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ADVOCATES SHOULD USE APPLICABLE INTERNATIONAL STANDARDS TO ADDRESS VIOLATIONS OF UNDOCUMENTED MIGRANT WORKERS' RIGHTS IN THE UNITED STATES*

CONNIE DE LA VEGA** AND CONCHITA LOZANO-BATISTA⁺

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees."

National Labor Relations Act, 29 U.S.C. §§ 151-169, Sec. 1 (1988)

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Introduction

A migrant worker is defined in international law as "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."¹ There are over 150 million migrants and refugees worldwide,² and in the United States alone the undocumented migrant worker population is estimated to be between 5 and 11 million.³ Migrants are present in virtually every sector of the economy, and their numbers will continue to grow as long as receiving countries continue to provide higher wages than sending countries.

As the economy globalizes, migration intensifies with jobs shifting to different parts of the world. Though international migration and globalization are linked, there is much resistance to the free circulation of persons. Regional markets—the precursors to the single world market that has emerged—have reacted in different ways to this new situation. The European Union very quickly integrated the principle of the free *internal* circulation of persons (though resistance to external circulation of persons is still present, as it is all over the world).⁴ By contrast, the North American Free

1. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 158, at Art. 2(1), U.N. GAOR, 3d Comm., 45th Sess., 69th plen. mtg. U.N. Doc. A/RES/45/158 (Dec. 18, 1990), available at <http://www.un.org/documents/ga/res/45/a45r158.htm> [hereinafter *Migrant Workers Convention*] (entered into force July 1, 2003). This article will address issues specific to undocumented workers; thus, when we speak of migrants we are referring to undocumented migrant workers.

2. *International Migration, Racism, Discrimination and Xenophobia*, at I, 1, ILO, International Organization for Migration, (IOM), Office of the United Nations High Commissioner for Human Rights (OHCHR), and in consultation with Office of the United Nations High Commissioner for Refugees (UNHCR) (August 2001), available at <http://www.ilo.org/public/english/protection/migrant/download/wcar.pdf>.

3. U.S. Gen. Accounting Office, GAO-01-842, *INS' Southwest Border Strategy: Resource and Impact Issues Remain After Seven Years*, Report to Congressional Committees 1 (2001), available at <http://www.gao.gov/new.items/d01842.pdf>.

4. Andre Linard, Int'l Confederation of Free Trade Unions (ICFTU), *Migration and globalisation: The new slaves* 8 (1998), available at <http://www.icftu.org/www/PDF/Migration-ENG.pdf>. Since the implementation of Gatekeeper (the 1994 government program that increased militarization of Border Patrol operations along the United States-Mexico border), the Immigration and Naturalization Service (INS, now known as Department of Homeland Security) estimates that 1,013 migrants have died trying to cross the United States-Mexico border illegally between October 1997 and June 2001, and that between 1998 and 2000, migrant deaths on the border increased 41%. U.S. Gen. Accounting Office, *supra* note 3, at 25. However, the Mexican Foreign Relations Office reports that a greater number of migrants have died in this time frame. In addition, in 2001, 391 migrant deaths were reported along the

Trade Agreement (NAFTA) maintains strict controls over migration from Mexico to the United States,⁵ and since its passage there has been increased militarization of the border and a consequent rise in the number of migrant deaths.⁶

Socioeconomic realities stand in contrast to the limits imposed by countries on migration. In December 2001, Mexico's National Population Council released a report that concluded: "Migration between Mexico and the United States is a permanent, structural phenomenon. It is built on real factors, ranging from geography, economic inequality and integration, and the intense relationship between the two countries that make it inevitable."⁷ The report found that between 400,000 and 500,000 Mexicans will migrate to the United States every year through 2030, depending on Mexico's economic growth.⁸

The fact is that the economic gap between rich and poor continues to grow, forcing many people to migrate in order to survive.⁹ But because of the recent tightening of migration controls, migrants are increasingly turning to smugglers to help them reach the host country.¹⁰ Unfortunately, this practice is often extremely expensive and highly exploitative. In a recent speech, Mexico's Secretary of Governance, Santiago Creel, stated that U.S. immigration policy had not stopped migration flow, but had only changed traditional routes taken by migrants and increased the price they must pay to get across.¹¹

Though NAFTA hoped to address many of these issues by promising to help stop the flow of poor Mexicans into the United States by creating more jobs in Mexico, this did not occur. In a recent report on the effects of NAFTA, the Carnegie Endowment found that illegal immigration to the United States continued to grow after the passage of NAFTA and that apprehensions along the United States-Mexico border rose from 700,000 in 1994 to 1.3 million

border; in 2002, 371 migrant deaths were reported; and in 2003, 422 migrant deaths were reported. Wayne A. Cornelius, *Controlling 'Unwanted' Immigration: Lessons from the United States, 1993-2004*, 31 (December 2004), available at <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg92.pdf>. These numbers are conservative, as no one knows how many bodies lie undiscovered.

5. Linard, *supra* note 4, at 9.

6. U.S. Gen. Accounting Office, *supra* note 3, at 1-10, 24-25.

7. *Mexico: More Migration, Remittances*, 9 Migration News, Jan. 2002, http://migration.ucdavis.edu/mn/more.php?id=2535_0_2_0.

8. *Id.*

9. Linard, *supra* note 4, at 10.

10. U.S. Gen. Accounting Office, *supra* note 3, at 17.

11. Santiago Creel, Speech at the 2003 U.S. Catholic Bishops' Conference (July 10, 2003), in U.S. Newswire, July 10, 2003, available at <http://releases.usnewswire.com/GetRelease.asp?id=18617>.

in 2001.¹² The report further stated that "the average growth of the total unauthorized population during the decade was higher in the years after NAFTA went into effect than in the years before."¹³ The population of undocumented Mexican migrants in the United States grew from 2 million in 1990 to 4.8 million in 2000, with the proportion of unauthorized Mexican migrants increasing from 58.3% to 68.7% of the entire unauthorized immigrant population in the United States.¹⁴

Migrants who succeed in completing the journey to receiving countries are often subject to human rights violations once they begin to work. Because undocumented migration is illegal, they are often unprotected by domestic labor and employment laws, leaving them virtually defenseless against violations of basic rights. They often have no alternative but to accept low wages and appalling working conditions, exploited by those who profit from their illegal status. Moreover, where laws exist to protect migrant workers and control migration, such laws are often either not enforced or are used against the migrants they purport to protect.

Because of this vulnerability, the international community has recognized the need to promote and protect the rights of migrant workers. On July 1, 2003, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Convention) entered into force, providing yet another legal basis to deal with human rights violations of migrants.¹⁵ In 1999, a Special Rapporteur was appointed by the United Nations Commission on Human Rights to address the specific concerns of migrant workers,¹⁶ and she highlighted the particular vulnerabilities faced by migrants in her 2000 report, stating that:

Discrimination against migrant workers in the field of employment takes many forms, such as limitations or preferences with regard to the kind of work they can do. Some contracts deny migrants certain advantages and also apply rules on job security that differ from those applied to nationals; sometimes they are

12. John J. Audley et al., *Nafta's Promise and Reality: Lessons from Mexico for the Hemisphere* 48 (2003), available at http://www.ceip.org/files/Publications/NAFTA_Report_full.asp?from=pubdate.

13. *Id.* at 49.

14. U.S. Immigration and Naturalization Serv., *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 TO 2000*, at 9 (2003), available at http://uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf.

15. *Migrant Workers Convention*, *supra* note 1.

16. *Migrant Workers: Commission Action*, 1999 U.N.Y.B. 612, U.N. Doc. E/CN.4/1999/167. Commission on Human Rights Res. 1999/44, adopted on April 27, 1999, *Commission on Human Rights: Report of the Fifty-fifth Session*, E/1999/23 (1999) 161.

excluded from the regulations on working conditions and denied the right to take part in trade union activities.¹⁷

Exploited migrant workers in the United States face increased workplace abuses and a decrease in rights, and risk deportation for exercising those rights to which they are entitled. Employers are increasingly fighting unionization campaigns by firing or threatening undocumented workers, thwarting labor organizers, and defying immigration law.¹⁸ This is occurring while retaliatory firings have increased as unions aggressively recruit immigrants and as the economy employs more undocumented workers.¹⁹

It is our goal in this article, to provide migrant rights advocates with international legal arguments that can be used to address domestic human rights abuses when domestic law is inadequate and in violation of U.S. treaty obligations. We will provide a guide to applicable international law and suggest how these standards may be used to protect migrant workers. The first part describes the working conditions of undocumented migrants in the United States, highlighting recent violations of their human rights. The article then discusses *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*,²⁰ decided by the U.S. Supreme Court in 2002, which limited the rights of undocumented workers, and its aftermath. The Supreme Court's decision was based on the compatibility of labor and immigration law. But no brief was submitted to the Court detailing international legal obligations and binding treaty law that might have affected the outcome—a disturbing fact given the outcome and repercussions of the case, and given that there is international law bearing directly on the point. This law and the methods for raising it in the United States are covered in the next part of the article. In discussing the human rights of migrants, we focus specifically on violations of the right to organize in order to be free from exploitative conditions, the right to equality before the law, and the right to legal recourse.

17. *Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro: Human Rights of Migrants*, U.N. ESCOR, 56th Sess., Agenda Item 14(a), at ¶ 51, U.N. Doc. E/CN.4/2000/82 (2000).

18. Nancy Cleeland, *Unionizing is Catch-22 for Illegal Immigrants*, L.A. Times, Jan. 16, 2000, at A1.

19. *Id.*

20. 535 U.S. 137 (2002).

I. Working Conditions of Migrant Workers in the United States

Working conditions endured by migrants in the United States are increasingly more exploitative. From January 1 to May 7, 2002, Mexico intervened in the defense of the human rights of Mexican nationals in approximately 383 U.S. cases dealing with work-related discrimination, unpaid wages, and compensation for occupational illnesses and accidents.²¹ In a recent case, the Mexican government brought suit on behalf of migrant workers in the United States who were found to be working in slave-like conditions at a northeastern egg farm,²² being made to endure horrific working conditions, and wading through dung and dead birds without protective clothing. Additionally, the workers were barred from seeing people outside company premises, denied pay raises, and subjected to freezing winters while packed with 16 or 17 other workers in dilapidated trailers with faulty heating systems.²³

Recently, operators of migrant labor camps were indicted in Buffalo, New York, on charges of trafficking in immigrant labor and running forced labor camps where dozens of workers were forced into near slavery.²⁴ Those running the camp kept the paychecks of undocumented workers employed by area farmers, and subjected them to threats and intimidation to deter them from escaping the camps.²⁵ Though the government had fined farmers for allowing the operators to withhold workers' paychecks, the fines were dropped once the farmers promised to no longer use the same workers.²⁶

Disturbingly, these types of migrant labor camps are becoming more common in some parts of the country. The U.S. Department of Justice is currently investigating 120 slavery cases, most involving migrant workers and women forced into prostitution.²⁷ Since 1997, five slavery cases have been prosecuted in southwest Florida alone.²⁸ In 1999, a labor contractor was found to be holding 27 undocumented workers against their will in run-down trailers until

21. *Advisory Opinion* OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, at ¶ 47 (Sept. 17, 2003) [hereinafter *Advisory Opinion*] (solicited by the United Mexican States).

22. Alfredo Corchado, *Mexico, U.S. Farm Settle Suit: Landmark Case Alleged that Migrants Toiled in Horrid Conditions*, The Dallas Morning News, July 2, 2002, at 9A.

23. *Id.*

24. *Abusing the Powerless*, Buffalo News, June 30, 2002, at H2.

25. *Id.*

26. *America's Shame*, Rochester Democrat & Chronicle, June 24, 2002, at 6A.

27. John Bowe, *A Shameful Harvest*, The American Prospect, July/Aug. 2003, at 38.

28. *Id.*

their debt to smugglers was paid off.²⁹ Migrant workers are housed miles from civilization, with no telephones or cars, and thus no means of escape.³⁰ In one case, a Florida and North Carolina contractor was arrested on charges of extortion and slavery for forcing migrants to work six-day weeks for a wage of \$15 a day, and charging them exorbitant prices for food, thus insuring continued indebtedness; the contractor also allegedly raped female camp residents and threatened workers who reported the conditions.³¹

In 1999, the U.S. Department of Labor cited a large North Carolina tobacco and sweet-potato farm for withholding \$100,000 in wages from workers,³² and in 2003, North Carolina state inspectors found an unregistered labor camp where hundreds of migrant farm workers were housed six men to a room in squalid rental properties that did not meet basic codes, with broken windows, exposed wiring, and piles of rotting garbage.³³ During the growing season the site may have drawn more than 500 migrant workers, but because North Carolina law requires that crew leaders be responsible for the housing conditions, the company that hired the leaders may not be liable for housing violations.³⁴ As has been shown, migrant farm workers are forced to accept low wages as a condition of employment and are often subjected to deplorable working conditions. "Agriculture is one of the most deadly occupations in the United States. Studies show that the death rate among workers is approximately 20.9 per 100,000 workers, compared to the average for all industries of 3.9."³⁵ There are about 2.5 million hired farm workers in the United States, of whom about 1.8 million work directly on crops that are treated with pesticides.³⁶ Exposure to some pesticides can cause acute and long-term effects, as well as death. Chronic effects of pesticide exposure have not yet been conclusively researched, and even less is known about the combined effects of different pesticides.³⁷

29. *Id.*

30. John Bowe, *Nobodies: Does Slavery Exist in America?*, *The New Yorker*, Apr. 21 & 28, 2003, at 106, 108.

31. *Id.* at 124.

32. Bowe, *supra* note 27, at 39.

33. Kristin Collins & Christina Headrick, *Workers Housed Poorly*, *The News & Observer* (Raleigh, N.C.), Sept. 11, 2003, at A1.

34. *Id.*

35. Margaret Reeves et al., *Californians for Pesticide Reform, Fields of Poison: California Farmworkers and Pesticides* 6 (1999), available at <http://www.panna.org/resources/documents/fields.pdf>.

36. U.S. Gen. Accounting Office, *GAO/RCED-00-40, Pesticides: Improvements Needed to Ensure the Safety of Farmworkers and Their Children* 6 (2000), available at <http://www.gao.gov/archive/2000/rc00040.pdf>.

37. *Id.* at 4.

The working conditions that migrant farm workers endure compound health problems, as lack of adequate hand-washing facilities results in pesticide residue remaining on the skin for 12 hours or more.³⁸ Moreover, living conditions for migrant workers are poor, and there is often no access to running water or washing machines. At least 800,000 farm workers across the country lack adequate shelter and camp in parking lots, cars, trailers, garages, tool sheds, caves, and tents.³⁹ From 1991 to 1996, the California Environmental Protection Agency's Department of Pesticide Regulation reported 3,991 cases of poisoning by pesticides, an average of 665 cases per year.⁴⁰ However, the numbers are in reality much higher, as workers are afraid to report incidents due to lack of medical insurance, fear of retaliation by employers, lack of knowledge as to rights, and mistaken belief that the symptoms are just part of the job. Florida laws requiring safety information for workers expired in 1998 and the state legislature recently voted against a bill that would have required farm owners to provide workers with bilingual safety sheets describing pesticides used and what to do to protect them from harm.⁴¹

Few fines are issued to farms violating laws dealing with pesticide abuses, and they are so low as to be ineffective. This is especially so for counties with large amounts of agricultural labor. During 1995, no county in California's Central Valley issued more than an average of 25 fines per year, despite the increased use of pesticides and continued high numbers of pesticide poisonings.⁴² Of the few fines issued during 1991-96, almost half were less than \$151, and fewer than five percent exceeded \$1,000.⁴³ These fines amount to no more than a slap on the hand for agricultural corporations. Moreover, enforcement of laws has been found to be weakest in areas of high pesticide use.

Apple growers in the state of Washington use some of the most dangerous pesticides, and since 1995 there have been 15,000 injuries in a working community of 40,000. Workers have attributed skin rashes, dizziness, muscle cramps, and miscarriages to the chemicals and physical hardship they endure.⁴⁴ Migrant farm workers in Washington also experience retaliation by growers in the form of

38. See Reeves, *supra* note 35, at 30.

39. *Id.* at 11.

40. *Id.* at 45.

41. *Forgotten Farmworkers: Pesticide Protections Would Be a Start at Improving Migrants' Lives*, Sarasota Herald Trib. (Sarasota, Fla.), July 22, 2003, at A12.

42. Reeves, *supra* note 35, at 27.

43. *Id.*

44. Nick Paton Walsh, *Victims of America's Harvest of Shame: 800,000 Child Labourers Provide Big Profits*, The Observer (London), June 25, 2000, at 24.

firings and layoffs for organizing activities. Whenever the farm workers organize, the apple industry engages in massive retaliation.⁴⁵

Migrants working in the garment manufacturing industry also face human rights abuses. While globalization has opened the American marketplace to goods from countries that routinely allow abuse of migrant workers, sweatshops also thrive inside the United States. Many sweatshop workers both in the United States and working for U.S. firms outside the country are subjected to violations of workplace rights.⁴⁶ Migrant workers often work up to seven days a week for extremely low wages;⁴⁷ 80-hour working weeks are common; and the health and safety of workers, the majority of whom are women, is constantly undermined. Additionally, workers have no security of employment, and women are discriminated against and harassed, sometimes sexually.⁴⁸ A Department of Labor survey conducted in 1996 found that half of all garment-manufacturing businesses in New York City could be characterized as sweatshops.⁴⁹

Many U.S. sweatshops are located in the Pacific territories of the United States. In 2003, a Washington court found a Korean sweatshop owner near the American Samoa capital of Pago Pago guilty of human trafficking,⁵⁰ which Attorney General John Ashcroft described as "modern day slavery."⁵¹ The sweatshop employed 251 migrant workers who were forced to pay \$200 a month for room and board, which consisted of a bunk in a 36-bed dormitory and three small meals. Paychecks for workers were routinely withheld, and when they went on strike to recover lost earnings, managers switched off electricity, making the overheated compound unbearable.⁵² There were also reports of physical abuse against workers. Similar conditions prevail in Saipan, another U.S. territory in the Northern Mariana Islands, where thousands of workers have

45. Tom Alkire, *Mexico Concerned About Treatment of Migrant Farm Workers*, *Officials Say*, 154 Daily Lab. Rep., July 2 - Sept. 28, 2001, at A-5, A-5.

46. Behind The Label, *U.S. Retailers: Responsible for the Global Sweatshop Crisis*, at <http://www.BehindTheLabel.org/pdf/retailindus.pdf>.

47. *Id.*

48. Clean Clothes Campaign, *Companies and Working Conditions in the Garment Industry*, at <http://www.cleanclothes.org/companies.htm>.

49. Labor Department: *Close to Half of Garment Contractors Violating Fair Labor Standards Act*, 1996 Daily Lab. Rep. (BNA) 87, May 6, 1996, at d11; U.S. Dep't of Labor, *Compliance Highlights* 1, 3 (Nov. 1999).

50. David Fickling, *Misery of Rag-trade Slaves in America's Pacific Outpost*, *The Guardian* (London), Mar. 1, 2003, at 20, available at <http://www.buzzle.com/editorials/text2-28-2003-36444.asp>.

51. *Id.*

52. *Id.*

brought a class-action suit against leading U.S. clothing and retail companies for alleged exploitation in sweatshops there.⁵³

U.S. labor inspectors admit that they do not have the resources to examine working conditions in these territories, and because the territories benefit from an ambiguous legal status, many believe this makes them a perfect location for labor exploitation.⁵⁴ Goods imported from these territories to the United States have no import tariffs, there are favorable tax incentives to attract business, and products even qualify for the "Made in the USA" label, which some shoppers take as a guarantee of good labor practices.⁵⁵

While abuse against migrant workers in the United States grows, immigration controls are being used against undocumented workers to avoid unions and punish employees for exercising their workplace rights. Where existing workplace rights are violated, most migrants risk deportation to exercise these rights. Moreover, many parts of the country lack the legal resources to help abused migrants. In 1996, the agriculture industry successfully lobbied Congress to prohibit the country's Rural Legal Services from representing undocumented workers.⁵⁶ The Bush administration's proposed 2004 budget for the Department of Labor eliminates the National Farmworker Jobs Program, which has a budget of \$81 million for migrant and seasonal farmworker programs.⁵⁷

II. *Hoffman* and its Aftermath

Exacerbating these already exploitative working conditions, the U.S. Supreme Court recently held that undocumented migrant workers could be fired for unionization efforts without back pay liability by the employer.⁵⁸ The decision has already been criticized by international bodies, but employers have sought its expansion in other areas of the law, some successfully.

53. *Id.*

54. *Id.*

55. *Id.*

56. Bowe, *supra* note 27, at 39.

57. *Id.*

58. *Hoffman Plastics Compounds, Inc. v. National Labor Relations Board*, 535 U.S. 137, 140 (2002).

A. *Hoffman*

In *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*,⁵⁹ an undocumented worker was fired for his organizing activities, and the worker filed a complaint with the National Labor Relations Board (NLRB).⁶⁰ The NLRB ordered the employer to cease and desist, post a notice of its violation, reinstate the employee, and provide him with back pay for the time he was unable to work due to the illegal firing.⁶¹ But during the case, the worker admitted to using false immigration documents and being undocumented,⁶² resulting in the administrative law judge denying back pay to the employee. Back pay is a traditional remedy under the National Labor Relations Act (NLRA),⁶³ and simply requires that an employer pay an injured employee the amount he or she would have earned for work performed had the employer not unlawfully dismissed the employee for union organizing. The NLRB reversed the decision and ordered back pay, calculated from the date of discharge to the date the company learned of the employee's undocumented status.⁶⁴ The Supreme Court reviewed the decision, and a 5-4 majority held that the worker was not entitled to receive back pay. The Court reasoned that awarding back pay would undermine federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA).⁶⁵

Since this decision, the exploitation and harassment of migrant workers in the United States has increased, as discussed below. A recent report by the General Accounting Office (GAO) that reviewed the purported effects of *Hoffman* on the collective bargaining rights of undocumented workers found that the number of undocumented workers potentially affected by *Hoffman* is about 5.5 million.⁶⁶ The

59. *Id.*

60. In its statutory assignment, the NLRB is entrusted with the prevention and the ability to remedy unfair labor practices by either employers or unions. The agency does not act on its own motion in either function. It processes only those charges of unfair labor practices and petitions for employee elections that are filed with the NLRB. See National Labor Relations Act, 29 U.S.C. §§ 151-169 (1988).

61. *Hoffman*, 535 U.S. at 140.

62. *Id.* at 141.

63. 29 U.S.C. §§ 151-169 (1988). Back pay is measured at the rate the worker would have received had they not been unlawfully discharged from the time of the discharge to the date of resolution. 29 U.S.C. § 160 (1988).

64. *Hoffman*, 535 U.S. at 142.

65. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324(a) (2003) (making the employment of undocumented workers illegal).

66. U.S. Gen. Accounting Office, GAO-02-835, *Collective Bargaining Rights: Information on the Number of Workers with and Without Bargaining Rights*, Report to Congressional Requesters, U.S. Senate 4 (2002), available at

GAO stated that "[b]ack pay is an important remedy ... because it provides an incentive to report law-violating behavior and imposes financial penalties on an employer and job protection for the workers"⁶⁷ and concluded that loss of such a remedy "diminishe[s] the legal bargaining rights available to [undocumented] workers under the act."⁶⁸

B. The International Response

There have been several responses to *Hoffman* at the international level. Mexican legislators claimed that the decision was tantamount to reinstating slavery and would lead to greater exploitation of migrant workers.⁶⁹ The Mexican Senate called on President Vicente Fox to denounce the United States before the United Nations and the International Labour Organization (ILO). While that action was not taken, in light of the continuing mistreatment of migrant workers, Mexico recently filed a request for an advisory opinion with the Inter-American Court of Human Rights (Inter-American Court).⁷⁰ Though the United States is not subject to the Court's jurisdiction, as it has not accepted jurisdiction by separate agreement, the Court has the power to exercise a broadly defined advisory jurisdiction and may issue advisory opinions concerning the meaning of the American Convention on Human Rights (American Convention),⁷¹ the American Declaration of the Rights and Duties of Man (American Declaration),⁷² and other human rights instruments.⁷³ In response to Mexico's request, the Inter-American Court determined that states could not discriminate

<http://www.gao.gov/new.items/d02835.pdf>.

67. *Id.* at 21.

68. *Id.* at 18.

69. *Mexico: Outrage at U.S. Ruling on Migrant Workers*, Latinnews Daily Briefing Apr. 8, 2002, at <http://www.latinnews.com>.

70. *Advisory Opinion*, *supra* note 21.

71. American Convention on Human Rights, O.A.S. Off. Rec. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), 1144 U.N.T.S. 123 (entered into force July 18, 1978), available at <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm>.

72. American Declaration of the Rights and Duties of Man, adopted by the Ninth International Conference of American States (1948), reprinted in OEA/Ser. L/V/II.82, Doc. 6 Rev. 1 (1992) [hereinafter American Declaration]. The American Declaration was adopted in 1948 as a resolution of the General Assembly of the OAS, and is directly binding on the United States by virtue of the United States' ratification of the OAS Charter in 1951. The Inter-American Commission on Human Rights made that specific ruling in a case involving the United States. See *Baby Boy*, Case 2141 (United States), Inter-Am. C.H.R. 25, *Annual Report 1980-1981*, OEA.Ser.L/V/II.54, Doc. 9 rev.1 (Mar. 6, 1981).

73. See David Weissbrodt et al., *International Human Rights: Law, Policy, and Process* 592, 609-10 (3d ed. 2001).

against *any* workers in their labor rights, regardless of their immigration status.⁷⁴

In addition, in October 2002, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM) filed a complaint with the ILO's Committee on Freedom of Association, claiming that the *Hoffman* decision violates international labor law,⁷⁵ and alleging that it put the United States in violation of its obligations under ILO Conventions 87 and 98⁷⁶ and its obligations under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work.⁷⁷ The United States has not ratified these Conventions, and it maintains that the 1998 Declaration is a non-binding statement that does not give rise to legal obligations.⁷⁸ However, the ILO may still examine complaints alleging violations of freedom of association and issue requests to states since the Committee's mandate is not linked to the 1998 Declaration but is established in the fundamental aims and purposes of the ILO Constitution.⁷⁹ In its conclusions, the ILO found that the post-*Hoffman* remedies available to migrant workers in the United States were "inadequate to ensure effective protection against acts of anti-union discrimination."⁸⁰ The ILO also recommended that the United States amend labor law to bring it into conformity with freedom of association principles and ensure "effective protection for all workers against acts of anti-union discrimination in the wake of the *Hoffman* decision."⁸¹

The opinions of the Inter-American Court and the ILO highlight the extent to which international law is violated by the *Hoffman* case. Interestingly, these international standards are rarely raised by those advocating on behalf of migrant workers in the United States. But as the erosion of the rights of migrants continues, it is critical that advocates use the international standards discussed below in their advocacy work. We first turn to the aftermath of the *Hoffman* decision.

74. *Advisory Opinion*, *supra* note 21.

75. Case 2227 (United States), ILO Committee on Freedom of Association: 332nd Report of the Committee on Freedom of Association, GB.288/7 (Part II), para. 578 (Nov. 2003), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf>.

76. Freedom of Association and Protection of the Right to Organize Convention, ILO No. 87, *adopted* July 9, 1948, 68 U.N.T.S. 17 (*entered into force* July 4, 1950); Application of the Principles of the Right to Organise and to Bargain Collectively Convention, ILO No. 98, *adopted* July 1, 1949, 96 U.N.T.S. 257 (*entered into force* July 18, 1951).

77. Case No. 2227, *supra* note 75, at para. 555.

78. *Id.* paras. 578-79.

79. *Id.* paras. 599-600.

80. *Id.* para. 610.

81. *Id.* para. 613.

C. Post-*Hoffman* Developments in the United States

The *Hoffman* case established a dangerous precedent and further enables employers to exploit migrant workers and fire them once they begin to demand better working conditions. Though undocumented workers are protected from unfair labor practices under the NLRA,⁸² the *Hoffman* decision leaves potential plaintiffs with an ineffectual remedy and restricts their opportunities to organize. Additionally, since the law requires a specific finding of anti-union animus in order for employers to be otherwise liable for reporting an employee to the INS for unionization efforts,⁸³ many migrants are unlikely to risk deportation to exercise their rights. Moreover, the NLRB, with no authority to award punitive damages or other remedies that seek to punish employers, relied on the back pay remedy to serve this purpose, thus, without an effective remedy, many attorneys are unlikely to represent migrants in such cases.⁸⁴

Though an argument can be made that *Hoffman* does not apply in the case where an employer knows of an employee's undocumented status at the time of hire, the NLRB has not made this distinction.⁸⁵ Additionally, such a holding would still violate international law, as other undocumented migrant workers would continue to be restricted in their opportunity to organize by *Hoffman*

82. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). An unfair labor practice exists when an employer interferes, restrains or coerces employees in the exercise of their rights to organize and engage in collective bargaining. See 29 U.S.C. §§ 157-158 (2003). The Committee issued a similar ruling in a case challenging Spain's Basic Act on Rights and Freedoms of Foreigners, which prohibited foreign workers who are not legally registered in the country from organizing a strike. The Committee ruled that Article 2 of Convention No. 87 "recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization." Case 2121 (Spain), ILO Committee on Freedom of Association: 327th Report of the Committee on Freedom of Association, GB.283/8, at para. 561 (Mar. 2002), available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/pdf/gb-8.pdf>.

83. *Sure-Tan*, 467 U.S. at 895-96.

84. Another area of concern for migrants' ability to seek redress for wrongs committed by employers deals with the liability of contractors and principals. Employers may attempt to shield themselves from liability for violations of labor law by using subcontractors who hire undocumented workers. An expansion in this area would reward employers who establish such corporate structures without ensuring that subcontractors comply with both labor and immigration laws.

85. In this set of circumstances, it can be argued that prior law under *NLRB v. A.P.R.A. Fuel Buyers Group*, 320 N.L.R.B. 408, 408 (1995), *aff'd* 134 F.3d 50 (2d Cir. 1997) would apply. In *A.P.R.A.*, the employer knew of the workers' undocumented status at the time of hire. With regard to back pay, the *A.P.R.A.* court held that back pay should be tolled as of the date of reinstatement or when the discriminates are unable to present documents necessary to comply with back pay within a reasonable period of time.

and a distinction would be drawn based on legal status, in contravention of nondiscrimination provisions in international law, as well as binding international labor law.

Since the *Hoffman* decision, there have been numerous attempts by employers to deny migrants previously available remedies based on their undocumented status. Some courts have allowed the expansion of *Hoffman* into other areas of the law, while others have resisted attempts to expand the decision and recognized the additional exploitation migrant workers would face if they did so. Additionally, some state legislatures have begun efforts to limit the impact of *Hoffman* on state labor and employment law. In California, SB 1818 was passed limiting the effect of the *Hoffman* decision on California labor, employment, and civil rights laws.⁸⁶ However, despite these efforts by some state legislatures and courts, migrant workers are increasingly facing challenges on legitimate claims, and many have been and will be deterred from bringing suit against exploitative employers, as these employers have begun to use *Hoffman* to challenge the legality of workers' immigration documents early on in legal proceedings. Below is a summary of these post-*Hoffman* attempts by employers to deprive migrant workers of protections under the law.

1. *Changes Under the National Labor Relations Act*

Though the *Hoffman* court reaffirmed prior law under *Sure Tan*,⁸⁷ that undocumented migrant workers are employees under the NLRA,⁸⁸ the remedies still available to them are inadequate to protect their right to unionize, as there is no financial penalty for employers who violate this right. Additionally, there are open questions as to the applicability of other parts of the NLRA, and many employers are actively seeking to expand *Hoffman* to avoid any liability under the Act when it comes to undocumented migrant workers. General Counsel for the NLRB has recently determined that the back pay limitation in *Hoffman* applies only to work not performed and that back pay is limited for work previously performed under unlawfully imposed terms and conditions.⁸⁹ The

86. S.B. 1818 resulted in the enactment of Cal. Civ. Code § 3339, Cal. Gov't Code § 7285, Cal. Health & Safety Code § 24000 and Cal. Lab. Code § 1171.5 (2002).

87. 467 U.S. at 892.

88. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 145 (2002).

89. In July 2002, the General Counsel of the NLRB issued a guidance document interpreting *Hoffman*. See Arthur F. Rosenfeld, General Counsel, Procedures and Remedies for Discriminates Who May Be Undocumented Aliens After *Hoffman Plastic Compounds, Inc.*, Memorandum GC-02-06 (July 19, 2002), available at

General Counsel stated that there is an open question as to whether this remedy is available to undocumented workers who are unlawfully demoted,⁹⁰ and has allowed conditional reinstatement for unlawful discharges of undocumented workers whom an employer knowingly hires for a reasonable period of time necessary to establish work eligibility.⁹¹ Additionally, in litigation of unfair labor practice cases, the NLRB has stated that they will object if employers seek evidence about an employee's legal status in order to escape unfair labor practice liability.⁹²

Despite the limits established by the General Counsel, some employers have attempted to use *Hoffman* to deter migrants from asserting their rights. In *Tuv Taam Corp.*,⁹³ the NLRB found that an employer had committed an unfair labor practice by retaliating against employees attempting to unionize. The employer argued that the employees' immigration status should be discoverable before a finding of an unfair labor practice, as back pay is an unavailable remedy. The court distinguished between an unfair labor practice hearing and a compliance hearing, where remedies are determined. The court stated that back pay issues arise only after an unfair labor practice charge is established and did not allow the employer to discover the employees' immigration status during the initial hearing.

Similarly, in *Chicago Future, Inc. and International Brotherhood of Teamsters Local Union No. 727 AFL-CIO*,⁹⁴ an employer threatened employees and tried to coerce them into voting against the union. The employer challenged the immigration status of one employee, whose vote was decisive in the election for the union, arguing that the employee was an ineligible voter under *Hoffman* and his vote should be discredited. The court held that *Hoffman* did not make an employee an ineligible voter and that undocumented migrants were "employees" under the NLRA and eligible to vote in union elections.⁹⁵

http://www.nlr.gov/nlr/shared_files/gcmemo/gcmemo/gc02-06.asp?useShared=/nlrb/legal/gcmemo/gcmemo/default.asp.

90. *Id.*

91. *Id.*

92. *Id.*

93. 340 N.L.R.B. No. 86 (2003).

94. 2003 N.L.R.B. LEXIS 93 (2003).

95. *Id.* at 12, n.4.

2. Title VII of the Civil Rights Act

Hoffman may also have ramifications as to Title VII of the Civil Rights Act,⁹⁶ which protects workers, including undocumented workers, from discrimination based on national origin.⁹⁷ Since *Hoffman*, the Equal Employment and Opportunity Commission (EEOC) has reaffirmed coverage of undocumented workers under the Act, but rescinded its former guidance that allowed for a back pay remedy.⁹⁸ It is unknown whether compensatory and punitive damages are still available to migrant workers, though they are, in theory, available under the Act. However, the Second and Seventh Circuit Courts have upheld the right of undocumented migrant workers to recover punitive damages for violations of Title VII, even in the absence of any other damage awards.⁹⁹

Since *Hoffman*, defendants have attempted to expand its reach to dismiss claims and avoid liability under Title VII. In *Escobar v. Spartan Security Service*,¹⁰⁰ an employee sued his employer for sexual harassment, sex discrimination, retaliation, common law assault, negligence, and intentional infliction of emotional distress. The employee was undocumented during the alleged incidents, but later gained the legal right to work. The employers argued that the employee was not entitled to the protections of Title VII under *Hoffman*, and also sought to dismiss his state law claims. Citing *Hoffman*, the District Court dismissed the employee's claim for back pay under Title VII, as he was undocumented at the time he was employed, and left open the possibility of dismissing additional claims to front pay and reinstatement by refusing to address the topic of the employee's legal status, stating that the employer had not made arguments addressing the issue.¹⁰¹

96. 42 U.S.C. §§ 2000e-2000e-17.

97. See *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1517 (9th Cir. 1989); *Rios v. Enterprise Ass'n Steamfitters Local Union 638 of U.A.*, 860 F.2d 1168, 1173 (2d Cir. 1988); *EEOC v. Tortilleria "La Mejor"*, 758 F. Supp. 585 (E.D. Cal. 1991). But see *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (holding "that nothing in the equal employment opportunities provisions makes it illegal to discriminate on the basis of citizenship or alienage").

98. U.S. Equal Employment Opportunity Comm'n, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws, Directives Transmittal, No. 915.002 (June 27, 2002), available at <http://www.eeoc.gov/policy/docs/undoc-rescind.html>.

99. *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 354 (2d Cir. 2001); *Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998).

100. 281 F. Supp. 2d 895 (S.D. Tex. 2003).

101. *Id.* at 897.

3. *Compensation for Work Actually Performed*

Some employers have gone so far as to argue that migrants are not entitled to compensation for work actually performed. Allowing that to happen would only increase slavery-like conditions in the United States.¹⁰² Fortunately, courts have refused to extend *Hoffman* to deny workers' compensation for work already performed, and many agencies have released position papers in support. The U.S. Department of Labor has stated it will fully and vigorously enforce the Occupational Safety and Health Act (OSHA),¹⁰³ Fair Labor Standards Act of 1938 (FLSA),¹⁰⁴ Migrant and Seasonal Agricultural Worker Protection Act (AWPA),¹⁰⁵ and the Mine Safety and Health Act,¹⁰⁶ without regard to whether an employee is documented.¹⁰⁷

In a particularly disturbing case, *Singh v. Jutla*,¹⁰⁸ an employee sued his employer for unpaid wages and overtime for work actually performed from May 1995 to February 1998. Once the employee sued, his employer threatened to report him to INS and eventually did. The employer argued that the employee should have no cause of action under the FLSA due to *Hoffman*, but the court refused to extend *Hoffman*, especially to a "knowing employer" and reiterated prior law stating that the FLSA covers undocumented migrants. The court stated that "every remedy denied to undocumented workers provides a marginal incentive for employers to hire those workers," and found that prohibiting the employee's action would provide employers a "perverse economic incentive to employer to seek out and knowingly hire illegal workers."¹⁰⁹

In *Cortez v. Medina Landscaping*,¹¹⁰ employees sued their employer for overtime wages and liquidated damages for work

102. While we do not focus on the prohibition against slavery in this article, in addition to its prohibition under the U.S. Constitution, it is prohibited under numerous treaties including the International Convention on Civil and Political Rights, which prohibits slavery in Article 8. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, available at <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> [hereinafter ICCPR].

103. Occupational Safety and Health Act, 29 U.S.C. § 660(c)(1).

104. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2004).

105. Migrant and Seasonal Worker Protection Act, 29 U.S.C. §§ 1801-1872 (2004).

106. Mine Safety and Health Act, 30 U.S.C. §§ 801-962 (2004).

107. U.S. Dep't of Labor, Fact Sheet No. 48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman* Plastics Decision on Laws Enforced by the Wage and Hour Division, available at <http://www.dol.gov/esa/regs/compliance/whd/printpage.asp?REF=whdfs48.htm>.

108. 214 F. Supp.2d 1056 (N.D. Cal. 2002).

109. *Id.* at 1062.

110. 2002 U.S. Dist. LEXIS 18831 (N.D. Ill. 2002).

actually performed under the FLSA. The employer sought to compel discovery regarding the citizenship status of the employees. The Illinois District Court followed *Singh's* reasoning, limiting *Hoffman* to back pay for work not performed, refusing to allow the employer to harass employees by requesting immigration documents when they claim wages for work performed.

In *District Council No. 9 v. APC Painting, Inc.*,¹¹¹ a union sued their employer for unpaid wages on behalf of one of the employees. The employer argued that the employee could not recover unpaid wages because he was an "illegal alien." The District Court of New York held that the employer could not make a naked assertion regarding an employee's immigration status without personal knowledge and denied the employer's request to compel recovery.

In *Martinez v. Mecca*,¹¹² an employer sought to challenge the class standing of its employees for claims of unpaid overtime for work performed, based on their immigration status. The court held that the employees were not barred from bringing an NLRB action by virtue of their status and limited *Hoffman* only to back pay remedies, not wages for work actually performed.

Some employers have retaliated against undocumented workers who bring suits against them by firing them and then using *Hoffman* as a defense to avoid liability. Fortunately, courts are allowing these suits to continue, but remedies are being limited. In *Renteria v. Italia Foods, Inc.*,¹¹³ employees sued their employer for retaliatory discharge for firing them once they joined a suit to recover actual wages. The District Court of Illinois held that the employees could bring suit for retaliatory discharge and collect compensatory damages, but that back pay and front pay were not available remedies under *Hoffman*. The court reasoned that compensatory damages were available, as they did not assume continued illegal employment.

4. Discovery Requests

Some employers have attempted to use *Hoffman* to scare undocumented workers from pursuing claims by asking courts to require production of immigration papers during litigation, regardless of whether or not employees sue for back pay. Though courts have thus far limited these requests, one court noted that it

111. 272 F. Supp. 2d 229 (S.D.N.Y. 2003).

112. 213 F.R.D. 601 (S.D. Fla. 2002).

113. *Renteria v. Italia Foods, Inc.*, 2003 U.S. Dist. LEXIS 14698 (N.D. Ill. 2003).

may allow such discovery requests in later stages of litigation.¹¹⁴ Such attempts by employers will no doubt have a quieting effect on suits by undocumented workers and will lead to further exploitation of these workers.

In *Zeng Liu v. Donna Karan Int'l, Inc.*,¹¹⁵ an employer sought discovery of plaintiff employee's immigration status early in the case. The District Court of New York denied the request because the risk of injury to the employee outweighed the need for disclosure due to the danger of intimidation. The court noted, however, that such discovery may be allowed in later stages.

In *Flores v. Albertsons*,¹¹⁶ employees sued their employer for overtime, contract breach, negligence, and fraud, but not for back pay, as they had not been terminated by the employer. The employer sought the production of immigration documents from employees. The District Court of California said that *Hoffman* was limited to the back pay remedy and not to work actually performed and that employer's request for documents had a chilling effect on employees trying to protect their rights. The court further held that the FLSA protected undocumented workers, allowing the employees' suit to continue.

5. *Personal Injury and Tort Cases*

Employers have also attempted to use *Hoffman* to avoid liability in state personal injury and tort cases by arguing that undocumented migrant workers are not entitled to lost earning capacity, as they cannot be legally employed in the United States. A ruling in favor of employers in such cases would allow them to avoid partial liability for their actions and would, again, encourage hiring of undocumented workers, as they pose less of a liability risk to employers. Some employers have made alternative arguments that undocumented workers should, at the least, be entitled to lost earning capacity as measured in the country of which the migrant is a national. It is unclear how the law will continue to develop in this area, but thus far two courts have ruled in favor of workers and two against.

In *Tyson Foods, Inc. v. Guzman*,¹¹⁷ a chicken catcher working for Tyson was hit by a moving forklift and left with spinal and nerve damage due to the negligence of the company. The jury awarded

114. *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 193 (S.D.N.Y. 2002).

115. *Id.*

116. 2002 U.S. Dist. LEXIS 6171 (C.D. Cal. 2002).

117. 116 S.W.3d 233 (Tex. App. 2003).

the employee future earning capacity, along with other remedies. Tyson argued that the employee should not recover lost earning capacity due to *Hoffman*. The Texas Court of Appeals held that *Hoffman* was limited to the NLRA, and did not apply to common-law personal injury damages.

In *Cano v. Mallory Management and Con Edison*,¹¹⁸ an employee was injured when his employer's electric meter exploded and caused him third degree burns. The employer attempted to expand *Hoffman* to bar the undocumented employee from bringing his negligence suit in New York state courts. The court denied the employer's request and allowed the employee to seek damages for pain and suffering.

Conversely, in *Hernandez-Cortez v. Hernandez*,¹¹⁹ an employee sued his employer for negligence for personal injuries resulting from a car accident. The employee sought lost income based on projected earnings. The employer argued that *Hoffman* precluded this recovery. The Kansas court agreed and denied the employee recovery for this make-whole remedy.

Also, in *Majlinger v. Cassino Contracting Corp.*,¹²⁰ an employee was injured when he fell while installing siding, due to his employer's negligence. The employee sued for negligence and for violations of state labor laws, claiming lost earnings. The Supreme Court of New York held that *Hoffman* barred an award for lost earnings under New York law. More recently a New York appeals court, citing *Hoffman*, ruled that undocumented workers were entitled to recover lost wages in state court personal injury actions, but limited the amount of their recovered wages to what they would have earned in their home country, not what they would have been paid in the United States.¹²¹ Though this remedy seeks to impose some liability on employers, it ignores the realities of employment of undocumented workers in the United States. However, unlike *Hoffman*, the *Balbuena* Court recognized that it is the punishment of undocumented workers to the advantage of the employer that contravenes the IRCA's purpose and intent.¹²² It is also noteworthy that the Court stated that an award for damages for lost earnings in a future tort case is unlikely to influence the decision of undocumented workers to seek work in the United States, but is more likely to encourage employers to hire undocumented workers and to reduce their compliance with safety standards.¹²³

118. 760 N.Y.S.2d 816 (N.Y. Sup. Ct. 2003).

119. 2003 U.S. Dist. LEXIS 19780 (D. Kan. 2003).

120. 766 N.Y.S.2d 332 (N.Y. Sup. Ct. 2003).

121. *Balbuena v. IRD Realty LLC*, 787 N.Y.S.2d 35 (N.Y. App. Div. 2004).

122. *Id.* at 36.

123. *Id.* at 37.

6. Disability Law

Employers have also begun to use *Hoffman* in disability cases to argue against liability for disabilities sustained by workers at their places of employment. If courts were to expand *Hoffman* to hold that undocumented workers do not have standing under anti-discrimination laws, disabled migrant workers will be left with no legal recourse to workplace violations of their rights.

In *Lopez v. Superflex*,¹²⁴ an undocumented worker was fired due to a disability and sued his employer under the Americans with Disabilities Act (ADA). The employer tried to dismiss the suit based on the employee's immigration status and asked the court to impose additional pleading requirements on ADA plaintiffs, requiring them to state their immigration status. The court refused the employer's request, as such heightened pleading in the absence of a requirement in the Federal Rules of Civil Procedure was expressly rejected earlier by the Supreme Court.¹²⁵ The court allowed the employee's claim to proceed and did not address the employer's alternative argument that the plaintiff lacked standing. However, the court added that if the employee were to admit to being in the United States illegally or refused to answer questions regarding his status, the question of standing would be at issue and the court would address whether *Hoffman* applied to ADA claims for compensatory and punitive damages brought by undocumented workers.¹²⁶

While the IRCA does not have any direct impact on state disability laws, employers have attempted to use *Hoffman* to avoid liability for migrants' claims to state disability payments. In *Safeharbor Employer Services v. Velazquez*,¹²⁷ a Florida court agreed with this proposition when an employer argued that *Hoffman* should limit migrant's compensation. The court upheld prior case law,¹²⁸ stating that the Florida Workers' Compensation Act¹²⁹ provided workers' compensation for undocumented workers and stated that *Hoffman* had no effect on this.

The Supreme Court of Minnesota made a similar ruling in *Correa v. Waymouth Farms*.¹³⁰ In this case, the employer tried to stop disability payments, under the Minnesota Workers' Compensation

124. 2002 WL 1941484 (S.D.N.Y. 2002).

125. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

126. See *Lopez*, 2002 WL 1941484 at 2.

127. 860 So. 2d 984 (Fla. App. 1 Dist. 2003).

128. See *Cenvill Dev. Corp. v. Candelero*, 478 So. 2d 1168 (Fla. App. 1 Dist. 1985); see also *Gene's Harvesting v. Rodriguez*, 421 So. 2d 701 (Fla. App. 1 Dist. 2003).

129. Fla. Stat. ch. 440.01 (2004).

130. 664 N.W.2d 324 (Minn. 2003).

Act,¹³¹ upon termination of the employee due to the illegality of the employee's immigration documents. But the court allowed the distribution of disability payments, reasoning that the statute governing workers' compensation in Minnesota specifically included "aliens" in its definition of "employees."¹³² It should be noted, however, that the court stated that if protection were not specifically included in the statute, they would be forced to address immigration policies, as discussed in *Hoffman*.

Some state courts, however, have limited the availability of workers' compensation for undocumented migrant workers. In *Sanchez v. WCAC Eagle Alloy, Inc.*,¹³³ two employees were injured on the job and received workers' compensation under Michigan's Worker's Disability Compensation Act (WDCA).¹³⁴ Using *Hoffman*, the employer argued that they should not receive workers' compensation due to their undocumented status, and the lower court reduced the award, limiting it to the date on which the employer learned of their undocumented status. The employer appealed this judgment, arguing that the plaintiffs were not "employees" because they were "illegal aliens." The employer also argued that there was no employment contract, using a fraud in inducement theory due to the illegality of their work papers. The Michigan Court of Appeals held that the workers were "employees" under the law and that there was a contract, as state law was silent as to the effect of false representations. The court skirted the *Hoffman* issue by holding that the employees were not entitled to workers' compensation because state law entitled employers to stop disbursement of compensation once a crime had been committed and the court found that presentation of false documents was sufficient to qualify as a crime.¹³⁵ In *Reinforced Earth Co., v. Workers' Compensation Appeal Board*,¹³⁶ an undocumented worker was struck in the head, neck, and back by a steel beam and sustained serious injuries that left him unable to work. The worker sought benefits under the Pennsylvania Workers' Compensation Act, and the employer argued that *Hoffman* should bar such benefits.¹³⁷ The Pennsylvania court held that undocumented workers were eligible for workers' compensation, but that an employer need not show the prior requirement of job availability in order to suspend benefits for

131. Minn. Stat. § 176.011 (2004).

132. See 664 N.W.2d at 329.

133. 658 N.W.2d 510 (Mich. App. 2003).

134. Mich. Comp. Laws § 418.361(1) (2005).

135. See *Sanchez*, 658 N.W.2d at 521.

136. 810 A.2d 99 (Pa. 2002).

137. *Id.* at 469-70; Act of June 2, 1915, P.L. 736 (as amended 77 P.S. §§ 1-1041.4, 2501-2626).

the worker.¹³⁸ This holding makes it easier to deny any medical benefits for undocumented workers injured as a result of their employer's negligence, as defendants have a smaller burden in seeking to discontinue disability payments.

D. Relevant International Law Protecting the Workplace Rights of Migrant Workers

Both international treaties and customary international law addressing the rights of undocumented migrant workers are applicable in the United States. For purposes of this article and of the rights affected by the *Hoffman* decision, we will focus only on the international protection of the rights of freedom of association, nondiscrimination and the right to effective recourse through legal aid.

1. Use of International Law in the U.S. Courts

International law may be used in the United States as direct application of treaty law, as application of customary international law, and as an interpretive guide.¹³⁹ The Supremacy Clause of the U.S. Constitution states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."¹⁴⁰ The doctrine of "self-executing treaties," a court-created doctrine limiting direct enforcement to clauses that directly confer rights, must be addressed,¹⁴¹ as well as reservations, understandings, and declarations¹⁴² when seeking to enforce treaty obligations in U.S. courts.

Customary international law arises out of the practice of nations acting in a particular manner from a sense of legal obligation.¹⁴³ Article 38(1)(b) and (c) of the Statute of the

138. *Reinforced Earth*, 810 A.2d at 479-80.

139. See Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. Cin. L. Rev. 423 (1997).

140. U.S. Const. art. VI, § 2, cl. 2.

141. See also De la Vega, *supra* note 139, at 448-51 (providing a more in depth analysis of this topic).

142. *Id.* at 452-62.

143. See generally Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principal or Customary International Legal Right?*, 11 Harv. BlackLetter L.J. 37 (1994) (describing customary international law under international standards as well as its use in the United States, with a focus on its use as an interpretive guide).

International Court of Justice provides that customary international law is: (1) international custom, as evidence of a general practice (state practice) accepted as law, and (2) the general principles of law recognized by civilized nations.¹⁴⁴ State practice may be deduced from treaties, whether ratified or not, national laws, declarations of intergovernmental bodies, and evidence of the extent to which customary law is observed.¹⁴⁵ Customary law binds nations whether or not they have formally recognized it, as long as they have not "expressly and persistently objected to its development."¹⁴⁶ In the United States, customary international law, like treaty law, is enforceable in the courts.¹⁴⁷ The U.S. Supreme Court has held that it is "part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . ."¹⁴⁸ International law may also be used as an interpretive guide. U.S. laws, when ambiguous, should be construed to be consistent with customary international law.¹⁴⁹ The Supreme Court has ruled that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains . . ."¹⁵⁰ U.S. courts have found international human rights standards helpful in interpreting both federal and state laws.¹⁵¹ For example, in *Lipscomb v. Simmons*,¹⁵² the Ninth Circuit used the Universal Declaration of

144. *Id.* at 41.

145. *Id.* at 41-42.

146. Restatement (Third) of the Foreign Relations Law of the U.S., American Law Institute §102 (1987) [hereinafter Restatement (Third)]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27); North Sea Continental Shelf Cases (F.R.G. v. Den.; F.R.G. v. The Neth.), 1969 I.C.J. 3, at 41-44 (Feb. 20).

147. See Restatement (Third), § 111; see also Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 Yale L.J. 2277, 2284 (1991).

148. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

149. It is important to keep separate the use of international human rights law as an interpretive tool from its application as customary international law. For a discussion on whether an international norm has to reach the level of customary international law in order to be used as an interpretive tool, see Susan Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 Colum. L. Rev. 550, 619-20 (1992). Bitensky agrees with Richard Lillich's position that the use of international standards as interpretive devices do not require treating them as dispositive law. *Id.* at 620.

150. *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804); see also *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982).

151. See Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 Mich. J. Int'l L. 1 (1992); Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Court*, 18 Tex. Int'l L.J. 291, 308-11 (1983); Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. Cin. L. Rev. 3 (1983).

152. 884 F.2d 1242 (9th Cir. 1989), *rev'd en banc*, 962 F.2d 1374 (9th Cir. 1992). In the en banc reversal, however, the Court did not refer to international law.

Human Rights (Universal Declaration),¹⁵³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁵⁴ the International Covenant on Civil and Political Rights (ICCPR),¹⁵⁵ and the American Convention¹⁵⁶ to show the importance of the right to associate with family members.¹⁵⁷ International law regarding labor rights may be used to help interpret laws in the United States in the same way.

2. *International Protections Guarding Freedom of Association*

The right to freedom of association is present in various treaties and may also be recognized as customary international law. At a minimum, the international norms are available as interpretive guides.

a. *Treaties Ratified by the United States*

The United States became a party to the ICCPR on September 8, 1992, and is thus bound by its provisions.¹⁵⁸ Article 22(1) of the Covenant states that "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."¹⁵⁹ Article 22(2) further states that "[n]o restrictions may be placed on the exercise of this

153. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, [no session #], [no supplement #], [hereinafter Universal Declaration of Human Rights].

154. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 994 U.N.T.S. 3 (ICESCR).

155. ICCPR, *supra* note 102.

156. See American Convention on Human Rights, *supra* note 71.

157. *Lipscomb*, 884 F.2d at 1242 (holding Oregon violated due process rights of children living with close relatives in denying them foster care benefits); see also *Lareau v. Manson*, 507 F. Supp. 1177, 1188 n.9 (D. Conn. 1980), *modified on other grounds*, 651 F.2d 96 (2d Cir. 1981) (using international standards on treatment of prisoners to interpret Eighth Amendment to the U.S. Constitution); *Conservatorship of Hofferber*, 616 P.2d 836, 844 (Cal. 1980) (challenging procedures used to commit conservatee charged with violent crime and noting concern of U.N. Human Rights Commission regarding treatment of persons detained on mental illness grounds); *Sterling v. Cupp*, 625 P.2d 123, 131 n.21 (Ore. 1981) (using U.N. Charter, Universal Declaration of Human Rights, and ICCPR as examples of principles governing treatment of prisoners in case enjoining pat downs of prisoners' sexual areas by guards of the opposite sex); *Doe v. Plyler*, 458 F. Supp. 569, 592 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), 457 U.S. 202 (1982) (recognizing right to education of non-citizens and cited to Article 47 of Protocol of Buenos Aires for support).

158. See 138 Cong. Rec. S4, 781-84 (daily ed. Apr. 2, 1992).

159. See ICCPR, *supra* note 102, at art. 22(1).

right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others."¹⁶⁰ Despite clarity in many of its provisions, the Senate ratified the ICCPR to establish that the treaty was not self-executing.¹⁶¹ The validity of this declaration has been called into question by many who believe that such a reservation runs counter to the object and purpose of the treaty.¹⁶² Article 22 is extremely clear in stating that *all* individuals have the right to form unions and that no restrictions may be placed on this right except for reasons of national security, public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others. The *Hoffman* decision was not based on any of these factors, but only on the existing labor laws and the Immigration Reform and Control Act of 1986. Thus, it is not in compliance with U.S. treaty obligations under the ICCPR.

The United States is also bound by the Charter of the Organization of American States (OAS), which it ratified in 1951. Article 45(c) of that Charter states that "workers . . . have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike . . ."¹⁶³ No reservation was attached to this provision, and direct enforcement in the courts would be subject to the traditional self-execution doctrine.¹⁶⁴ The United States is also a member of the ILO, whose standards, in general, cover all workers irrespective of their nationality. ILO Conventions 87 and 98, dealing with freedom of association, have been ratified by 142 and 154

160. *Id.* at art. 22(2).

161. See 138 Cong. Rec. S4, 781-01, sec. I(2) (daily ed. Apr. 2, 1992).

162. Commentators have noted that a U.S. limitation that declares a treaty to be non-self-executing should not be given effect when it runs counter to the object and purpose of the treaty. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control over the Conclusion and Operation of Treaties*, 67 Chi.-Kent L. Rev. 571, 608 (1991). It is also important to remember that the courts, not the Senate, ordinarily decide when treaty provisions are self-executing. See Bayefsky & Fitzpatrick, *supra* note 151, at 42-47; Lori Fisler Damrosch, *The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties*, 67 Chi.-Kent L. Rev. 515, 526 (1991); David Weissbrodt, *The United States Ratification of the Human Rights Covenants*, 63 Minn. L. Rev. 35, 67 (1978); see also *White v. Paulsen*, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998).

163. Charter of the Organization of American States art. 45(c), Dec. 31, 1951, 2 U.S.T. 2394, 119 U.N.T.S. 3.

164. See generally, *supra* note 139, at 448-51 (describing how the doctrine of self-executing treaties has been applied in the United States, focusing on the issue of intent addressed in the Restatement (Third) and the various factors considered by the courts in ascertaining intent).

member states, respectively.¹⁶⁵ Each member country is bound by these, whether or not they have ratified those Conventions, since freedom of association is taken to be a constitutional norm binding on countries by virtue of their membership in the organization. All members, even if they have not ratified the Conventions in question, have an obligation to respect, promote, and realize the principles concerning fundamental rights that are the subject of those Conventions.¹⁶⁶ As discussed above, the ILO's Committee on Freedom of Association held just that in a case filed by the AFL-CIO, a federation of 66 national and international unions representing approximately 13 million workers in the United States. The AFL-CIO alleged that the *Hoffman* decision violated the ILO Convention on the Freedom of Association and Protection of the Right to Organize, by creating a distinction based on immigration status.¹⁶⁷ The complaint also alleged that *Hoffman* violates the requirement of the ILO Convention on the Right to Organize and Collective Bargaining for adequate protection against acts of anti-union discrimination, as well as the ILO Declaration of Fundamental Principles and Rights at Work by denying the freedom of association to undocumented workers.¹⁶⁸ Based on this, an argument could similarly be made that the ILO provisions can also be directly applied in U.S. courts. Even though the United States is not a party to Conventions 87 and 98, they could be applicable as authoritative interpretations of its obligations under the Constitution of the ILO.¹⁶⁹ While direct enforcement of both the OAS Charter and the ILO Constitution might face difficulties with the self-execution doctrine, clearly both are relevant to the argument that they are part of customary international law. At a minimum, the standards under both treaties are relevant as interpretive guides, especially since the United States is party to both.

165. ILO, *Ratifications of Fundamental Conventions*, available <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN> (last visited Mar. 20, 2005).

166. See ILO Declaration on Fundamental Principles and Rights at Work, 37 I.L.M. 1233, art. 2 (entered into force June 18, 1998) (declaring that "all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions").

167. See ILO Committee on Freedom of Association, *supra* note 76, at No. 87, para. 555.

168. *Id.*

169. See Burke et al., *supra* note 151, at 308, for a similar argument involving the use of the ICCPR and ICESCR as interpretive guides for U.N. Charter obligations.

b. Customary International Law Protecting Freedom of Association

Numerous other treaties, national laws, and declarations of inter-governmental bodies provide for the right to freedom of association. We focus here on the international instruments, though advocates pursuing this claim should also look to the laws of the states. The U.S. government need not formally recognize the right, so long as it has not expressly and persistently objected to its development. If sufficient evidence of acceptance of this norm exists, it can be argued that freedom of association has risen to the level of customary international law because it is recognized in a large number of treaties, declarations, and resolutions, and has been adopted by many nations as a fundamental right under domestic laws.¹⁷⁰ Moreover, the United States has not expressly and persistently objected to this right in ratification of international instruments or in the development of its own law.

Of the principal international human rights treaties protecting this right, there are 152 state parties to the ICCPR, 149 state parties to the ICESCR, and 34 parties to the Migrant Workers Convention.¹⁷¹ Additionally, the 175 member states of the ILO must observe this right.¹⁷² The Migrant Workers Convention, which recently came into effect, also provides migrants with much-needed protections in

170. Additional research on the practice of nations is needed in this regard, as there is some evidence that compliance is not worldwide. A large number of nations in the Middle East restrict the right to associate in and form unions in various ways, and many are aimed at migrant workers, both documented and undocumented. See Sara Hammerton-Clarke, *Annual Survey of Violations of Trade Union Rights*, (Int'l Confederation of Free Trade Unions, Brussels, Belg.), 2004, at 276-95, available at <http://www.icftu.org/www/pdf/Survey04-EN.pdf>. Those nations include Jordan, Kuwait, Lebanon, Oman, Israel, Qatar, Saudi Arabia, Syria, and Yemen. Malaysia, where Indonesians make up the largest irregular flow in Asia and globally are second only to Mexicans entering the United States, has specific laws not allowing national unions in certain industries. On May 10, 2004, the governments of Indonesia and Malaysia signed a Memorandum of Understanding prohibiting migrant workers from joining trade unions and forming associations. See Stephen Frost, *Indonesia: Govt Signs MOU on Migrant Workers with Malaysia*, Asian Labour News, May 11, 2004, at <http://www.asianlabour.org/archives/001551.php>; *Help Wanted: Abuses Against Female Migrant Domestic Workers in Indonesia and Malaysia*, 16 Human Rights Watch 9(B) at 81 (July 2004) at <http://hrw.org/reports/2004/indonesia0704/indonesia0704simple.pdf>.

171. *Status of Ratifications of the Principle International Human Rights Treaties*, Office of the U.N. High Commissioner for Human Rights, Nov. 2, 2003, revised by June 9, 2004, at 12, available at <http://www.unhchr.ch/pdf/report.pdf> [hereinafter UNHCHR Status Report].

172. ILO "Core" Conventions Ratifications Surge Past 1,000 Mark, ILO 2000 Press Release, Doc. No. ILO/00/36 (Sept. 22, 2000), at <http://www.ilo.org/public/english/bureau/inf/pr/2000/36.htm>.

the workplace. Article 11 states that neither migrants nor members of their families may be held in slavery.¹⁷³ Moreover, Article 26 gives migrants and their families the right to join unions and to seek their aid and assistance without any restrictions.¹⁷⁴ The United States became a signatory to the ICESCR in 1977,¹⁷⁵ and Article 8 states that everyone has a right to "form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned."¹⁷⁶ And it further states that the exercise of this right is subject only to restrictions based on national security, public safety, public health or morals, or the rights and freedoms of others.¹⁷⁷ Moreover, it does not allow legislative measures to be taken that would "prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in [the] Convention."¹⁷⁸ Protection of the right to unionize is also contained in various regional human rights instruments. The United States became a signatory to the American Convention in 1977,¹⁷⁹ and Article 16(1) states that "[e]veryone has the right to associate for ... labor ..., or other purposes."¹⁸⁰ Article 16(2) further states that the exercise of this right is subject only to restrictions based on national security, public safety, public health or morals, or the rights and freedoms of others.¹⁸¹ The African Charter on Human and Peoples' Rights (African Charter),¹⁸² ratified by 53 states, provides that "[e]very individual shall have the right to free association provided that he abides by the law."¹⁸³ The European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention),¹⁸⁴ ratified by 45 states, also includes protections for the right to unionize; Article 11(1) states that "[e]veryone has the right to ... freedom of association with others, including the right to form

173. Migrant Workers Convention, *supra* note 1, at art. 11.

174. *Id.* at art. 26.

175. UNHCHR Status Report, *supra* note 171, at 12; ICESCR, *supra* note 154.

176. *Id.* at art. 8; ICESCR, *supra* note 154.

177. *See id.* at art. 8(1)(c).

178. *Id.*

179. *See American Convention, supra* note 71.

180. *Id.* at art. 16(1).

181. *Id.* at art. 16(2).

182. African [Banjul] Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3/Rev. 5, 21 I.L.M. 58 (1982) (in force 21 Oct. 1986) [hereinafter African Charter].

183. *Id.* at art. 10(1); Institute for Human Rights and Development in Africa, The African Charter on Human and Peoples' Rights, available at <http://www.africaninstitute.org/eng/afSystem/afcharter/ac.php>.

184. European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, (in force Sept. 3, 1953), as amended by Protocols Nos. 3, 5, 8, and 11, which entered into force on Sept. 21, 1970; Dec. 20, 1971; Jan. 1, 1990; and Nov. 1, 1998; respectively [hereinafter European Convention].

and to join trade unions for the protection of his interests.”¹⁸⁵ Article 11(2) further secures this right by requiring that no restrictions are placed on the exercise of this right, unless they are “necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.”¹⁸⁶ The United States has also been held to be subject to the jurisdiction of the Inter-American Commission and, as a member of the OAS, is bound by the rights enumerated in the American Declaration,¹⁸⁷ of which Article XXII states that “[e]very person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.”¹⁸⁸ In addition, the Universal Declaration is generally held to espouse principles of customary international law. Continual adherence to the Universal Declaration of Human Rights¹⁸⁹ by nations who subsequently joined the United Nations and the incorporation of its principles into many countries’ constitutions have made these standards “an authoritative statement of the international community.”¹⁹⁰ Because of this, the Universal Declaration is “recognized by leading international scholars as customary international law binding on all countries.”¹⁹¹ This recognition has been attained even though the Universal Declaration is not a treaty. “Article 38(1)(c) of the Statute of the International Court of Justice concerns ‘general principles of law recognized by civilized nations’ and instructs that Court to apply those principles.”¹⁹² Thus,

185. *Id.* at art. 11(1).

186. *Id.* at art. 11(2).

187. See *Baby Boy*, Case 2141 (United States), Inter-Am. C.H.R. 25, *Annual Report 1980-1981*, OEA/ser.L./V./II.54, doc. 9 rev.1 (Mar. 6, 1981), *Baby Boy* case at para. 17 (regarding the applicability of the American Declaration to the United States and the competence of the Inter-American Commission).

188. American Declaration, *supra* note 72, at art. XXII.

189. See Universal Declaration of Human Rights, *supra* note 153.

190. *Lareau v. Manson*, 507 F. Supp. 1177, 1193 n.18 (D. Conn. 1980), quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980); see also *Fernandez v. Wilkinson*, 505 F. Supp. 787, 796 (D. Kan. 1980) (recognizing that in practice, the Universal Declaration of Human Rights is invoked as legally binding on nations, private individuals, and groups).

191. *Children’s Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 178 (Cynthia Price Cohen et al., eds., 1990). The Universal Declaration of Human Rights is not a treaty but a resolution adopted unanimously by the U.N. General Assembly in 1948. It is considered either an authoritative interpretation of the U.N. Charter or a statement of customary law. See *Filartiga*, 630 F.2d at 883. In either case, its basic provisions are now considered binding on member states of the United Nations. *Id.*

192. Frank C. Newman, *Introduction: The United States Bill of Rights, International Bill*

international principles need not be incorporated in a treaty in order to reach the status of customary international law.

The Universal Declaration states that "[e]veryone has the right to form and to join trade unions for the protection of his interests."¹⁹³ *Hoffman* and subsequent decisions are thus also in violation of customary international law, as undocumented workers no longer have an equal right to join trade unions and are denied back pay remedies, resulting in increased exploitation by employers.

The United States is also a signatory to various treaties dealing with the right of association and is thus charged with the responsibility not to defeat the object and purpose of these treaties.¹⁹⁴ While these treaties may not be the basis for direct enforcement, they are certainly evidence of custom¹⁹⁵ and at a minimum would be useful along with the other treaties as an interpretive guide, especially for resolving conflicts between two statutes, as occurred in *Hoffman*.

c. International Protections Guarding Rights to Equality Before the Law, Equal Protection, and Nondiscrimination

International law provides undocumented workers with equality before the law in regard to substantive employment protections contained in various instruments. No exceptions exist under existing international law for discrimination based on citizenship or immigration status. When this issue was recently raised with the Inter-American Court of Human Rights, it found that there was no existing exception based on immigration status..¹⁹⁶

i. Binding Treaties Protecting These Rights

Articles 2, 3, and 26 of the ICCPR set forth the basic principle of equal protection of the laws. Article 2 requires that States Parties provide the enumerated rights to all individuals within their jurisdiction without regard to "race, colour, sex, language, religion,

of Human Rights, and Other "Bills," 40 Emory L.J. 731, 738 (1991).

193. Universal Declaration of Human Rights, *supra* note 153, art. 23(4).

194. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 331, 336.

195. Advocates should also research the laws and practices of other countries to further bolster the argument that the right to freedom of association has reached the level of a customary international norm.

196. *Advisory Opinion*, *supra* note 21, at 164-66.

political or other opinion, national or social origin, property, birth or other status.”¹⁹⁷ Article 26 reinforces that equal protection language by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.¹⁹⁸ Article 3 specifically guarantees “the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant.”¹⁹⁹ Article II of the American Declaration also establishes equal protection of the laws. All rights and duties established in the Declaration must be provided “without distinction as to race, sex, language, creed or any other factor.”²⁰⁰ The Convention on the Elimination of all Forms of Racial Discrimination (CERD),²⁰¹ ratified by the United States in 1994, also prohibits racial discrimination, which it defines as “any distinction, exclusion, restriction or preference based on race, [color], descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, or human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁰² Equality before the law is mandated with respect to specific enumerated rights, including the right to equal treatment before tribunals. While distinctions are allowed under CERD with respect to citizens and non-citizens, the Committee on the Elimination of Racial Discrimination has issued a General Comment interpreting those restrictions as applying to such rights as citizens’ right to participate in elections, to vote, and to stand for election; many of these, such as the right to equal treatment before tribunals, apply to all persons within the jurisdiction of the state.²⁰³

ii. Customary International Law Protecting These Rights

In addition to those three treaties, ICESCR and the Migrant Worker Convention²⁰⁴ both protect these rights. Moreover, Article 7

197. ICCPR, *supra* note 102, at art. 2.

198. *Id.* at art. 26.

199. *Id.* at art. 2.

200. American Declaration, *supra* note 72, at art. II.

201. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, art. 1, 660 U.N.T.S. 195 (adopted by the United States on Nov. 20, 1994).

202. *Id.* at art. 1(1).

203. *Id.* at art. 5. The Committee on the Elimination of Racial Discrimination may make suggestions and general recommendations based on the information contained in State Parties’ reports. These recommendations are then reported to the General Assembly, printed in Official Records, and used to give guidelines to States Parties regarding questions of interpretation or implementation. *Id.*

204. Article 18(1) of the Migrant Workers Convention states that “[m]igrant

of the Universal Declaration states that "[a]ll are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."²⁰⁵ The principle of nondiscrimination was also affirmed when, on May 10, 2002, the government of Mexico requested an advisory opinion from the Inter-American Court after the *Hoffman* decision,²⁰⁶ asking it to determine whether states could deem a specific migratory status to be a prerequisite for the enjoyment of labor rights or whether such practices constituted a violation of international (and OAS) principles of equality before the law and nondiscrimination. Mexico worried that decisions such as *Hoffman* would lead to a progressive loss of labor rights like payment of overtime, seniority, outstanding wages, and maternity leave.²⁰⁷ Some of these concerns have already been realized, as discussed above.

The Inter-American Court determined that American states could not put undocumented migrant workers at a legal disadvantage in terms of labor rights, just as it could not do so with legal residents or citizens.²⁰⁸ The court stated: "States may not subordinate or condition observance of the principle of equality before the law and nondiscrimination to achieving their public policy goals, whatever these may be, including those of a migratory character."²⁰⁹

The Inter-American Court also found that the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.²¹⁰ The right to nondiscrimination in employment is also one of four core worker rights recognized by the ILO as internationally accepted fundamental human rights²¹¹ and held to be binding on all ILO

workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals." Migrant Workers Convention, *supra* note 1.

205. Universal Declaration of Human Rights, *supra* note 153, art. 7.

206. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).

207. *Advisory Opinion*, *supra* note 21, at 2, para. 2.

208. *Id.* at 113-14, paras. 9-10.

209. *Id.* at 114, para. 11.

210. *Id.* at 113-14.

211. See Convention Concerning Discrimination in Respect of Employment and

members.

Article 2(2) of the ICESCR requires that state parties undertake to guarantee that the rights will be exercised "without discrimination of any kind as to race, [color], sex, language, religion, political or other opinion, national or social origin, property, birth or other status."²¹² Article 24 of the American Convention also states that "[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."²¹³ Likewise, the Migrant Convention provides that state parties must ensure all migrant workers and their families the rights provided in the convention "without distinction of any kind such as ... national, ethnic or social origin, nationality, ... or other status."²¹⁴ Various regional instruments also provide further proof that the principle of the right to equality before the law has secured general acceptance. The African Charter contains various provisions safeguarding this right. Article 2 of the Charter states that "[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ... national and social origin, ... birth or other status."²¹⁵ Article 3 requires equality before the law and equal protection of the law for "every individual."²¹⁶ Lastly, Article 15 states that "[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."²¹⁷ The European Convention also safeguards the right to equality before the law. Article 14 of the Convention states that "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... national or social origin, association with a national minority, ... birth or other status."²¹⁸ Finally, both the American Convention, to which the United States is a signatory, and the American Declaration include provisions protecting the right to equality before the law. Under Article 1 of the American Convention, state parties must ensure "all persons ... the free and full exercise of ... rights and freedoms, without any discrimination for reasons of race ... national or social origin, ... birth or any other social condition."²¹⁹ Similarly, Article II of the American

Occupation, June 25, 1958, 362 U.N.T.S. 31, 32-40.

212. ICESCR, *supra* note 154, at art. 2(2).

213. See American Convention on Human Rights, *supra* note 71, at art. 24.

214. See Migrant Workers Convention, *supra* note 1, at art. 7.

215. See African Charter, *supra* note 182, at art. 2.

216. *Id.* at art. 3.

217. *Id.* at art. 15.

218. See European Convention, *supra* note 184, at art. 14.

219. See American Convention on Human Rights, *supra* note 71, at art. 1(1).

Declaration states that "[a]ll persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, . . . or any other factor."²²⁰ The provisions of these treaties, regional instruments, and the Inter-American Court decision are evidence that the principle of equality is customary international law.²²¹ Advocates can also bolster this with evidence of national laws prohibiting discrimination. At a minimum, these standards should provide useful guidance for interpreting federal and state constitutional and statutory schemes applicable to the right to equality in the provision of workers' rights.

d. International Law Provisions Protecting the Right to an Effective Remedy

The United States is party to several treaties protecting the right to an effective remedy, and there are other treaties that support the argument that it has risen to the level of a customary international norm. Additional research on the practice of nations would be useful to develop the argument. At a minimum, the treaties would be useful in this regard in helping to interpret the various state and federal laws that have been the subject of challenges to undocumented workers' rights under *Hoffman*.

i. Binding Treaties Protecting This Right

Article 2(3) of the ICCPR requires state parties to ensure that "any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity."²²² Likewise, the American Declaration provides all persons with the right to legal procedures "whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights."²²³ Lastly, the OAS Charter

220. See American Declaration, *supra* note 72, at art. II.

221. Vienna Convention on the Law of Treaties, *supra* note 194, at 352. Indeed, since nondiscrimination and equality are central to most human rights treaties, they may have risen to the level of *jus cogens* or peremptory norms of international law from which no derogation is permitted. See also Connie de la Vega, *Amici Curiae Urge the U.S. Supreme Court to Consider International Human Rights Law in Juvenile Death Penalty Cases*, 42 Santa Clara L. Rev. 1041, 1043 (2002).

222. See ICCPR, *supra* note 102, at art. 2(3).

223. See American Declaration, *supra* note 72, at art. XVIII.

provides all persons "due legal aid in order to secure their rights."²²⁴ The *Hoffman* decision violates these binding international law provisions, as there is no longer an effective remedy for undocumented migrants, given that punitive damages and reinstatement are not available remedies under the NLRA. The recent expansion of *Hoffman* is further encroaching on these rights as it extends the reach of the decision into other areas, including the right to health, as seen in the disability law and personal injury cases. Moreover, policies undertaken to deprive migrant workers of legal representation, such as prohibiting Rural Legal Services²²⁵ from representing undocumented workers, also stand in violation of U.S. responsibilities under the OAS Charter.

ii. Customary International Law Protecting This Right

The ICCPR²²⁶ and the Migrant Worker Convention²²⁷ protect the right to an effective legal remedy. Article 8 of the Universal Declaration provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."²²⁸ Regional instruments in Europe, Africa, and the Americas also carry provisions safeguarding the right to effective legal recourse and provide further support for the argument that this right has attained the status of customary international law. Article 25 of the American Convention, to which the United States is a signatory, guarantees all persons the right to "effective recourse . . . for protection against acts that violate his fundamental rights recognized by the [American Convention]."²²⁹ Article XVIII of the American Declaration states that "[e]very person may resort to the courts to ensure respect for his legal rights."²³⁰ Article 7 of the African Charter states that "[e]very individual shall have the right to have his cause heard."²³¹ And finally, Article 13 of the European

224. Charter of the Organization of American States, *supra* note 163, at art. 45(i), as amended by Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Buenos Aires"), Mar. 12, 1970, 721 U.N.T.S. 324, as amended by Protocol of Amendment to the Charter of the Organization of American States ("Protocol of Cartagena de Indias"), 25 I.L.M. 529 (*entered into force* Nov. 16, 1988).

225. See Bowe, *supra* note 27.

226. See ICCPR, *supra* note 102, at art. 2(3).

227. See Migrant Workers Convention, *supra* note 1.

228. See Universal Declaration of Human Rights, *supra* note 153, at art. 8.

229. See American Convention on Human Rights, *supra* note 71, at art. 25(1).

230. See American Declaration, *supra* note 72, at art. XVIII.

231. See African Charter, *supra* note 182, at art. 7.

Convention states that "[e]veryone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."²³²

Conclusion

As attempts to expand *Hoffman* into other areas of the law increase, it is important that attorneys understand and make use of international human rights law to avoid further deprivation of migrant worker rights. Since no international arguments were made during the *Hoffman* case, there is still arguably a claim under international law that could reinstate the right to back pay for undocumented migrant workers.

Immigration law is also in need of reform to remedy violations of the human rights of migrants. The U.S. employer sanctioning system has many loopholes through which exploitation of migrant workers is conducted. One such loophole allows employers who accept documents that appear on their face to be genuine and to relate to the individual named to avoid any liability for hiring undocumented workers. Thus, employers who hire undocumented workers not only profit from the low wages paid to these workers, but also avoid liability for back pay and any sanctions when a worker's rights have been violated. It is also important that any future changes to existing law or proposals for new immigration policies conform to international human rights standards. For example, President George W. Bush has put forward a revised guest-worker program that would allow non-nationals to receive work permits for periods of up to five years. This proposal is being hailed by the current administration as a solution to the problems of undocumented migration and established demand for additional workers. However, many experts question this assertion, and many more fear that such a guest-worker program could lead to similar abuses experienced under prior U.S. guest-worker programs. Thus, it is important that attorneys and legal scholars demand that this new proposal be in conformity with international human rights law and that it provide migrant workers with the same rights and remedies as citizens.

Recent decisions by the Inter-American Court and the ILO regarding the *Hoffman* decision should also be used to support legislative change in the United States to overturn *Hoffman*. Additionally, since international law was not considered in the

232. See European Convention, *supra* note 184, at art. 13.

court's opinion in *Hoffman*, Congress should consider overturning the decision on this basis alone. Advocates for migrant workers should make clear that labor rights and principles of nondiscrimination have attained the status of customary international law, as recognition of this will allow advocates to fight further expansions of *Hoffman* and other human rights violations in these areas.

Finally, advocates must insist on the applicability of international human rights law on all levels—domestically, as well as regionally and internationally. Thus, as more trade treaties and labor agreements are negotiated, it is essential that these agreements comply with international human rights standards and that they are not limited by domestic laws that may violate such norms. More specifically, they should include provisions that specifically protect the human rights of all workers, including the right to organize and bargain. In that event, the mandate of the National Labor Relations Act that the protection by law of the right to organize and bargain collectively to promote the flow of commerce will be upheld in this era of globalization.

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