the right to equal protection and equality before the law further dictates additional, protective measures for unauthorized workers because of their vulnerability.* What Beth Lyon said can be described in the description below.

*First, undocumented migrant workers have the right to join the Free Trade Union for organized migrant workers joining the migrant trade union conveying its aspirations is a recognized right of international customary law because it has been recognized in a large number of international treaties, declarations, resolutions, has also been adopted as a fundamental right in the national laws of countries in the world.*³⁰ Article 26 of the Convention on Migrant Workers and their families states that migrant workers have the right to join a migrant union to fight for their fate. Furthermore, Article 8 of the ICESCR states *that "states that everyone has a right to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned."* Freedom of organization is also governed by *the ILO Declaration on Fundamental Principles and Rights at Work*. This declaration is binding on all members of the ILO. This declaration guarantees a variety of freedoms for workers such as the freedom to form unions, collective bargaining, the elimination of all forms of discrimination without any exception.³¹ The next instrument is the ILO Convention No. 87, *the Convention on the Freedom of Association and Protection of the Right to Organize* as well as the ILO Convention No. 98, *the Convention on the Right to Organize and Collective Bargaining*. Both ILO conventions affirm that the right of migrants to organize, to join a trade union is the right of all workers regardless of their status whether as undocumented or undocumented workers. Under Article 8 number (1) letter (c) ICESCR restrictions on the right of migrants to join a union can only be restricted in matters relating to public safety, national security, public health or morals, or the right and freedom others.

Although the freedom to join a trade union is recognized in the law of international law, it does not mean that there is no longer a violation of that right. A number of Middle Eastern countries such as Jordan, Kuwait, Lebanon, Oman, Israel, Qatar, Saudi Arabia, Syria, and Yemen

³⁰*Opcit*, Page 250

³¹ ILO Declarations on Fundamental Principles and Right at Geneva. 1998;

restrict the union rights of workers both documented and undocumented.³² The American court's ruling in Hoffman's case stating that undocumented migrant workers fired by their employers for joining unions are not entitled to severance money is deeply hurting the sense of justice because this ruling is tying the same as legitimizing what employers are doing to prohibit their workers from joining migrant unions conveying their aspirations.

Second, undocumented migrant workers are entitled to effective *remedy*. Employer practices often take advantage of the status of undocumented migrant workers by hiring them with excessive hours but withholding wages, paying wages well below standard, or even not paying their wages at all. They also intimidate workers into reporting their illegality to the authorities if they demand their rights. What these employers are doing violates international human rights law because undocumented migrant workers are entitled to effective *remedy*. That undocumented migrant workers are entitled *to an effective remedy* has gained recognition in the law of international customs. This is reflected in various legal instruments both international and regional which are later adopted into the national law of many states, as well as various court rulings that recognize the right of effective *remedy*. Not only the ICCPR, the Migrant Workers Convention and its families as well as the UDHR, conventions whose scope is regional such as Europe, Africa, and America although in different redactions but the principle states that *everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law*.

Trial in *Singh v. Jutla case*³³ require employers to pay the wages of undocumented migrant workers for work they have done since January 1995 May 1998 that has not been paid by the employer.³⁴ The court found that undocumented migrant workers were entitled *to an effective remedy* even though their status was illegal. The court held that the employer had no right to withhold workers' wages because he knew of the illegality of the workers in question but continued to use his services so there was no reason for migrants not to pay their wages. Granting the request of migrant employers not to pay the wages of undocumented migrant workers is a violation of human rights and will only benefit employers who exploit undocumented workers by utilizing the immigration status of the workers concerned. It is further stated that employers should also not

³² Sara Hammerton Clareke

³³ Ibid

³⁴ ibid

seize or withhold any immigration documents belonging to migrant workers. The verdict in Singh's case was followed by subsequent cases such as *the Cortez v. Medina Landscaping case*. also the case of *Martinez v. Mecca*.³⁵ In both cases when employers tried to use the Supreme Court of America's ruling in Hoffman's case, the court ruled that Hoffman's case was limited to severance payments due to termination of employment but no migrant liability for paying wages or overtime wages that became the right of undocumented migrant workers.

Often employers not only seek profit through the employment status of migrant workers by not paying their wages or paying wages well below the standards of undocumented workers but also often do not want to be responsible for losses due to work accidents experienced by undocumented migrant workers. In this case the court also stated that undocumented migrant workers are entitled to *effective remedy*. Some of the court rulings related to this issue include the *Cano v. Mallory Management case and the Con Edison case*. In this case the employer refused to compensate its undocumented migrant workers who suffered level 3 burns due to an explosion of an electrical meter at the employer's factory. Employers argue their workers are illegal *foreigners*, so they are not entitled to work accident compensation. A New York district court rejected the employer's argument by stating that the employer knew of the employment in question but continued to hire it so that it should be held accountable for what its workers were experiencing. Workers have the same rights as migrant undocumented workers get *effective remedy*.³⁶

As for the case of *Hernandez Cortez v. Hernandez*,³⁷ The court recognized the rights of undocumented migrant workers to *obtain effective remedy* for car accidents he experienced while carrying out his work. However, the court rejected labor claims demanding compensation for its future losses. The laborer argued that because of the accident he would no longer be able to carry out his migrant work for some time to come, so he would have lost the income he would have earned had he not had the accident. Unfortunately, in this case the court restricted the *effective remedy* demanded by undocumented migrant workers. The court rejected the claims of undocumented migrant workers on the grounds that the right of undocumented migrants was only

³⁵ 213 FRD 601 SD FLA 2002

³⁶ NYS 2 D 816 NEW YORK SUB COURT 2003

for the work he had done, he had no right to claim future losses because his work had not been done.³⁸

Third, undocumented migrant workers are entitled to *equality before the law*, *equal protection*, and *nondiscrimination*. There is no instrument of international law that permits discriminatory treatment of undocumented migrant workers based on their nationality or immigration status. Article 2 states to oblige migrant member states to provide the enumerated rights and all individuals within their jurisdictions without regard to race, color, sex, language, religions, political or others opinion, nation or birth or others status. Another *said status* in the above article should be interpreted that migrant workers, even if their status is undocumented have the same rights as others who are undocumented, Article 3 obliges the state to guarantee "*the equal right of men and women to the enjoyment of all civil and political rights set forth in the ... Covenant.*", and Article 26 confirms that *all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases*. ICCPR are provisions that underlie the principle of *equal protection of the laws*. The same terms can also be found in the CERD in article 5. Article 1 CERD prohibits:

Racial discrimination, defined as distinction, limitation, exclusion, or preference based on race, descent, color, or national and ethnic origin that has the purpose or effect of nullifying or undermining recognition, enjoyment, or Exercise on an equal footing, or fundamental human rights and freedoms in the fields of politics, economy, social, cultural, or human rights and fundamental freedoms in the economic, political, cultural, social, or other areas of public life.

Equality before law, equality of protection and nondiscrimination is also affirmed in Article 7 of the Universal Declaration on Human Right (UDHR) which specifies:

all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Furthermore, Article 1 paragraph (2) of the convention affirms that the principle of non-discrimination will apply during the entire process of migrant workers and their family members, consisting of the preparation of migrant migration, departure, transit and all paid stays and

³⁸ *Ibid*

occupations within the country of employment, and the return to the Country of origin or State in which they reside.

The 1990 convention of migrant workers and their families was the first instrument to explicitly regulate undocumented migrant workers. The term used by this instrument is *irregular migrant workers*. This instrument is issued out of the international community's awareness of the protection gap between documented and *undocumented migrant workers (irregular migrant workers)* that exist in practice. An important obligation given by the convention to all countries is that migrants do not commit acts of discrimination.

The convention guarantees equal rights for all migrant workers by ignoring their immigration status. Section III of the Convention, Article 8 to Article 35, states that the rights of all migrant workers are no exception to *irregular migrant workers* such as protection from *violence and equal conditions, equal wages* of migrants, overtime wages, holidays, occupational safety, and health, as well as the right to join a union. These rights must be granted by the employer. The fundamental rights that must be provided by the state are emergency medical *care*, the right to the education of migrant children, respect for cultural identity, as well as the procedure of examination that ensures safety. While not requiring, the Convention asks host countries to consider the possibility of legalizing undocumented workers in their country considering the factors of the working family as well as the length of their stay in the host country. ILO Convention number 143 urges countries to host migrants as quickly as possible to make decisions on legislation.³⁹

The ambiguous thing about this Convention is the existence of CHAPTER IV. Chapter IV is entitled other rights for migrant workers and their undocumented families. The issue that arises from this chapter is whether the assertion of rights for documented workers means that undocumented workers are not entitled to what is stipulated in Chapter IV of this Convention. Rights guaranteed in Chapter IV include the right of migrants to vacation, free to move and determine their residence, joining a trade union, political rights, access to education services, social and health services, transferring salaries to their home country, tax-free or tax-free as applicable to local citizens. The existence of Chapter IV can be contradictory to what is stipulated in Article

³⁹ Laura Jakubowski, *op.cit.*, hlm.512

7 on non-discrimination and overlaps with what is regulated in Chapter III which is declared the right for all migrant workers. Other legal instruments that provide equal treatment for undocumented migrant workers include the ILO Convention on Migrant Workers Migration (No.97), the Convention on Migration In Persecuted Circumstances and the Promotion of Equal Opportunity and Treatment for Migrant Workers (No.143 Recommendations on Working Migrant Migration (No.86), Recommendations on Migrant Workers (No.151), Convention on Compulsory Labor or Forced Labor (No.159), and Convention on the Elimination of Forced Labor (No.105).

Still related to non-discriminatory treatment, *the Inter American Court* requested by the Mexican Government granted its advisory opinion against the American court's ruling in Hoffman's case stating that American courts cannot put undocumented migrant workers in unfavorable legal positions regarding their rights as *workers* simply because they cannot qualify *for completeness as legal residents or legal citizens* or lawful laborers. Furthermore, the inter-American court also stated that the court should not ignore the principle of *equality before the law* is also *non-discrimination to achieve public policy* or any reason including related to immigrant status.⁴⁰

The Solution for the State in Dealing with Undocumented Migrant Workers in Its Territory

As stated in the introduction, the existence of undocumented migrant workers has the potential to harm Negara host. This is especially so when viewed in terms of economic, fiscal, and socio-political interests of the host country. As a sovereign party, host countries that do not want their territory to be inundated with undocumented migrants should do their utmost to prevent the influx of undocumented migrants. Preventive measures are much better than repressive or enforcement measures such as deporting, criminalizing, or allowing undocumented migrant workers to be mistreated by their employers.

The first precaution that a State can take is to conduct strict surveillance or security in the border area to prevent undocumented migrants from entering their territory. As stated in International Covenant on Civil and Political Right number 15 states that, ICCPR does not grant

⁴⁰ Advisory Opinion, page 114. Paragraph 11.

foreigners the right to enter the territory of a country without the permission of the country concerned. The state has the authority and right to determine who enters its territory.⁴¹

The second-tier preventive measures are carried out to impede the entry of *clandestine immigration* by making undocumented migrant workers unprofitable for employers, for example by imposing hefty fines on employers who employ undocumented migrant workers.

The state reserves the right to deport undocumented migrant workers based on violations of immigration law if it feels their arrival has an adverse impact on the country. However, if the migrants are perceived to benefit the state then the state should facilitate the change of their status from illegal to legal. This would double the advantage of protecting workers from the arbitrary exploitation of employers who use or exploit their legal status and provide tax revenue benefits to the state.

The first important note that must be considered by the state is that when the migrant worker has entered and lived in the territory of the Country concerned, has got and carried out his work then he is entitled to migrant workers get his rights as a laborer regardless of the validity status of his immigration documents. Undocumented migrant workers *are entitled to equality before the law, equality protection, non-discrimination treatment, the right to join a union, entitled to an effective remedy*, entitled to a safe and decent workplace for the safety of their lives, entitled to both work wages and overtime, and others as guaranteed in various instruments of international Human Rights law.

The second important note is that although as stated above the state is prohibited from discriminating against undocumented migrant workers, the ICCPR and ICESR allow discrimination as long as *the discrimination is objective and reasonable*.⁴² Article 34 of the Convention on migrant workers and their families affirms that nothing in the Convention will result in migrant workers and their family members regardless of the obligation of the migrant to comply with the laws and regulations of the Transit State and the State in which it works, or the obligation of the migrant to respect the identity and culture of the inhabitants of those Countries. The state is authorized to restrict undocumented migrant workers in the interest of *national security*

⁴¹ ICCPR In General Comment number 15

⁴² Alan Stevens Alan, *Emory International law Review*, Rev. 2000. 406

or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others" It is stated in Article 22 paragraph (2) of the ICCPR.

Conclusion

International Law does not grant rights to migrant foreigners entering the territory of a country without the permission of the country concerned. International law does not require a country of migrants to accept *undocumented migrant workers*. However, international law requires that migrant countries respect, fulfill, and protect the rights of undocumented migrant workers who have carried out their work without discrimination on any basis including their immigration status.

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