

Global Workers Require Global Justice:
The Portability of Justice Challenge for Migrants in the USA

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I. Introduction

Businesses are global. Workers are global. Justice is not. Due to their unfamiliarity with the local languages, laws and available assistance, foreign migrant workers are frequently exploited in their countries of employment. When migrants return home, however, they are forced to abandon their legal claims because their access to justice in their country of employment is thwarted once they leave.

Most migratory norms focus on the rights in the country in which the migrants are physically present. But the migrants' ability to vindicate rights violated in one state when they return home or move to a third state is an issue that has not received the attention it deserves.

This paper shall address the portability of migrant justice in the United States and relate it to the Committee on Migrant Workers Day of General Discussion Guidelines "General" Point One: "Consequences of an increased protection of the rights of migrant workers and members of their families on the development in both the country of origin and the country of employment."

This issue is not confined to migrants in the United States. Rather the inability of migrants to seek redress after leaving their country of employment is a scenario repeated in any transnational migratory stream. Until nations allow justice to be portable by removing substantive and procedural legal obstacles, such as allowing longer statute of limitations, absentee plaintiffs, extraterritorial application of employment laws, and ensuring that laws apply equally to foreign workers, migrant workers will continue to labor in the shadows of globalization.

The Global Workers Justice Alliance, a non-governmental organization dedicated to promoting effective and efficient transnational legal representation of global migrant workers by fostering and supporting a network of advocates in nations affected by global migration, is grateful to the Committee on Migrant Workers for the opportunity to introduce this important issue and explore its connection to development.

II. Migrant Mobility and the Effects on Vindicating their Rights

Migration for work does not always result in permanent resettlement in the country of employment. In fact, the trend globally is for temporary foreign migration to meet domestic labor needs. By tying workers' legal presence to the length of employment, the host country is assured that the workers must leave when the employment ends. Workers also return home for other reasons, including caring for ill relatives or starting businesses with the money they have saved. Whatever the reason may be, it is essential that these workers are able to vindicate their legal rights after they have left. If they are thwarted in these efforts, then an underclass of laborers is created which is all too attractive to employers who seek to avoid complying with the law. As a result, labor and safety standards are lowered for all workers.

This is the scenario happening all over the world. In the United States alone, the result is that valid claims are routinely abandoned and thousands of workers never receive their wages or treatment for compensable injuries. The legal and practical barriers advocates face in representing these migrants prevent the majority of workers from ever addressing violations of their rights. The lack of portable justice is a violation of migrant human rights.

Case Study: United States and the Denial of Transnational Migrant Justice

Exploitation such as untreated work place injuries, underpayment of minimum or overtime wages, and sexual harassment are commonplace for foreign migrants in the United States. Legal services are available to low-wage workers in the United States, although not nearly sufficient to meet the demand of over 100,000 workers who hold temporary ("H2") work visas or the six million undocumented laborers. Although it varies greatly, most states have one or more of the following which provide a certain level of legal support to foreign workers: state department of labor, federal department of labor, state attorney general offices, non-governmental organizations (which can include federally funded legal services, state funded legal services, workers rights centers), and private attorneys.

The difficulty in representing migrants who have left the country is that the United States legal system relies legally and practically on an available litigant. In general there are two types of legal actions, one in which a small group can represent all of the similarly affected litigants ("class action") so the whole group or "class" will ultimately benefit, or individual or collective actions where each person must formally join the suit at the outset in order to benefit from it.

During the course of civil litigation, the workers need to be available in four phases: initial case development (joining plaintiffs to the suit); pre-trial "discovery," such as depositions (a formal interrogation in the presence of a court reporter), interrogatories (written questionnaires), and requests to produce (documentary evidence); and settlement when workers must approve settlement terms with the defendants, or trial, when workers may be called on to testify. In class actions, only the "class representatives," a small

group of litigants who represent the class, must be available for discovery, trial testimony or settlement negotiations. Eventually, workers in any legal action who will benefit from a court award or negotiated settlement must be available to actually receive the monies.

Litigation is typically a protracted procedure. From the date the case is filed to the day of trial is usually more than one year and if appeals are involved it could potentially continue for over a decade. Migrants, however, are not likely to have remained in the country for this length of time. In fact, most migrants have moved on, jeopardizing the viability of their legal claims. Their mobility and subsequent lack of availability greatly increase the chance that they will be dropped from the case at some point during the litigation. The following are real-life examples of the impact on legal claims caused by migrants' mobility and an unaccommodating legal system.

In the example described below, workers could not be located at the outset, the "initial case development" phase. The workers who did not join the suit will not benefit from the collective action law suit.

- Thousands of janitors cleaned USA "Big-Mart" stores nightly. They never received overtime and were locked into the stores at night. A small group of janitors decided to stand up to the company, and found a small firm of lawyers willing to represent them. The court set a six-month deadline to find the approximately ten thousand workers eligible to participate in the suit. The private attorneys, unable to travel to the 14 countries from where the workers hailed and where the majority were expected to have returned, were only able to locate two hundred of them after four months of searching.

During the pre-trial "discovery" phase, additional workers will be excluded because they must leave the country and the legal system allows for little flexibility.

- She should have won \$3,000 as compensation for unpaid wages for her work at a tomato packing house. But "Rosa's" mother was dying and she chose to return to her native Guatemala instead of waiting two more days to sit for her scheduled deposition. Unable to arrange for the deposition to occur in Guatemala, Rosa's lawyers dropped her from the case and she never recuperated the lost earnings.

When cases conclude, workers are often no longer readily available to share in the award. That means even when cases are successful, the workers may never benefit—a tragic outcome for all involved. Another true-life example follows:

- For years, a farm, in Florida, USA, systematically paid its Mexican and Guatemalan migrant workers less than the minimum wage for picking tomatoes. A non-profit sued the grower for the wages the workers should have been paid. Four years later, the workers won the legal battle, but their attorneys could only locate 100 of the 2,000 affected workers. As a result only 5% of the workers received their share of the settlement.

Various possibilities exist for dispensing unclaimed awards depending on the type of law suit, the parties (whether private or public), the settlement terms, or the legal jurisdiction. For example, in union grievances, the National Labor Relations Board (the federal entity that enforces union law) will return unclaimed awards to the employer. If the state is a party, the money will revert to the state coffers after a stipulated statutory period. To avoid returning money disgorged from defendants who have violated the law in private law suits, courts have developed the *cy pres* doctrine which gives unclaimed class action awards to third parties such as non-profits that will use the money to benefit, albeit indirectly, the aggrieved class.

In a settlement, typically a fixed sum is negotiated and turned over to the plaintiffs' attorneys for distribution. If not all the workers are located, plaintiffs' attorneys whether non-profits or private firms will often split the monies between all the claiming litigants. In the Florida example highlighted above, the farm had agreed in the settlement to pay every claimant that came forward, gambling that the non-profit would not be able to locate many of the workers—the farm was right, it only paid out approximately \$100,000 instead of the nearly \$800,000 that was originally on the negotiating table.

Challenges to Initiating Legal Claims from Outside the United States

In the above examples, workers initiated their legal claims before leaving the jurisdiction. Most migrant workers, however, do not assert their rights before they leave the jurisdiction where the attorneys are available to assist them. Once they have returned home, workers have virtually no chance to vindicate their rights in the country of employment.

Several reasons exist causing workers not to file claims before they migrate. First, workers often do not know their legal rights nor where to obtain assistance. The legality of an issue is not always intuitive. Only through worker education will most realize that they have actionable claims. For example, in Florida, the tomato industry pays by piece-rate; a worker receives \$.40 per bucket of tomatoes picked. Workers know they have been wronged when they do not receive the \$.40 for each bucket. However, most do not know that the federal minimum wage is \$5.15 an hour, so that the wages received at the end of the work week must equal \$5.15 multiplied by the total hours worked. A myriad other such legal issues, for example the legal construct of compensable work time, constitute important, yet not necessarily obvious, protections. The result is that most migrant workers leave the jurisdiction unaware that their employer violated their rights.

Second, even workers who are aware of their rights are often fearful to assert them while under the watch of the employer. Fears of retaliatory firing, harassment, or deportation are real concerns. Although legal protections exist for these scenarios, they are typically difficult to prevent and harder to prove after the fact. Usually the short term outcomes are not satisfactory and cannot be relied upon as the sole measure to protect workers.

Once beyond the reach of the employer, workers may be in a better and more confident position to assert their rights. Unfortunately, once home, they do not have ready access

to the justice system in the host country. First, lawyers in the country of origin cannot bring suits in the host country. Only attorneys licensed to practice law in the state where the violation occurred can file suit. That means that even though those advocates may have better access to the returned workers, they cannot directly assist them. Moreover, most home-country advocates have little knowledge of substantive laws or litigation procedures in the United States and are, therefore, hard pressed to provide advice or know where to refer the workers for assistance. Second, there is no ongoing education of workers in the countries that send workers to the United States. Even if workers become aware of their rights, once they have returned home, there is little chance to assert them.

Advocate Efforts to Litigate Transnationally

Dedicated advocates in the United States do their best to confront these obstacles that prevent their transnational clients from vindicating their rights. The efforts, however, are time consuming, costly, and unsustainable, curtailing the advocates' willingness and ability to pursue these claims. Due to limited resources and contacts, it is common for cases to be withdrawn when migrants leave the country. Such was the case for a Colombian family when the state department of labor representing them dropped their wage claim when they returned to Colombia.

When sufficient resources exist, United States-based advocates travel to source countries to find potential plaintiffs, conduct discovery, or distribute settlements. For example, two attorneys and one paralegal went to rural Guatemala for one week to locate hundreds of potential clients who had not been paid the minimum wage for planting pine trees in Alabama. These workers would never have had the opportunity to claim their unpaid wages but for the sheer chance that one of the attorneys had experience in Guatemala and was willing to head the delegation. Other workers were not as fortunate. The similarly situated Honduran clients were not included in the suit due to lack of resources and contacts to find them in Honduras.

One legal services attorney's experience explains well the hardship that dedicated advocates face.

“When the court suddenly required us to bring our clients to the United States to testify in their minimum wage case we were stuck. It was crucial these workers had someone advocating for them to get them that visa. Even though we did not have the time or money we had to send an attorney to Mexico for one week to accompany these workers through the process. Without someone to help us in Mexico we simply had no choice.” Jim Knoepp, United States legal services attorney.

The human and financial costs expended in the current ad-hoc system render effective and efficient representation of transnational clients untenable for most United States attorneys. It is truly unjust that the businesses rely on mobile workers, but the justice system does not account for their mobility.

III. A New Approach: Transnational Advocacy & Portable Justice

Overcoming Practical Barriers to Transnational Litigation

In order for advocates to represent migrant workers under the new global worker landscape, justice must be transnationalized practically and legally. One approach to overcoming the practical barriers to migrant justice in the United States is to establish a transnational advocate alliance so that workers have access to justice no matter where they go. In order for sending-country advocates to be part of the solution to efficient litigation for transnational workers, they must be trained in United States procedural and substantive employment law. Once they have a basis for understanding, they will be able to assist United States attorneys who have returned clients or screen and refer new cases. Engaging sending-country advocates in the solution will not only enable host-country attorneys to better utilize their resources and increase the potential number of global migrant worker clients they serve, but will bring these advocates into the host nation migration dialogue—a voice that is now largely absent. Additionally, workers should have access to information about their rights in the receiving country both pre-departure and after they return.

Addressing Transnational Challenges Transnationally Will Result in More Effective Advocacy

Once advocates are working together to represent transnational workers, not only will the impact of specific litigation increase, but it will open the door to more creative and, perhaps, more effective advocacy. For example, a recent case charged that Mexicans in Mexico over a certain age were not contracted to work in the United States under the temporary guest worker program. The United States court concluded that it did not have jurisdiction over the case because the age discrimination occurred in Mexico. Unfortunately, the advocacy ended with the court's pronouncement. Considering the harm in a transnational perspective, an age discrimination case under Mexican law could have been filed in the appropriate jurisdiction in Mexico seeking relief for the harmed workers.

Other examples highlight how transnational coordination is essential to address some migrant worker injustices. In Guatemala, for example, several years ago United States businesses did not register with the Ministry of Work when recruiting Guatemalan workers to labor in the United States through the temporary worker program or pay the transportation and visa costs as stipulated in the Guatemalan labor code. When United States advocates approached Guatemalan advocates about the issue it was clear that they did not have knowledge of the issue but were motivated to denounce it. The Guatemalan attorneys can challenge the United States companies' unlawful practice in their country, but they need the information about the companies and the violations that the United States advocates can provide. Additionally, United States advocates can apply political pressure on the United States consulate in Guatemala, which facilitates the guestworker

program, to encourage companies to comply with the local labor laws. Pressure on both Guatemalan and United States governments is needed and that is best accomplished by advocates in both countries working together.

An interdependence among international advocates necessarily exists when laborers migrate through multiple nations. Ultimately, the workers will be better served when multilateral advocacy approaches are utilized. For example, as of this writing, Guatemalan workers in rural Guatemala are being threatened for participating in a lawsuit regarding wages earned while planting pine trees in the southern United States. In addition to the protective measures sought in the United States courts, a coordinated effort could spur Guatemalan attorneys to initiate a domestic response.

Overcoming Legal Barriers to Portable Justice

In addition to the practical challenges, legal barriers also exist which prevent justice from being portable. Re-envisioning the regulatory regime that governs workplace rights so it is transnationally viable would make the justice system responsive to the reality of today's global and mobile work force. In the United States, both procedural and substantive laws prevent justice from being portable and realistic sources of protection for transnational migrant workers.

Administrative obstacles vary. One example is the requirement in some jurisdictions that litigants appear before the court at least once during the litigation. For workers who have returned to their country of origin this mandate can be prohibitive due to cost and ability to obtain a visa. More recently, courts have been disallowing deposition testimony in lieu of live testimony unless the workers can prove they made a good faith effort to get a visa to the United States. Considering that most of these workers have little education and come from areas far from United States consulates, this jurisprudence can easily result in a worker being denied the opportunity to participate in a legal case. Some judges are more lenient about the use of telephone or video depositions as a substitution for in-person depositions. This trend should be encouraged and formally adopted in administrative codes because it recognizes that not all litigants are readily available.

Substantive legal issues also prevent migrants from accessing justice in the United States. Congressional regulations prohibit federally funded legal service programs from assisting migrant workers who labor with an H2B visa, the temporary guestworker program for non-agriculture work. This regulation prevents approximately 100,000 workers from accessing the most widely available legal services. Additionally, the federal legislation protecting United States farmworkers, the Migrant and Seasonal Agricultural and Seasonal Protection Act (AWPA), does not apply to temporary workers in the H2A program (temporary agricultural workers). Although the H2A program has its own regulations, the protections are not as extensive as the AWPA. As a result, foreign migrant workers are more vulnerable and the advocates have less legal options to combat exploitation. Other rules actually reduce or deny benefits available to migrants if they no longer reside in the United States, as happened in several recent workers compensation cases.

Additional Barriers for Unauthorized Migrants

Although most substantive employment protections extend to “undocumented” or “unauthorized” migrant workers, i.e. migrants who are working without the proper visa authorization, these workers face additional and increasing procedural and substantive obstacles when fighting for work-place justice. For example, federally funded legal services may not represent unauthorized workers; some states have disallowed time-loss benefits in worker compensation cases and, under the federal union organizing law, unauthorized workers who are unlawfully terminated for union activities are no longer compensated for the wages that they would have earned (“back pay”). This last issue spurred the Mexican government to seek an advisory opinion from the Inter-American Human Rights Court. Advisory Opinion number 18 held that international discrimination standards required nations to apply national labor and employment laws equally to unauthorized workers and domestic workers. Despite the additional and discrete issue of unauthorized workers’ inclusion under employment and labor laws, the portability of justice challenges apply equally to all workers regardless of immigration status.

IV. The Transnational Justice Impact on Economic Development

Development Impact on Sending Countries

The impact of portable justice on development in the sending country is direct: migrants will be able to move between countries without sacrificing their rights. Portable justice means that workers’ collection of their just wages will increase, and the need to re-emigrate will ease because the workers will have the chance to pursue economic opportunities with the recuperated earnings.

Development Impact on Countries of Employment

The development impact on businesses and workers in the United States as a receiving nation is also positive. By alleviating the obstacles to representing workers once they leave the sending countries, employers will be more readily held accountable for legal violations, no matter the nationality or mobility of the employees. This new reality will benefit the companies that already comply with local labor laws by leveling the playing field with the companies that seek immigrant labor calculating that few labor grievances will ever prevail due to the workers mobility and vulnerability. These entities have an unfair advantage over their law-abiding competition because they violate labor rights, e.g. lower labor costs, without repercussion. When these norms are compromised for one group, all workers—including national laborers-- are drawn into the downward spiral of decreasing work and safety standards. Ensuring that all workers have access to justice no matter where they go will help maintain minimum work standards for all

Transnational advocacy will make representation of clients who have left the host country feasible. By decreasing the human and financial costs expended in the current ad-hoc

system, United States advocates will be able to achieve their objectives more efficiently. This increases the likelihood of advocates being willing to pursue these claims and therefore the numbers of workers who ultimately benefit will increase.

Until justice is truly portable both legally and practically, migrant workers will continue to live and work in the shadows of globalization. Ultimately, the greatest beneficiaries of the disempowered foreign work force are the employers who disregard the domestic labor laws knowing that there is little to no consequence. Workers should not have to check their legal rights at the border. Global workers require global justice.

V. Migrant Worker Convention Provisions Relating to the Portability of Justice

Several articles in the International Convention of the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Worker Convention) relate to the issue of portable justice—although none specifically address the issue.

The most closely related provision addresses rights to wages after departing the migrant from the country of employment. Article 22.6 states, “In case of expulsion, the person concerned shall have a reasonable opportunity before *or after departure* to settle any claims for wages and other entitlements due to him or her and any pending liabilities (emphasis added).”

Various provisions assert that migrants must be treated equally as nationals in front of the courts (article 18), with regard to remuneration and other conditions of work (articles 25, 55 “regular migrants”, 54.1 “regular migrants”). Also several articles refer to “the right to address his or her case to the competent authorities” (articles 54.2 “regular migrants”, 61.2 “project-tied workers”).

Without the ability to fully enforce the rights, the worker protections are compromised. Unless migrants have access to the justice system in the country of employment after they have departed, then they will not have the full opportunity to enforce these rights. Although the right to recuperate wages after leaving the country of employment is only delineated in the context of deportation or expulsion, the core principle, reflected in the various articles highlighted above, is that all migrants have this opportunity.

Other provisions, such as articles 33, 37 (for “regular migrants”), address the need for pre-departure information regarding the employment, among other things, in the receiving nation. Article 65.1 requires the States to provide “services to deal with questions concerning international migration workers...” Although this provision does not specifically address providing services to workers to address legal issues that may have occurred in the country of employment after the worker has returned to the country of origin—the central tenet to ensuring justice’s portability—it could appropriately be embraced in this section.

The concept that migrant workers have a right to recuperate “wages and other entitlements” when they leave the country of employment shows that the portability of justice---the right to transnational access to justice and the accompanying access to information—is part of the State party obligations and are, therefore, a concern for the Committee on Migrant Workers.

The United States is not required to follow the Migrant Worker Convention because it is not a party to the Convention. The underlying issue of portable justice, however, is access to justice, which the United States is obligated to respect through other human rights instruments such as the Universal Declaration of Human Rights.

VI. Recommendations to the Committee on Migrant Workers

The Committee on Migrant Workers should assiduously monitor the issues that compromise the portability of justice or transnational right of enforcement. To ensure that State parties are addressing the issue, it would be useful to add questions to the current Provisional Guidelines regarding the form and contents of initial reports to be submitted by States parties under Article 73. The following are specific questions that may be useful guidance for State parties to articulate responses on the issue.

Suggested Questionnaire for:

Countries of Employment

- Availability of temporary work visas so that migrant workers may return to the country of employment to pursue non-frivolous legal cases (similar to article 38’s temporary absences).
- Existence of procedural judicial rules which allow for and accommodate absentee plaintiffs.
- Extraterritoriality of employment protections for workers recruited in sending countries.
- Extended statute of limitations for issues involving migrant workers.
- Statue of limitations which accrue when workers become aware of the violation as opposed to when the violation occurred.
- Benefit parity so migrants who no longer reside in country of employment are treated equally as nationals.
- Support for and inclusion of legal services for returned workers in bilateral or multilateral migrant worker treaties.

Countries of Origin

- State support of legal networks to support litigation in the country of employment by returned workers.
- Existence, availability, and effectiveness of State assistance to migrants pursuing litigation in the country of employment.

- Support for and inclusion of legal services for returned workers in bilateral or multilateral migrant worker treaties.

In addition to the Migrant Worker Convention, domestic laws and treaties (bilateral, multilateral, and regional) are important instruments governing migrant rights. While the Convention articulates general principles, each nation must apply them. It is important for the Committee to raise awareness and provide guidance and leadership to nations on the portability of justice. Spearheading regional dialogues or conversations is one approach to helping nations face and address this issue.

Lastly, it is recommended that the Committee on Migrant Workers produce a General Comment to define the transnational right to enforcement of migrant worker rights and explain how State obligations under the Migrant Worker Convention are affected by it.

VI. Conclusion

The United States is the largest migrant receiving nation in the world. Although it is not party to the Migrant Worker Convention, analysis of the portability of justice in the United States serves well to introduce the issue. More importantly, the lack of transnational enforcement is not confined to migrants laboring in the United States. The lack of access to justice is repeated wherever transnational migratory streams exist. Until these concerns are addressed--and the Committee is in a position to champion the issue--migrants will have rights on paper but have little chance to assert them if they do not remain in the country of employment.