

THE RELATIONSHIP BETWEEN MIGRATION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF THE MEXICAN MIGRATION CASE

Resumen

El objetivo del presente artículo de investigación es destacar mediante una metodología cualitativa el ejemplo significativo de la relación entre migración y desarrollo económico representado por la migración mexicana. Desde el Programa Bracero, la migración mexicana a Estados Unidos ha aumentado de manera significativa, confluyendo en el Tratado de Libre Comercio de América del Norte (TLC) y en el tratado NAFTA, pero, propiamente el análisis de los mismos demuestra el fracaso de las políticas laborales migratorias, ya que la migración puede ser un factor pujante en el desarrollo económico y no un elemento de disuasión. Por lo tanto, en las políticas de desarrollo se necesita un enfoque integral que considere la migración como un factor de crecimiento.

Palabras clave

Migración, México, Desarrollo, NAFTA.

Abstract

The objective of this research article is to highlight through a qualitative methodology the significant example of the relationship between migration and economic development represented by Mexican migration. Since the Bracero Program, Mexican migration to the United States has increased significantly, converging in the North American Free Trade Agreement (NAFTA) and the NAFTA treaty, but, in fact, the analysis of these shows the failure of the migratory labor policies, since migration can be a thriving factor in economic development and not a deterrent. Therefore, development policies need a comprehensive approach that considers migration as a growth factor.

Keywords

Migration, Mexico, Development, NAFTA.

Referencia: Tevere, V. (2019). The relationship between migration and economic development: an analysis of the Mexican migration case. *Cultura Latinoamericana*. 29 (1), pp. 88-109. DOI: <http://dx.doi.org/10.14718/CulturaLatinoam.2019.29.1.4>

LA RELACIÓN ENTRE LA MIGRACIÓN Y EL DESARROLLO ECONÓMICO: ANÁLISIS DEL CASO DE LA MIGRACIÓN MEXICANA

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DOI: <http://dx.doi.org/10.14718/CulturaLatinoam.2019.29.1.4>

Introduction

This paper concerns research on the issue of the relationship between migration and development through an analysis of Mexican labour migration between the United States and Mexico.

The Mexican case is one of the most important international migratory flows, and could be a valid example to understand the relationship between migration and development (Martins, 2013, p. 68).

Recently, this relationship has also caught the attention of international organizations. In fact, the United Nations (UN) has included this point in the UN's Post-2015 Development Agenda. It must be noted that migrants are an important resource for both sending and receiving countries. Population dynamics, including migration, should be considered by states in their development strategies and policies.

In fact, according to a thesis on the migration–development relationship, there should be ‘a virtuous circle’ in this link. Mature

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This article is the result of a research project developed in the University of Salerno.

Fecha de recepción: 10 de febrero de 2019; fecha de aceptación: 9 de marzo de 2019.



migratory processes should be characterized by the presence of consolidated social networks and migrant organizations, and migrants working abroad seen as a potential factor for local, regional and national development (Reichl Luthra & Waldinger, 2010).

A developed migratory process considers, first of all, the human rights of all migrants but unfortunately this doesn't happen very often in many states of destination. A good development must go together with respect for migrant workers rights. So this is a new goal to achieve in this historical moment—we should have more 'humanism' in the development projects.

For example, in the Mexican case, migration from Mexico to the US was not a real promoter of development in the migrant-sending areas, but only in the receiving country (the US), because economic integration under the NAFTA treaty has accentuated the asymmetries between Mexico, a developing State, and the US (Delgado Wise & Guarnizo, 2006) a developed state. In this example, there was a 'vicious circle' and the Mexican labour market in the US did not have a very 'human face'. In fact, the development plans of the sending and receiving countries did not take into consideration the respect for and protection of the human rights of Mexican workers who worked in sweatshops with unfair conditions. However, the development of a country also depends on the degree of consideration of the human rights of individuals – not only those of the native people but also of the immigrants.

The first part of this essay will show the context from which the increase of Mexican labour migration to the US originated, in particular the development of the *maquiladoras* plan on the northern border with the US and the North American Free Trade Agreement (NAFTA) with its indirect and adverse effects on the Mexican migration question.

In the second part of the paper we will focus further on the human rights of migrant workers with specific regard to the denial of labour rights for Mexican migrant workers.

It will be noticed that an effective development of a country must also depend on the degree of consideration of the human rights of migrants people. In particular, it will emerge that the international instruments to protection of migrants, including the most important UN convention on the protection of the rights of all migrant workers and their member families (ICRMW) wasn't ratified by states of destination like the US but only by a few states from which people emigrated. The rights placed in this Convention are not often considered



by the US and Mexico, as was seen in the *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* case and in the situation of migrant workers in *maquiladora* factories, which will be analyzed.

The increase of Mexican labour mobility to the US: The Bracero Program and the establishment of *maquiladora* factories before the NAFTA treaty

In the beginning, the Mexican labour migration flow from Mexico to the United States (US) started with the *Bracero Program*, an important temporary American guest worker program based on a bilateral agreement between Mexico and the US signed after the Second World War.

In the same period (1955–1973), in Europe, there was a similar program, called the ‘Gastarbeiter system’, which recruited temporary migrants in Germany from a number of Mediterranean countries, such as Italy (Rudolph, 1996).

Under the Bracero Program, over 4 million Mexican farm workers came to work in the US. This work program expired in 1964 (Gordon, 2010, p. 4). This agreement had an advantage because it was very flexible and could be adapted to changing labour market dynamics in the US, the receiving country.

Moreover, one of the reasons why the Bracero Program ended is that Mexican workers often overstayed in the US becoming irregular migrants. After this guest worker program, the Mexican government created jobs in Mexico by crafting the *maquiladoras* plans with the Maquiladora Export Program in 1965.

With increasing economic global integration the *maquiladoras* factories have been the instrument used by Mexican government policy to integrate the country’s economy with the rest of the world. *Maquiladoras* were new export processing factories, specialized in the assembly industry and established with foreign investments. Mexico’s *maquiladoras* sector was dominated by US corporations, including General Motors, General Electric, Zenith, Panasonic etc, which owned at least 90 percent of the factories. In 1990, after the NAFTA treaty, *maquiladoras* were the source of billions of dollars a year in export earnings for Mexico and employed over 500,000 workers.

However, the *maquiladoras* were places where Mexican workers earned low wages. For this reason, many Mexican workers moved to the US to find better working conditions.



The increase of Mexican labour mobility to the US: Labour market *maquiladoras* after the NAFTA treaty and the failure of the trade agreement to provide a solution for the Mexican migratory flow

So the *maquiladoras* also made a contribution to international migration and they did not only represent an example of intraregional migration. In particular, the Mexican migration flows to the US increased further in the 1990s. On December 17, 1992, the NAFTA treaty was signed by two North American States, Canada and the US, and a Central American State, Mexico and it came into force on January 1, 1994. The NAFTA agreement shaped a regional integration process between Mexico, the US and Canada.

To analyze the case of Mexican migration, it is therefore necessary to focus on the NAFTA treaty, its objective and its effects on Mexican worker flows.

The NAFTA agreement is a free-trade treaty. The main objective of NAFTA is to eliminate barriers to trade and to facilitate the cross-border movement of goods and services between the territories of the parties (Article 102).

This represents a big difference from the European Union integration (EU), an integration model that is more advanced pursuant to Article 3, par. 1, lett. c) TFUE, which provides that “*the European single market aims to eliminate between the EU states barriers to the free trade of goods, people, services and assets*”. Basically, the EU integration model also provides for the free movement of people, not only the free trade of goods.

Also the Mercosur (*Mercado Común del Sur*) is a subregional bloc with the purpose of promoting free trade and the fluid movement of goods, people and currency. Its full members are Argentina, Brazil, Paraguay, Uruguay and Venezuela. Its associate countries are Bolivia, Chile, Peru, Colombia, Ecuador and Suriname. MERCOSUR has agreements to facilitate labour movements across borders but, despite the NAFTA system, Mexico is only an observer country.

However the NAFTA treaty is not solely a trade agreement. In fact, according to the purposes of the negotiators, it could have the potentiality to produce indirect political and social effects, beyond its commercial effects (Di Stasi, 1998). In fact, at the beginning, the NAFTA treaty could have been a tool for the development of all of the party countries, but this objective was only partly fulfilled.



NAFTA did not produce its positive effects for the real development of Mexico but instead led to a lot of disadvantages for the Mexican unskilled workers who moved to the US.

It was noticed that after NAFTA, a labour market segmentation was created between primary and secondary labour market segments. The first contains good jobs while the second contains 'bad jobs' as well as barriers to mobility across these labour sectors.

In fact, Mexican migration from Mexico to the US generated a 'dual labour market'. Mexico exported to the US cheap labour. Mexican workers earned low wages –less than those earned by American native workers.

There is a relationship between the NAFTA and the *maquiladoras* industrialization. In fact, the regional integration model created more jobs, increasing the development of *maquiladoras*, but Mexican people also moved to the US in search of better living standards and sufficient minimum wages. It may be concluded, then, that Mexican people did not migrate because a lack of jobs but to improve their working conditions and to search for better pay.

However, it is common knowledge that the NAFTA treaty increased the development of the industrialization (more than 87 percent of *maquiladoras* were located specifically on the Mexican borders), encouraging new export business (with the additional negative effect on the environment due to pollution problems) in Mexico, and increased the free trade of goods and capital between the countries' parties, but it also broadened the asymmetries between the two countries, increasing illegal migration to the US (Boskin, 2014). It was not the intention of the negotiators to solve in depth the problem of migration, which was limited only to trade regulations as if the migration solution could alone disappear from the development of the liberalization of trade. In this case there was not a correct equation for trade development / migration. The movement of goods and the movement of people are not the same thing (Gordon, 2010, p. 4). This is evidenced by the fact that they require specific border policies. Indeed, more than a trade agreement, the migration question would have to be solved with specific bilateral agreements between the migrants' state of origin and the state of destination. For this reason, in the Mexican labour migration case, it was hoped that we could more thoroughly regulate the phenomenon of migration to the US through the establishment of bilateral agreements on migration and the creation of a transnational labour citizenship (TLC).



According to this theory, transnational labour citizenship would reconfigure the relationship between the sending countries and the United States, rework the core assumptions of the US immigration system and reshape the way that the US government and civil society workers' organizations relate with regard to labour migrants. The framework for TLC would be established through negotiations between the US and Mexican governments. The TLC would permit its holders to work for any employer in the US with full rights, with eventual conversion to permanent residence if the migrant so desired. The role of transnational labour organizations would be very important (Gordon, 2009). This theory should be very interesting and fascinating, and should be considered in the debate regarding the relationship between migration and development.

Furthermore, another limitation of the NAFTA treaty was that it only considered professional mobility. It was crafted to enhance profit-making for big businesses, not for all workers.

In fact, chapter 12 of the treaty sets forth the framework for mobility and the obligations regarding services, particularly professional services (for example, lawyers). Moreover, chapter 16 of the agreement addresses the 'temporary entry for business persons'.

It has been noted (Gal-Or, 1998) that the failure of NAFTA to provide a real solution to the Mexican immigration question was due to the lack of provisions for all workers. The omission of general provisions regarding labour became an issue in 1992 during the presidential elections. As he promised during his campaign, President Clinton, in addition to NAFTA, negotiated a 'side' labour agreement in 1994 called NALC (the North American Agreement on Labour Cooperation). The NALC preserved labour standards. According to the principle of cooperation, each member state promised 'effective enforcement of its labour laws'.

The NALC provides fundamental labour principles such as occupational safety and health; equal pay for men and women; labour's right to organize trade unions; the right to strike; the prohibition of forced labour; labour protection for children and young people; the prohibition of employment discrimination; the prevention of occupational injuries and illnesses; and the protection of migrants workers. It also provides procedural guarantees to support fair, transparent and equitable legal processes. These include the promise to ensure due process of law, open meetings, the right to be heard, reasonable fees, impartial review and effective remedies. However, these provisions have been ignored by the party countries.



Therefore, the NAFTA treaty has failed to consider the majority of immigrant workers: unskilled workers. Most of these workers are undocumented Mexican immigrants in the US. This category includes workers in rural labour, construction labour, work as dishwashers, cleaning operators, roofers, etc. Most Mexicans move from Mexico to improve their lives and illegally cross the southern borders of the US. They seek employment in unequal conditions in sweatshops.

According to the report of the US General Accounting Office (GAO), a sweatshop is a workplace in violation of two or more basic laws governing working conditions, such as those addressing wages, safety and child labour (Gordon, 2005). The GAO reports that:

[i]llegal aliens comprise a substantial portion of the sweatshop workforce. These undocumented workers are easily exploited by unscrupulous employers and frequently labour for long hours at less than minimum wage under unsafe and unhealthy conditions. In some cases, illegal aliens are held in sweatshops under conditions of involuntary servitude.

In the second part of this essay we will see how the Mexican case is an example of the violation of the most important international instrument on the protection of migrant workers: the UN Convention on the protection of the rights of all migrant workers and their member families (ICRMW).

Mexican labour mobility after NAFTA and the violation of human rights in the case of undocumented migrant workers.

The international agreement was founded on the principle of cooperation between the party countries, but this principle was ignored, especially in violation of workers human rights. It should be noted that the NAFTA treaty had two faces: a real face and a symbolic face (Gaines, 2003). On the one hand, it increased investments and industrialization in Mexico through the development of the *maquiladoras*. On the other hand, it was not the right means to improve the general conditions of life for the Mexican population. In fact, in the *maquiladoras* (specialized in the electronic industry– for example, Guadalajara became a centre for computers and other high-tech production– Mexican workers had low wages. There were jobs but not a good and humane work. In fact, many Mexicans entered the workforce in *maquiladora* plants but they did not have regular em-



ployment. There was no difficulty in attracting unskilled workers, and as we have seen, also young female regional migrants from the rural areas, at low wages without rights. For this reason, for many Mexican workers it seemed a better solution to move to the US to search for jobs with good conditions, but often this did not happen, especially for the undocumented workers in the US undocumented workers are those migrant workers who are without a valid residence or work permit. There are many circumstances under which this would have happened. For example, they may have been given false papers by unscrupulous agents or they may have entered the country with a valid work permit but may have lost it because the employer may have arbitrarily terminated their services, or they had become undocumented because employers may have confiscated their passports. Sometimes workers may have extended their stay after the expiry of the work permit or entered the country without valid papers.

The *Sure-Tanv. National Labor Relations Board* judgment, the *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* judgment of the Supreme Court and the Advisory Opinion of the Inter-American Court of Human Rights on Undocumented Migrants

The American domestic law has violated the fundamental principle of discrimination for undocumented workers. In this regard, there are two important leading cases: the Supreme Court Judgment in *Sure-Tanv. National Labour Relations Board*, ruled in 1984 and the Supreme Court Judgment the *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* ruled in 2002 (Cassel, 2006).

The first case involved a small employer in Chicago (Sure-Tan Inc.), most of whose employees were undocumented Mexican migrant workers. After a successful union-organizing drive, the employer objected to the National Labor Relations Board (NLRB) that most voters in the union election were illegal aliens. The NLRB overruled this objection. The employer then notified the immigration authorities, who arrested several employees who agreed to a 'voluntary' return to Mexico in lieu of deportation. The NLRB found that Sure-Tan violated domestic labour law by notifying immigration authorities to investigate the employees 'solely because' they supported the union. It ordered the employer to desist from this and from other labour practices and also ordered the conventional remedy of



reinstatement with back pay', leaving the question of whether the employees were in fact available for work, a prerequisite for these remedies, for further proceedings. On review, the federal court of appeals found that if it had not been for the employer's illegal act of notifying the immigration authorities, the workers might have kept their jobs for at least another six months. Therefore it awarded them six months backpay. The Supreme Court agreed that the employer had violated the rights of the undocumented workers but by a 5-4 majority set aside the backpay. The Court ruled that undocumented workers are 'employees' within the meaning of domestic labour legislation to protect union organizing. So, the Court allowed labour rights for undocumented workers.

After this case, undocumented workers had domestic labour rights including the right not to be discharged from employment or reported to immigration authorities because of their union activities. They were entitled access to an administrative agency (the NLRB) and courts to enforce these rights, and to some remedies. However, if they left the US they faced the probable unavailability of the key remedies of backpay and reinstatement. However, later, in 1986, the Congress passed new immigration legislation, the Immigration Reform Control Act (IRCA), designed to combat the employment of undocumented migrants. This act required employers to obtain and employees to sign documents verifying their lawful presence in the country and authorization to work. Employers who violated the IRCA were subject to civil fines and criminal penalties and undocumented workers who give employers fraudulent documents were guilty of crimes. The *Hoffman Plastic Compounds Inc v. National Labor Relations Board (NLRB)*, a case concerning undocumented Mexican workers, verified the effects of the IRCA on labour union rights and remedies of undocumented workers and changed the *Sure-Tan* doctrine. It is important to analyze this Judgement of the US Supreme Court, decided in March 27, 2002 . The facts are as follows: Hoffman Plastic Compounds was a corporation that formulated chemical compounds for business. In May 1988 it had hired Mr Castro, a Mexican citizen, on the basis of documents appearing to verify his authorization to work in the US. According to the IRCA of 1986, 'the employers must verify the identity and eligibility of all new hires by examining specified documents before they begin work'. In December 1988, the United Rubber, Cork, Linoleum and Plastic Workers of America (AFL-CIO) began a union-organizing campaign at Hoffman's production plants. Castro and several other



employees supported the organizing campaign and distributed authorization cards to co-workers. In January 1989, Hoffman laid off Castro and other employees engaged in these organizing activities. Three years later, in January 1992 the Respondent Board found that Hoffman had unlawfully selected four employees, including Castro, for layoff 'in order to rid itself of known union supporters' in violation of par. 8 8°) 3 of the National Labor Relations Act (NLRA). To remedy this violation, the Board ordered that Hoffman cease and desist from further violations of the NLRA and offer backpay to the employees. In June 1993, the parties proceeded to a compliance hearing before an Administrative Law judge (ALJ) to determine the amount of backpay owed to each discriminated. On the final day of the hearing, Castro testified that he was born in Mexico and that he had never been legally admitted to, or authorized to work in the US. He admitted gaining employment with Hoffman only after tendering a birth certificate belonging to a friend who was born in Texas. Based on this testimony, the ALJ found the Board precluded from awarding Castro backpay. However, in September 1998, four years after the ALJ's decision, and nine years after Castro was fired, the Board reversed its decision with respect to backpay. The Board determined that 'the most effective way to accommodate and further the immigration policies embodied in the IRCA (Immigration Reform and Control Act) is to provide the protections and remedies of the NLRA to undocumented workers in the same manner as to other employees'. The Board calculated this backpay award from the date of Castro's termination to the date Hoffman first learned of Castro's undocumented status. Hoffman filed a petition for review of the Board's order in the Court of Appeal. A panel of the Court of Appeal denied the petition for review. The case was decided later by the US Supreme Court. Regarding the legal question, there is a conflict between two US laws, which protect different interests. On the one hand, there is the IRCA (Immigration Reform and Control Act), which protects US borders security, on the other hand, there is the NLRA (the National Labor Relations Act), which protects the rights of workers. The motivation behind the Supreme Court's judgment was this: In this case Mr Castro was fired unfairly while he was trying to organize a union with other workers. However he was an undocumented worker. According to the US Supreme Court, undocumented workers do not have the same rights as other legal workers. This is a critical point of this judgement and several judges, in this case, did not agree. According to the US Supreme Court,



Mr Castro would have lost his right to backpay because he was an undocumented migrant and he had violated the NLRA Act' and 'Mr Castro had committed serious violations of the NLRA, using false documents to obtain employment with Hoffman Plastic Compounds'. So the Board had no discretion to remedy these violations by awarding reinstatement with backpay to employees who themselves had committed serious criminal acts. According to the US Supreme Court, 'allowing the Board to award backpay to illegal aliens, would encourage the successful evasion of apprehension by immigration authorities, condone prior violations of the immigration laws and encourage future violations'. In this judgment there was also the dissenting opinion of the Justice Breyer with whom Justice Stevens, Souter and Ginsburg joined. '[The] Backpay remedy is necessary; it helps make labor law enforcement credible. It makes clear that violating the labor laws will not pay'. 'To deny the board the power to award backpay will increase the number of undocumented migrants because it is convenient for the employer to hire them'. According to this opinion, "enforcement of the NLRA is compatible with the policies of the Immigration and Nationality Act'.

After this case, in 2003, an Advisory Opinion of the Inter-American Court of Human Rights on the legal Status and rights of undocumented migrants set out principles that were the opposite to the Hoffman decision.

In fact, the Court set the fundamental principle of equality and non-discrimination, which is entered in the domain of *jus cogens*. Mexico felt that American policies on undocumented migrant workers were discriminatory and asked the Court to render an advisory opinion about this.

The Court considered that the rights of migrant workers had not been sufficiently recognized everywhere and, furthermore, undocumented workers were frequently employed under less favorable conditions of work than other workers (par. 132). Moreover, according to the Court, 'labor rights necessarily arise from the circumstance of being a worker (...) 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'. Furthermore, 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. According to opinion, it is clear that *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 (par. 134).

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 labour; the prohibition and abolition of child labour, 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 safeguarding of these rights for migrants has great importance based on the principle of the inalienable nature of such rights that 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 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood'.

The Court considered that undocumented migrant workers are in a situation of vulnerability and discrimination with regard to national workers in the state of entry but they have the same labour rights of employment as those that correspond to other workers of the state and the latter must take all necessary measures to ensure that such rights are recognized and guaranteed in practice. Therefore all workers, as possessors of labour rights, must have the appropriate means of exercising them, and the goal of migratory policies should take into account the respect of human rights (par. 168 ; in www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf).

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) and the other international instruments for the protection of labour rights of migrant workers.

The conditions of the undocumented Mexican migrant workers in sweatshops in the US are an example of a violation of the human rights of workers. The UN, in Resolution n.45/158, approved the Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW).



This Convention was born after the death of some non-citizen irregular workers from Mali in 1972 in France, in the tunnel ‘Monte Bianco’. They died in a truck which was transporting them across the Italian border where they were supposed to be working illegally.

Before this Convention, in 1975, the ILO (International Labour Organization) also signed Convention n. 143 regarding undocumented migration and the promotion of equal treatment of migrants workers. This was a convention concerning migration, protecting international migrant workers from abusive conditions and promoting equality of opportunity and treatment of migrant workers. This Convention was also important because its Article 1 provided that member states undertake to respect the basic human rights of all migrant workers, regardless of their legal status. This is very important because it is one of the few ILO instruments that did not exclude undocumented immigrants from its application (Díaz & Kuhner, 2009).

According to the International Convention on the Protection of the Rights of Migrant Workers, a migrant worker, instead, is *a person who is to be engaged or has been engaged in a remunerated activity in a state of which he or she is not a National*. This UN Convention is based on the principle of non-discrimination. Article 7, in t part. II, lays down that State Parties, in accordance with the international instruments concerning human rights, undertake to respect and to ensure *to all migrant workers and members of their families* the rights provided in the Convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. Moreover, Article 8, paragraph 1, establishes that *migrant workers and members of their families shall be free to leave any State, including their State of origin*. Therefore, mobility is a human right. Another very important Article is Article 24, which provides: *Every migrant worker and every member of his or her family shall have the right to recognition everywhere as a person before the law*.

According to the Convention, the State Parties cooperate with a view to promoting sound, equitable and human conditions in connection with the international migration of workers and members of their families (Article 64). It should be noticed that Article 82 provides that the Convention *‘it shall not be possible to derogate by contract’*.

However, this is a critical point because, at the moment, many states, including the US, have not ratified the Convention (further information about the state of the ratification of ICRMW is available



at www.ohchr.org). According to what has been observed regarding Mexican undocumented migrants, it can be deduced that under international law, migration is a very important issue, but in reality, few countries are currently realizing the rights of migrant workers and considering migration as a positive factor for growth. This has been demonstrated by the NAFTA experience.

The international community is working to promote and protect the fundamental rights of migrant workers who cross international borders, but much work needs to be done.

The ICRMW has the longest course of all UN instruments because it is making the slowest progress between the initial adoption and the ultimate entry into. In fact, at the moment, it has the smallest number of participating countries. In fact a lot of developed Western countries (which are the major destinations of international migrants) have shown a reluctance to ratify the Convention (Battistella, 2009, p. 47). This demonstrates that it is very difficult to approach migration from a human rights perspective. However, only a human rights perspective on migration could be the right key to real development in this age of globalization. In monitoring the Convention an important role is played by the Committee on the Protection of the rights of migrants workers (CRMW), which oversees the implementation of this Convention. It consists of 14 independent experts who are elected for a term of four years by State Parties to the Convention. The CRMW holds sessions two times a year in Geneva (Switzerland). Generally the CRMW will issue recommendations in the form of concluding observations. In particular, Article 77 of the Convention foresees an individual complaints mechanism to allow the CRMW to address specific violations of the Convention¹.

1. The article 77 of the Convention provides: 1. A State Party to the present Convention may at any time declare under the present article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established by the present Convention have been violated by that State Party. No communication shall be received by the Committee if it concerns a State Party that has not made such a declaration. 2. The Committee shall consider inadmissible any communication under the present article which is anonymous or which it considers to be an abuse of the right of submission of such communications or to be incompatible with the provisions of the present Convention. 3. The Committee shall not consider any communication from an individual under the present article unless it has ascertained that: (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement; (b) The individual has exhausted all available domestic remedies; this shall not be the rule where, in the view of the Committee, the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to that individual. 4. Subject to the provisions of paragraph 2 of the present article, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to the present Convention that has made a declaration under paragraph 1 and is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by



Very relevant, for example, is the General Comment CRMW/C/GL/2 n. 2 made by the CRMW on 28 August 2013, regarding the rights of migrant workers in an irregular situation and members of their family, which underlines, in the III, that some fundamental rights, including the right to join trade unions and to social security, are extended to all migrant workers, including undocumented workers. Furthermore, the Committee is fearful of the situation of children migrant workers, especially those of undocumented workers (cfr. General Comment CRMW/C/GL/2). The CRMW is of the view that the terms ‘in an irregular situation’ or ‘non-documented’ are the proper terminology when referring to this status and the use of the term ‘illegal’ to describe migrant workers in an irregular situation is inappropriate and should be avoided. There is another important General Comment CMW/C/GC/1 of 23 February 2011 on the situation of migrant domestic workers, in which the CMW has observed that there was recently a trend of growing prevalence of migrants amongst domestic workers, especially women migrants. The CMW has noticed the particular vulnerability of this category of migrants.

Discrimination Against Women in *maquiladoras*

In *maquiladoras* production the female labour force was also very important (at least 50% of employees were women) but without guarantees and often in violent conditions. Sex discrimination was very common in *maquiladoras*. The case of Nogales and Ciudad Juarez is very famous: many young Mexican women have migrated from rural towns to work at the border in *maquiladoras* (Kopinak, 1996) Nogales, which was the sixth largest *maquiladoras* area, located on Mexico’s northern border, represents an area of intraregional migra-

that State. 5. The Committee shall consider communications received under the present article in the light of all information made available to it by or on behalf of the individual and by the State Party concerned. 6. The Committee shall hold closed meetings when examining communications under the present article. 7. The Committee shall forward its views to the State Party concerned and to the individual. 8. The provisions of the present article shall come into force when ten States Parties to the present Convention have made declarations under paragraph 1 of the present article. Such declarations shall be deposited by the State Parties with the Secretary-General of the United Nations, who shall transmit copies thereof to the other State Parties. A declaration may be withdrawn at any time by notification to the Secretary-General. Such a withdrawal shall not prejudice the consideration of any matter that is the subject of a communication already transmitted under the present article; no further communication by or on behalf of an individual shall be received under the present article after the notification of withdrawal of the declaration has been received by the Secretary-General, unless the State Party has made a new declaration. However the CMW will only be authorized to receive individual complaints after 10 State Parties have made the declaration necessary to accept the individual complaint procedure).



tion in Mexico. It had fewer plants but the number of employees per plant was much higher. So, the *maquiladoras* were not only icons of trade liberalization, after the NAFTA, but they were also places of sex discrimination against women. Unfortunately, the economic development did not also have as a consequence social development. In fact, economic development should live together with a high level of protection of human rights. The conditions of women *maquiladoras* migrants workers are an example of development does not automatically go hand in hand with respect for human rights.

For example, Ciudad Juarez, which sits directly across the US Mexico border from El Paso (Texas), is a centre very famous because of its high migrant worker murder rate.

A lot of women have been murdered here. Many victims worked in the *maquiladoras* assembly factories and their bodies were found raped, disfigured and lying in the garbage-strewn desert just beyond the *maquiladoras* industrial parks on the outskirts of the city. In 1999, a group of bus drivers hired by the *maquiladoras* to transport women to and from work were arrested for several female murders.

There was not enough protection offered to women workers. They worked for many hours and also during the night. There was no safe protection and cares for their health. Also, there was no guarantees for woman in pregnancy. So, in the *maquiladoras* experience there is an intersection among gender, labour and violence. According to one theory (Moser, 2001) there is a framework for this causal level of gender violence. There is a multitude of causal factors of gender violence at the structural, institutional, interpersonal and individual levels. In the case of the *maquiladoras* the trade development, which lacked gender policies to protect women migrant workers, also contributed to sexual discrimination.

In *maquiladora* factories, a lot of young Mexican women who moved from the rural areas in Mexico to the northern border (which was an inter-regional migration) made up a relevantly significant portion of labour in the assembly industry, helping the global economy.

They entered the *maquiladoras* from economic necessity to help their families. A lot of them were also single women. They wanted to gain financial independence but this independence had the price of inequality and often of sexual violence.

Employers in *maquiladoras* in export processing zones hired women in work because they showed more respect and obedience to the authority of men, following orders willingly, accepting changes and adjustments easily.



Their work was cheaper than that of men. Moreover, they had no training and they were relegated to limited roles as low-paid workers.

The *maquiladoras* industry devalued women workers, paying them lower wages and creating an environment where women were considered untrainable.

In the case of the *maquiladoras*, the principles of human rights and gender equality were not considered by the Mexico and US corporations, according to the Convention on the elimination of all forms of discrimination against women and the General Recommendation n. 26 on women migrant workers (CEDAW/C/2009/WP.1/R) signed on 5 December 2008.

In fact, the General Recommendation n. 26 of CEDAW (in www.hrw.org/new/1996/08/17/mexicos-maquiladoras-abuses-against-women-workers) considers the specific vulnerability of many women migrant workers and their experience of sex and gender-based discrimination as a cause and consequence of the violation of their human rights. It provides that all women migrant workers are entitled to the protection of their human rights, which include, first of all, the right to life, the right to personal liberty and security, the right not to be tortured, the right to personal liberty and security, the right to be free of degrading and inhuman treatment, the right to be free from discrimination on the basis of sex, race, ethnicity, culture, particularities, nationality, language, religion or other status, the right to be free from poverty, the right to an adequate standard of living, the right to equality before the law, the right to equality in benefits from the due processes of the law. These rights are also provided for in the Universal Declaration of Human Rights.

It is noticed that women migrant workers may receive lower wages than men because of discrimination on the basis of gender and sex.

They often suffer from inequalities that threaten their health. In fact, they may be unable to access health services, in case of pregnancy, for example, including gynecological health services.

Moreover, in this recommendation, it is underlined (par. 20) that migrant women workers are more vulnerable to sexual abuse, sexual harassment and physical violence, for example in the industrial sector or in domestic working. There is a 'double vulnerability' because they are migrants and they are female (Morrone, 2013).

For this reason the Committee has recommended the State Parties to formulate a comprehensive gender-sensitive and rights-based policy and to protect the human rights of women migrant workers.



However in the case of *maquiladoras* this recommendation was ignored by Mexico and US.

In particular, the Committee has asked for more protection for undocumented migrant women workers who must also have access to legal remedies and justice in case of risk to life and of cruel and degrading treatment, regardless of the lack of immigration status.

In conclusion, in the situation of women migrant workers there was a violation of the CEDAW.

Discussion

In conclusion, in addressing NAFTA and its effects on Mexican migration and development, this paper has shown that the NAFTA treaty has not been a valid development tool for the parties involved, because it does not thoroughly address the migration issue and its potential as a growth factor. This failure has demonstrated the need for a multi-factor' approach to address development policies, including migration and respect for the rights of migrants.

The case of undocumented workers is emblematic. Moreover, it deals only with purely commercial aspects and not the issue of labour mobility, unlike the EU integration model; therefore, it contributes to increasing the phenomenon of migration in a negative way by encouraging undocumented migration.

Furthermore, the situation of women workers in *maquiladora* factories, who moved from the rural areas of Mexico to the industrial centres on the northern boundaries, has demonstrated how women migrants were oppressed and discriminated twice as much as males migrants. We have also reported that there is a very important UN international instrument on the protection of the human rights of migrant workers (ICMW), which unfortunately was not ratified by States of destination like the US. Moreover, the US immigration policies and the domestic law (IRCA) do not conform to international instruments to the protection of all migrant workers. The *Hoffman Plastic Compounds Inc. v. National Labor Relations Board* case is a valid example of this. In this judgment the Supreme Court did not afford to the undocumented migrant workers the same social rights (the back pay) of other workers because of their irregular status. We have also reported the important advisory opinion of the Inter-American Court of Human Rights on the legal status and rights for undocu-



mented migrants (2003), which sets out principles that are opposite to those of the *Hoffman* decision.

In this opinion it is underlined that a migrant worker is first of all a person and his status shouldn't in any way deprive him of his fundamental rights.

In the category of migrant workers there are particularly vulnerable groups like women who are also protected by international instruments such as the CEDAW. In this regard General Recommendation n. 26 of the CEDAW Committee was also reported, in which the specific vulnerability of women migrant workers is considered.

In particular, discrimination in the workplace on the basis of gender and sex represents an ugly plague in the global world.

In conclusion, from this research into the issue of migration and development it is shown that a good economic development must also have as a consequence social development and a sensitive perspective on the migration question.

It is necessary that the States' policies on development must have a high level of protection of the human rights of migrants who are vulnerable people. In the Mexican case there was no protection of the human rights of Mexican migrants workers. However, it was essential to report on this case in order to understand that there is an intersection between development, migration and human rights. We hope for a new inclusive societal model of development based on much more humanism and respect for the fundamental human rights of migrants and we wish that policies will put the person at the very core of the political and economic project.

With regard to this issue, the UN Declaration for Refugees and Migrants, adopted by all Member States at the UN Summit for Refugees and Migrants on 19 September 2016 in New York, could be a first important step. This Declaration expresses the political will of world leaders to protect the human rights of all refugees and migrants, regardless of status, to prevent and respond to sexual and gender-based violence and to strengthen the positive contributions made by migrants to economic and social development in their host countries.

References

- Battistella, G. (2009). Migration and Human Rights. The Uneasy but Essential Relationship in Migration and Human Rights. The United Nations Convention on Migrant Workers Rights (pp. 47-69).



- In R.Cholewinski, P. De Guchteneire, A. Pecoud (eds.) *Unesco*. Paris and Cambridge UK.
- Boskin, J. (2014). *NAFTA at 20 (The North American Free Trade Agreement's achievements and challenges)*. California: Hoover Institution Press, Stanford University.
- Cassel, D. (2006). Equal labor rights for undocumented migrant workers (pp. xx-xx). In, A.F. Bayesfsky (ed.) *Human rights and refugees, internally displaced persons and migrant workers, essay in memory of Joan Fitzpatrick and Arthur Helton*. Boston: Martinus Nijhoff Publishers.
- Delgado Wise, R. & Guarnizo, L.E. (2006). *Migration and development: lessons from the Mexican experience*. Recovered from www.migrationpolicy.org.
- Di Stasi, A. (1998). Ordine Economico Mondiale e Grandi Spazi Organizzati (pp. xx-xx). In M. Panebianco, A. Lamberti, G. De Simone (eds.) *Il G7 ed il nuovo ordine internazionale*. Roma-Salerno: Ledip-Elea Press.
- Diaz G., & Kuhner, G. (2009). Mexico's role in promoting and implementing the ICRMW (pp. 219-246). In R. Cholewinski, P. De Guchteneire, A. Pecoud (eds.), *Migration and Human Rights: the United Nations Convention on Migrant Workers Rights*. Paris, Unesco: Cambridge UK, Cambridge University Press.
- Gaines, E., (2003). NAFTA as a symbol on the border. *UCLA L. Rev.*, 51, pp. 1-50.
- Gal-or, N. (1998). Labor mobility under NAFTA: regulatory policy spearheading the social supplement to the international trade regime, *Arizona Journal of International & Comparative Law*, 15 (2), pp. 366.
- Gordon, J. (2010). People are not bananas: how immigration differs from trade. *Northwestern University Law Review*, 104 (3), pp. 1109-1145.
- Gordon, J.(2009). Transnational labor citizenship. *S. Cal. L. Rev.* 80 (3), pp. 503-588.
- Gordon, J., (2005). *Suburban Sweatshops, the Fight for Immigrant Rights*. Massachusetts and London, England: The Belknap Press of Harvard University Press.
- Kopinak, K. (1996). *Household, gender and migration in Mexican maquiladoras: the case of Nogales*. New York: CMS.
- Kopinak, K. (1995). *The continuing importance of gender as a vehicle for the subordination of women maquiladoras workers in Mexico*. Latin American Perspectives: Spring.



- La Vega, C. & Lozano-Batista, C. (2006). Advocates should use applicable international standards to address violations of undocumented migrant workers rights in the US. *Human Rights and Refugees*, 22, pp. 517-550.
- Martins, P. (2013). *Labour migration and development indicators in the post 2015 global development frame work, Migration and the United Nations post-2015 Development Agenda*. Geneva: IOM publications.
- Morrone, F. (2013). La violencia contro le donne migranti tra strumenti normativi di cooperazione e prassi internazionale. *Diritti umani e Diritto internazionale*, 7, pp. 55-77.
- Moser, C. (2001). The gendered continuum of violence and conflict (pp. 13-29). In C. Moser, F. Clark (eds.) *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*. London: Zed Book.
- Reichl Luthra, R. & Waldinger, R. (2010). Into the mainstream? Labor market outcomes of Mexican – origin workers. *International Migration Review*, 44 (4), pp. 830-868.
- Rudolph, H. (1996). The new Gastarbeiter system in Germany. *New Community*, 22 (2), pp. 287-300.