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Sarah Paoletti

American University Washington College of Law

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Human Rights for All Workers: The Emergence of Protections for Unauthorized Workers in the Inter-American Human Rights System

by Sarah Paoletti

AS THE GLOBAL MIGRANT WORKFORCE INCREASES, particularly within the low- and semi-skilled job sectors, international and regional human rights mechanisms have responded by increasingly recognizing the need to protect the human rights of all migrant workers. Migrant workers are often referred to as “voluntary” migrants, as opposed to “involuntary” migrants, such as refugees, asylum seekers or internally displaced persons; however, an examination of the factors that drive migrant workers to leave their native countries, such as the search for economic survival for themselves and their families, reveals a far more complicated reality. The international human rights community, recognizing the vulnerability of migrant workers, has sought to develop fundamental standards to govern the treatment of all migrant workers, and to establish mechanisms for the global implementation of those standards.

For example, the Inter-American Commission on Human Rights established a Special Rapporteur on the Rights of Migrant Workers and their Families in 1996 at the behest of the General Assembly of the Organization of American States. Until recently, however, the Inter-American System did not have jurisprudence directly addressing the rights of migrant workers to guide the work of the Rapporteur. This changed on September 17, 2003, when the Inter-American Court issued its Advisory Opinion on the Legal Status and Rights of Undocumented Migrants (OC-18). As will be discussed in this article, the Inter-American Court not only granted equal rights in employment to undocumented migrant workers as those rights granted to all workers, but it also expanded workers’ rights under the Inter-American human rights jurisprudence. This article will look briefly at the development of standards at the international level to provide a context for discussing OC-18 in greater detail and its implications for all migrant workers throughout the Americas.

According to the International Labor Organization (ILO), which has recently placed the rights of migrant workers at the center of its discourse on worker rights, nearly 81 million people, excluding refugees, are migrant workers, with the majority located in Europe, followed by Asia and then North America. The ILO estimates that ten to fifteen percent of them are irregular migrants, meaning they have entered or are working in a host country without legal authorization. There are approximately 47 million migrants in the Americas, according to the Population Division of the United Nations Department of Economic and Social Affairs. The United States alone hosts an estimated eight to eleven million undocumented workers. Migrant workers without employment authorization are among the most vulnerable workers, subject to low wages and, in some cases, unpaid wages, dangerous work conditions, exploitation and other forms of abuse because of a lack—both perceived and real—of legal remedies or a lack of access to those remedies.

DEVELOPMENT OF HUMAN RIGHTS STANDARDS FOR MIGRANT WORKERS INTERNATIONALLY

AT THE INTERNATIONAL LEVEL, THE ILO AND MORE recently the United Nations (UN) have set universal standards pertaining explicitly to the rights of migrant workers. Although ILO labor conventions do not discriminate between nationals and non-nationals in the rights afforded, the ILO took an important leadership role in establishing fundamental standards expressly for migrant workers in 1949 through the Convention concerning Migration for Employment (No. 97). In 1975, the ILO expanded on those rights through the adoption of the convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143). The ILO also took the lead in being the first international body to hold explicitly that the labor rights that its conventions provide apply to irregular migrants.

More than half a century after passage of ILO Convention No. 97, the UN International Convention on the Protection of the Rights of All Migrant Workers and Their Families (UN Convention) entered into force on July 1, 2003, formally putting migrant workers’ rights into an international human rights framework. The UN Convention defines the term “migrant worker” as

"Migrant workers without employment authorization are among the most vulnerable workers, subject to low wages . . . dangerous work conditions, exploitation, and other forms of abuse."

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.” As with the ILO conventions, the UN Convention does not exclude irregular workers from its definition of migrant workers. Instead, the States Parties expressly recognize “that workers who are non-documented or in an irregular situation are frequently employed under less favorable conditions of work than other workers and that certain employers find this an inducement to seek such labor in order to reap the benefits of competition.” As such, the UN recognizes that to protect the rights of all migrant workers, it must provide recourse to fundamental human rights to those

in an irregular status. Unfortunately, the UN Convention has only 21 signatories and 26 parties to date. Thus the work of the ILO, and the emergence of migrant worker rights in regional human rights mechanisms, such as the Inter-American System on Human Rights, remains critical to ensure respect for the fundamental human rights of all workers.

RECENT DEVELOPMENTS IN HUMAN RIGHTS PROTECTIONS FOR MIGRANT WORKERS

THE MOST RECENT AND POTENTIALLY FAR-REACHING developments in international human rights law vis-à-vis irregular migrant workers have emerged in response to the 2002 United States Supreme Court decision in *Hoffman Plastics Compound, Inc. v. NLRB*. In *Hoffman Plastics*, the Supreme Court ruled that José Castro, an undocumented worker at a plastics factory who was fired for distributing union cards in violation of the National Labor Relations Act, had no right to recover back pay—the only direct remedy available to him—because he was not authorized to work. In so doing, the Court overturned decades of National Labor Relations Board precedent and put all undocumented workers in the United States at risk of further exploitation and abuse due to the resulting perception that undocumented workers in the United States have no rights.

Immediately following the decision in *Hoffman Plastics*, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) brought a petition before the ILO specifically addressing the U.S. Supreme Court's decision and the failure of the United States government to address discrimination against irregular migrants in the United States, specifically with regard to their trade union rights under ILO Convention No. 87, ILO Convention No. 98, and the ILO Declaration on Fundamental Principles and Rights at Work. In its Report on Case No. 2227, the ILO Committee, acknowledging its decision in Case No. 2121 providing irregular migrants the right to participate in union activities, held a worker was entitled to a meaningful remedy should that right be denied. The Committee concluded that the remedies remaining after *Hoffman Plastics* were “likely to afford little protection to undocumented workers who can be indiscriminately dismissed for exercising freedom of association rights without any direct penalty aimed at dissuading such action,” and that, as such, those remedies were insufficient.

INTER-AMERICAN HUMAN RIGHTS COURT ON MIGRANT WORKER RIGHTS

AT THE REGIONAL LEVEL, THE MEXICAN GOVERNMENT SOUGHT an advisory opinion from the Inter-American Court in May 2002, on the rights of undocumented workers. Mexico was particularly concerned about the implications the *Hoffman Plastics* decision would have for its nationals working in the United States, noting:

[The unauthorized workers'] vulnerability makes them an easy target for violations of their human rights, based, above all, on criteria of discrimination and, consequently, places them in a situation of inequality before the law as regards the effective enjoyment and exercise of these rights.

The Court's advisory opinion on *The Legal Status and Rights of Undocumented Migrants*, OC-18, issued September 17, 2003, served as a watershed mark for the rights of all migrant workers in the Inter-American System in two very critical ways: 1) it recognized the applicability of individual rights guarantees to migrants, regardless of immigration status, under the principle of equality and non-discrimination; and 2) it expanded the Inter-American System's jurisprudence on economic, social and cultural rights through its enumeration of individual rights included in the Protocol of San Salvador, but not explicitly included in the American Convention. Not insignificant to the Court's opinion was the position taken by the Inter-American Commission before the Court, which advocated on behalf of undocumented migrants and recognized the critical importance of extending core economic, social and cultural rights to all migrant workers.



Farm workers cut lettuce, preparing it for packing during harvest season in Belle Glade, Florida (October 2003).

ADVISORY OPINION OC-18

Prior to the Inter-American Court's decision in OC-18, the Inter-American system's jurisprudence directly addressing employment and labor rights was extremely limited. In sharp contrast to the ILO, whose mission is labor and employment rights, the Inter-American System focused almost exclusively on severe violations of civil and political rights. Although civil and political rights include freedom from slavery, freedom of assembly, and freedom of association, rights that the ILO has treated as core workers' rights, the Inter-American Court on Human Rights and the Inter-American Commission on Human Rights have historically only addressed them as tangential to the more grave civil rights violations of the rights to life, humane treatment, personal liberty, a fair trial, and judicial protection. Similarly, when the petitioners or the subjects of the petition have been workers or union leaders, the Commission and Court historically treated their identity as workers merely as part of the context for understanding the violations of other rights and did not directly address the employment relationship as the cause for the rights violations.

Furthermore, although the American Declaration and the Charter of the Organization of American States (OAS) fully recognize economic, social and cultural rights, and specifically the right

to work and to fair remuneration, only Article 26 of the American Convention calls upon States Parties to achieve “progressively, by legislation or other appropriate means, the full realization of rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of Organization of American States as amended by the Protocol of Buenos Aires.” Since the entry into force on November 16, 1999, of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), which articulates the rights encompassed in Article 26 and provides a legal framework similar to that of the International

nation; 2) the application of the principle of equality and non-discrimination to migrants; 3) the rights of undocumented migrant workers; and 4) states’ obligations in the determination of migratory policies in light of the international instruments for the protection of human rights. In addressing these issues, the Court evaluated the fundamental nature of the principle of equality and non-discrimination, determining it to be a *jus cogens* principle.

Core to the Court’s decision was its analysis of Article 24 of the American Convention on Human Rights, which provides that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

The right to non-discrimination is also a central component to the Protocol of San Salvador, under which the States Parties “undertake to guarantee the exercise of the rights set forth herein without discrimination or any kind for reasons related to race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition.” Both the Commission and the Court have interpreted these provisions, as they relate to individual guarantees, to apply equally to non-nationals and nationals.

The Inter-American Court of Human Rights first addressed the applicability of Article 24 to non-nationals in its advisory opinion on the *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica*, OC 4/84, January 19, 1984. There, the Court acknowledged a difference between discriminating against individuals or a group of individuals and noting differences or factual inequalities. In looking at whether differences in legal treatment are discriminatory, the Court suggested it would evaluate whether the differences are “in themselves offensive to human dignity,” or whether they had a “legitimate purpose” that would not “lead to situations which are contrary to justice, to reason or to the nature of things.”

In OC-18, the Court expanded upon the principle of equality and non-discrimination as it applies to migrants. While recognizing that states may distinguish between migrants and citizens in the granting of political rights, the Court reiterated that states may not discriminate in the granting of individual rights. Although the Court allowed states, as it had done earlier, to grant “distinct treatment” between undocumented migrants and documented migrants, or between migrants and nationals, it maintained that the differential treatment is only permissible to the extent it is “reasonable, objective, proportionate and does not harm human rights.” As such, states may distinguish between a migrant’s and a national’s right to ownership of the political process and may control the entry and departure into their territory of undocumented migrants, but only if the mechanisms which they employ guarantee due process and respect for human dignity. With regard to employment, the Court allows states to distinguish between nationals and non-nationals in terms of who has the right to employment, but unequivocally stated, “if undocumented workers are engaged, they immediately become possessors of the labor rights corresponding to workers and may not be discriminated against because of their irregular situation.”

Equally important to the Court’s application of labor rights to all migrants regardless of immigration status was the extension



Paul J. Milette, Palm Beach Post

Migrant field workers in Madison County, Florida head for the trucks with buckets of banana peppers (June 2003).

Covenant on Economic, Social and Cultural Rights, the historical jurisprudential bias towards serious violations of civil and political rights under the American Convention has begun to shift. The shift has happened, however, largely through a civil and political rights lens, specifically the right to a fair trial, the right to judicial protection, as mentioned above, and, in limited situations, the right to assemble and associate freely, and the right to property, rather than squarely under the substantive rights granted through Article 26 and the Protocol of San Salvador.

On June 7, 1996, the OAS General Assembly stated, “The ideal of a free human being, untrammelled by fear and poverty, can be attained only if conditions which allow all individuals to enjoy their economic, social, and cultural rights as well as their civil and political rights are created.” Shortly thereafter, the Inter-American Commission on Human Rights created a working group to study the situation of migrant workers and their families in the Hemisphere, led by a Special Rapporteur on the Rights of Migrant Workers and Their Families. In the years since, States Parties to the OAS, in recognition of the forces driving migration and the vulnerabilities of migrant workers, have continued to state the need for all States Parties to take action to ensure the protection and promotion of the human rights of migrant workers.

CONSIDERATIONS AND ANALYSIS OF OC-18

In OC-18, the Court considered the following four issues: 1) States’ obligations to respect and guarantee human rights and the fundamental nature of the principle of equality and non-discrimi-

ers after using screening standards that differed according to the time they were applied and the nationality of the people to which they were applied. Freedom from arbitrary detention is a right enshrined in a number of international treaties that have been ratified by the U.S. The United Nations High Commissioner for Refugees has repeatedly stated that the detention of asylum-seekers is inherently undesirable and that current U.S. policies violate international standards.

In order to comply with international human rights standards, the U.S. must fundamentally alter its perception of asylum seekers as criminals or security threats and instead view them as victims of human rights abuses. Numerous changes must be made within the current system to ensure that asylum seekers are afforded due process and do not endure arbitrary, prolonged, or unnecessary detention. These changes include: the opportunity for asylum seekers in expedit-

ed removal proceedings to have their detention reviewed by a judge; the formation of regulations regarding parole criteria; the creation and implementation of regulations governing the treatment of alien children and other special groups; and the creation of an office within DHS charged with ensuring that regulations and policies regarding the detainment of asylum seekers are consistent with both domestic and international law. The detention of asylum seekers based solely on their national origin should be abolished and detention should be viewed as the exception, rather than the rule. Alternatives to detention should be pursued and, for those in detention, safeguards must be put in place to ensure aliens are informed of their rights and have access to legal counsel. The current system must be restructured with a foundation based on compassion and fairness, rather than fear. **HRB**

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of rights to acts of third parties and the Court's enumeration of those rights, which went well beyond the substantive rights it had historically addressed. The Court took specific note of the affirmative obligation of the State to protect against discrimination, even when committed by third party employers, stating:

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

* * *

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

The Court then noted that States' obligations to workers arise from both domestic legislation and international instruments and acknowledged the role of the judiciary in ensuring due process and other guarantees. The Court recognized the following rights, noting their "inalienable nature" and relationship to the "fundamental principle of human dignity embodied in Article 1 of the Universal Declaration": prohibition of obligatory or forced labor; prohibition and abolition of child labor; special care for women workers; freedom of association and to organize and join a trade union; fair wages for work performed; social security; and a working day of reasonable length with adequate working conditions (safety and health). In just one paragraph of its lengthy opinion, the Court effectively extended obligations incorporated in the American Convention and the Optional Protocols (including the Protocol of San Salvador) to all OAS Member States that have signed the OAS Charter, the American Declaration, or the Universal Declaration, or that have ratified the International Covenant on Civil and Political Rights. The Court did so by employing the principles of equal-

ity and non-discrimination as the basis for recognizing the applicability of enumerated economic, social, and cultural rights to unauthorized migrant workers.

CONCLUSION

AS STATED ABOVE, OC-18 PROVIDES CRITICAL GUIDANCE vis-à-vis the rights of migrant workers, both documented and undocumented. It establishes as fundamental human rights the rights of all workers to benefit from the fruits of their labor, free from exploitation and dangerous working conditions. It remains to be seen, however, how OC-18 will affect the lives of the millions of migrant workers it sets out to protect. To date, the United States has taken no steps to reinstate direct remedies for undocumented workers fired in violation of labor laws. Anti-immigrant forces continue to send up their rallying cry that undocumented workers should not benefit from breaking the law, and therefore should not be entitled to recover when employers violate their fundamental human rights in the workplace. At the same time, workers' advocates have been successfully fighting the efforts of employers and others to expand the scope of the *Hoffman Plastics* decision and continue to work fervently so that international human rights standards find a place in domestic law.

At the regional level, there is movement toward greater and more systematic protections for the fundamental human rights of all migrant workers, regardless of their immigration status. On September 30 and October 1, 2004, an OAS Working Group met to prepare the Inter-American Program for the Promotion and Protection of the Human Rights of Migrants, Including Migrant Workers and Their Families, bringing together the Inter-American Commission on Human Rights' Special Rapporteur and others from throughout the Americas. This coordinated effort, taken in light of the standards set forth in OC-18, seeks greater protection of all migrant workers' fundamental human rights, regardless of their immigration status.

As migrant workers cross borders, so do issues of exploitation, health and safety, and the need for social security—all relating directly back to the underlying reason workers cross borders in search of work: economic survival. Unless and until a truly coordinated effort at the local, regional and global levels is launched to address these issues, undocumented migrant workers will continue to suffer in the shadows. **HRB**