

THE INTER-AMERICAN COURT OF HUMAN RIGHTS
DEFINES UNAUTHORIZED MIGRANT WORKERS'
RIGHTS FOR THE HEMISPHERE:
A COMMENT ON *ADVISORY OPINION 18*

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In times of the so-called 'globalization' (the misleading and false neologism which is *en vogue* in our days), the frontiers have opened to the capitals, goods and services, but have sadly closed themselves to human beings.¹

I.

INTRODUCTION

The rights of migrant workers around the world have taken on new shape in recent years as a result of ever-increasing transnational migration flows and the proliferation of population-specific international human rights standards. A number of countries use employment law restrictions to control illegal immigration, believing that such prohibitions will stem the flow of people seeking unauthorized work.² In addition to employer sanctions regimes, many countries also afford lesser labor and employment rights to unauthorized workers, relying on theories of deterrence, administrative convenience and unclean

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1. Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), para. 16, (Cançado, J., concurring) [hereinafter *OC-18 Cançado Concurrence*], available at http://www.corteidh.or.cr/serie_a_ing/sa_cancado_18_ing.doc.

2. See M. Isabel Medina, Employer Sanctions in the United States, Canada, and Mexico: Exploring the Criminalization of Immigration Law, 3 SW. J. L. & TRADE AM. 333, 339 (1996). For example:

In 1982, the General Accounting Office reported that fourteen countries out of nineteen surveyed had in place some form of employer sanctions. Although the majority of countries provided for criminal penalties, fines, or a period of imprisonment of anywhere from six months to a maximum of three years, offenders, seldom, if ever, were sentenced to a prison term of any length, and fines imposed tended to be very low. Since that time, other countries, like Japan, Taiwan, South Korea, and Singapore, have adopted employer sanctions. Great Britain continues to resist the trend.

Id. (citations omitted).

hands to justify the differential standards. The Inter-American Court of Human Rights, the Organization of American States' highest court of human rights, recently challenged receiving-country governments to justify the curtailment of employment and labor rights for unauthorized migrant workers.³ In an advisory opinion issued September 17, 2003, entitled, *Legal Status and Rights of Undocumented Migrants*,⁴ the court concluded that employment and labor rights must extend to all workers equally, regardless of their immigration status. This conclusion represents a significant expansion of labor and employment rights for unauthorized workers within the international legal community.

Mexico requested the advisory opinion from the Inter-American Court in response to a United States Supreme Court decision that severely curtailed the labor law remedies available to unauthorized workers in the United States.⁵ *Hoffman Plastic Compounds, Inc. v. NLRB*⁶ involved an unauthorized Mexican worker who was fired after supporting a union organizing campaign. In *Hoffman*, the Court reversed a long-standing National Labor Relations Board policy by revoking monetary damages for victims of labor rights violations who are unauthorized to work in the United States.⁷ After publicly criticizing the new policy,⁸ the Mexican government promptly filed a request for an advisory opinion on the labor rights of unauthorized workers with the Inter-American

3. For the purposes of this article, an "unauthorized worker" is any foreign national working in violation of immigration laws, whether because they are illegally present in the country or because they are legally present but are not work-authorized under the terms of their visa. An "undocumented person" is anyone, whether working or not working, who is present in the country in violation of immigration laws. For further discussion of this terminology, see Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1996-97); Beth Lyon, *When More Security Equals Less Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 U. PA. J. LAB. & EMP. L. (forthcoming 2004). Terminology relating to unauthorized workers is highly variable. For example, in the United States one might also expect to encounter the terms illegal, unlawful, alien, and migrant used interchangeably. In supranational and other international contexts, other English-language terms denote additional categories of migrants, such as those who have an irregular immigration status, and those who are wholly clandestine. See Lyon, *supra*.

4. Advisory Opinion OC-18/03, *Legal Status and Rights of Undocumented Migrants*, Inter-Am. Ct. H.R. (Sept. 17, 2003) [hereinafter *OC-18*], available at http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc. This article refers to the case as *OC-18*, the designated acronym for the Spanish translation of the term "advisory opinion": *opinión consultiva*. "OC" is generally used to refer to these cases in the Inter-American system whether the decision referenced is in English, Spanish, or Portuguese.

5. Request for Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights [hereinafter Request for Advisory Opinion], available at http://www.corteidh.or.cr/Serie_a_%2018_ing.doc (last visited Apr. 20, 2004).

6. 535 U.S. 137 (2002).

7. *Id.* at 151 (Breyer, J., dissenting).

8. Press Release, Embassy of Mexico, The Embassy of Mexico Is Concerned About the Consequences of a U.S. Supreme Court Ruling, Washington, D.C. (Apr. 1, 2002) (on file with author).

Court of Human Rights.⁹ Although the Mexican government's request to the court came in response to the *Hoffman* decision, a favorable advisory opinion would not directly affect the *Hoffman* holding or any other U.S. laws. A direct state-to-state complaint was not possible, because the United States has not ratified the necessary treaty, thus the Inter-American Court lacks jurisdiction over complaints directly against the United States.¹⁰ Because the court lacked jurisdiction over the United States, Mexico could seek only an advisory opinion about the status of international human rights law, not a ruling on the United States' compliance or non-compliance with international law.¹¹ Moreover, the United States has a history of non-cooperation with the rulings of international tribunals generally and the Inter-American Commission¹² in particular.¹³

After Mexico filed its request with the court, a large number of governments, intergovernmental agencies and nongovernmental organizations intervened in the case as *amici curiae*. Many of the governments emphasized the importance of national sovereignty over immigration, but offered few prescriptions for how the court should structure its analysis; most parties argued that unauthorized workers should enjoy greater workplace protection than they had under existing international law. The *amici curiae* favoring a more protective standard offered a range of analytical frameworks to enable the court to reach a progressive outcome. These frameworks fell into three categories: a fundamental rights approach, a tiered-scrutiny approach, and a unitary balancing test. The court's decision is a high-water mark for the rights of unauthorized workers, establishing that states must respect the labor and employment rights of unauthorized workers on parity with their authorized counterparts.

The central tension in the case, for human rights law and immigrant labor policy generally, and for U.S. policymakers specifically, is the dual legal nature of unauthorized workers. Unauthorized immigrant workers have no legal right to work and are therefore *law-breakers*. Unauthorized workers cross international borders clandestinely or fail to leave the country when their visas expire. To obtain work they purchase and alter identity documents, use assumed names, and engage in what is often an unspoken conspiracy with their employers to avoid the law.¹⁴ The private arena in which they are asserting public rights—

9. See Request for Advisory Opinion, *supra* note 5.

10. See *infra* Part III.

11. *Id.*

12. The Inter-American Commission is the Organization of American States ("OAS") body that has jurisdiction over individual complaints against the United States.

13. See, e.g., Christina Cerna, *The Inter-American Commission on Human Rights: Its Organization and Examination of Petitions and Communications*, in THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 65, 108 (David J. Harris & Stephen Livingston eds., 1998) [hereinafter INTER-AMERICAN HUMAN RIGHTS] (describing a case in which the United States "effectively ignored" the Commission's request to stay the executions of two juvenile offenders pending Commission action).

14. See Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, The Workplace*

the workplace—is defrauded by their presence.

At the same time, unauthorized immigrant workers have a legal identity as employees, and from that perspective they are not merely law-breakers, but also *rights-holders*. Most governments, including the United States, have recognized the need to extend basic workplace rights to immigrant workers.¹⁵ Their legal identity derives from their economic significance to both receiving and sending countries. The United States currently hosts the world's largest population of unauthorized immigrant workers, conservatively estimated at 5.3 million;¹⁶ more than half of the undocumented persons living in the United States are Mexican nationals.¹⁷ In receiving countries, such as the U.S., unauthorized workers perform essential work at low cost to a range of industrial sectors, usually filling jobs that receiving country nationals are unwilling to accept. Unauthorized workers also fulfill an important economic service for their home countries by sending money home and circulating funds into the economies of sending countries, and by forming political and social bridges between the sending and the receiving countries.¹⁸

U.S. laws affecting unauthorized workers, and U.S. policy decisions affecting Mexico, have therefore given unauthorized workers a political significance that lies at the heart of *OC-18*. The conditions facing undocumented persons in the United States reflect the long history of recruitment of low-income immigrant workers combined with government's willingness to turn a

Project, and the Struggle for Social Change, 30 HARV. C.R.-C.L. L. REV. 407, 414 n.27 (1995); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 346–47 (2001).

15. See Nessel, *supra* note 14, at 347.

16. The Pew Hispanic Center estimates the numbers of undocumented immigrants in the workforce, placing the unauthorized urban labor force at 5.3 million and the unauthorized agricultural labor force at 1.2 million, with some uncertain percentage of overlap. See B. LINDSAY LOWELL & ROBERTO SURO, PEW HISPANIC CTR., HOW MANY UNDOCUMENTED: THE NUMBERS BEHIND THE U.S.-MEXICO MIGRATION TALKS 7–8 (Mar. 21, 2002). The Center notes that this overlap between the unauthorized urban and agricultural work force is “significant” and, because of uncertainty about how to calculate the overlap, the authors decline to provide an estimate of the total unauthorized workforce. *Id.* This article thus uses the urban labor force figure of 5.3 million as a conservative estimate of the total number of unauthorized workers in the United States.

17. According to the Urban Institute, 5.3 million of the undocumented persons living in the U.S., or 57%, come from Mexico. JEFFREY S. PASSEL ET AL., URB. INST., UNDOCUMENTED IMMIGRANTS: FACTS AND FIGURES (Jan. 12, 2004) [hereinafter PASSEL ET AL., UNDOCUMENTED IMMIGRANTS], available at http://www.urban.org/uploadedPDF/1000587_undoc_immigrants_facts.pdf. U.S. Citizenship and Immigration Services estimates that Mexican nationals comprise 69% of the undocumented population within the United States. U.S. CITIZENSHIP AND IMMIGR. SERV., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: 1990 TO 2000 (2003) [hereinafter USCIS ESTIMATES], available at http://uscis.gov/graphics/shared/aboutus/statistics/III_Report_1211.pdf. An estimated 2.2 million undocumented immigrants in the United States come from Latin American nations other than Mexico, and about 10% of undocumented immigrants are from Asia. PASSEL ET AL., UNDOCUMENTED IMMIGRANTS, *supra*.

18. JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 294 (2d ed. 2002).

blind eye to violations of the employer sanctions regime.¹⁹ Considering migrants' economic significance at home and their vulnerability abroad, it is not surprising that the Mexican government has made the protection of emigrant nationals a central foreign policy goal.²⁰ Mexico has been proactive in advancing this agenda with the United States, and over the last decade has begun to take its cause to international human rights tribunals.²¹ The current Mexican government's primary goal vis-à-vis the United States is to gain legal immigration status to undocumented Mexicans in the United States, patterned on the 1986 amnesty in which nearly 3 million people were permitted to shift status.²² Legislation favorable to Mexico and other countries seeking relief for their undocumented emigrant populations may be on the horizon.²³ Compromise legislation on the difficult question of legalization for agricultural workers, long tied up in questions about revision of existing temporary worker programs, has been introduced in Congress, and similar legislation that would provide temporary legalization to non-agricultural workers is anticipated.²⁴

19. Once immigrant workers have made the transit into the United States, the abundant opportunities for gaining work illegally stand in stark contrast with the virtual impossibility of obtaining work legally. Millions of immigrant laborers have virtually no options for obtaining visas to work legally, as only about 30,000 non-H1B temporary work visas are issued per year. Doris Meissner, *US Temporary Worker Programs: Lessons Learned*, MIGRATION INFO. SOURCE (Mar. 1, 2004), at <http://www.migrationinformation.org/Feature/display.cfm?ID=205>. Labor and employment rights for the unauthorized are severely restricted, and major government services critical to the performance of work are closed to them, including access to drivers' licenses and many types of civil legal assistance. Fear of deportation also limits negotiation and chills the assertion of rights. See Laura K. Abel & Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003); Rebecca Smith, Amy Sugimori & Luna Yasui, *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 597–98 (2003–04); Maria Gold & Rosalind S. Helderman, *Longer Road for Va. Drivers; New Law Requires Documents to Prove Legal Residency*, WASH. POST, Jan. 4, 2004, at C03. See also GEN. ACCOUNTING OFFICE, *ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST 15* (1999) (“INS has devoted a relatively small percentage of its enforcement resources to worksite enforcement.”).

20. Mexico's constitutional amendment allowing dual nationality was part of Mexico's foreign policy goal “to forge closer ties with Mexicans living in the United States.” Sam Dillon, *Mexico Woos U.S. Mexicans, Proposing Dual Nationality*, N.Y. TIMES, Dec. 10, 1995, at 16. Scholars have asserted that “the initiative . . . was a sharp reversal after decades in which successive governments either ignored Mexican expatriates or referred to them as *pochos*, or cultural traitors.” *Id.*

21. See *infra* notes 65–68 and accompanying text.

22. See, Ginger Thompson, *U.S.-Mexico Relations: Alliance Meets Boundaries*, N.Y. TIMES, Mar. 23, 2002, at A7. Indeed, the administrations of President Vicente Fox and President George W. Bush had begun negotiations toward this end when the terrorist attacks of September 11, 2001, halted discussions and threatened to foreclose the possibility of an amnesty. *Id.*

23. See Mike Allen, *Bush Proposes Legal Status for Immigrant Labor; Workers Could Stay Six Years or More*, WASH. POST, Jan. 8, 2004, at A1; Mary Beth Sheridan, *Invisible Community's Hushed Cheer; 'Guest Worker' Plan Excites Illegal Mexican Immigrants Here*, WASH. POST, Dec. 27, 2003, at A1.

24. Allen, *supra* note 23.

Beyond the bilateral politics underlying the advisory opinion request, the opinion is significant in its own right. International standards on migrant workers are evolving slowly, and *OC-18* is at present the most progressive binding international law statement on this issue. Before *OC-18*, unauthorized workers arguably held significantly different work-related entitlements in comparison with their legally working counterparts. Their equal rights to participation in social security schemes; to equal treatment in taxes; and to employment injuries benefits (workers' compensation) were uncertain under international law.²⁵ In the Americas, *OC-18* appears to have equalized the rights of unauthorized workers with respect to these issues under international law. In national legal regimes that do provide these rights to authorized workers, the same rights must be accorded to their unauthorized counterparts, regardless of immigration status, in those countries following the authority of *OC-18*.

OC-18 is also an indirect step forward for the application of international economic, social and cultural rights in the Americas. This category of rights, generally distinguished from rights termed as "civil and political,"²⁶ includes such issues as the right to occupational safety and compensation for employment injuries, as well as the right to health, social security, and adequate rest. In contrast with civil and political rights, economic, social and cultural rights have received relatively little attention from international human rights tribunals in the past.²⁷ *OC-18* was argued and decided on the basis of non-discrimination, a classic civil and political rights standard which was used in this case to protect economic and social rights.²⁸ While *OC-18* did advance protections for workers in the case at hand, the use of non-discrimination to protect one particularly vulnerable class of workers left open the question of the extent of governments' obligations under international human rights law to provide protections for all workers.

Although the Inter-American Court does not have direct jurisdiction over the United States, *OC-18* may nevertheless prove helpful to unauthorized workers in the United States. Unauthorized workers will be able to invoke the new international standard against the United States through petitions to the Inter-American Commission on Human Rights, which is in turn bound by the interpretations of the Inter-American Court.²⁹ Indeed, at the time of writing, a coalition of U.S. organizations is preparing to file a petition against the United States with the Commission.³⁰ The standard could also be incorporated into an

25. See *infra* Part II.

26. See HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 237 (2d ed. 2000).

27. *Id.* at 238.

28. See *infra* Parts IV, V.

29. BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L/V/II.4 Rev.9, at 6-14 (2003) [hereinafter BASIC DOCUMENTS].

30. Press Release, National Employment Law Project, Interamerican Court Condemns

interpretation of the United States' non-discrimination obligations under other U.N. treaties it has ratified. The possibility that the decision will directly influence the United States' judicial interpretation of its own domestic non-discrimination guarantees seems remote, but international human rights tribunal proceedings and rulings can have a persuasive influence on domestic law and policy, even in the United States. The decision also has direct legal significance for many of the hundreds of thousands, if not millions, of unauthorized workers in western hemispheric countries outside the United States.³¹ The twenty-two countries that have accepted the Inter-American Court's jurisdiction over contentious cases will be bound by the court's new ruling in *OC-18*. The Inter-American Court has the power to order monetary compensation, declaratory judgment, and other forms of relief.³²

In this article, I begin with a discussion of the historical and political contexts of *OC-18* (Part II). I then explore the background and procedural posture of the case (Part III) and discuss the arguments and questions that various parties posed to the Inter-American Court (Part IV). Next, I discuss the opinion of the court (Part V) and the significance of the decision in terms of its importance for the progressive development of international law and its implications for workers in the Americas (Part VI). In this article, I conclude that, although cautious with respect to pronouncements of economic and social rights for unauthorized workers, the court's decision represents a high-water mark for the rights of unauthorized workers by establishing that they should enjoy labor and employment rights on parity with their authorized counterparts.

Discrimination on the Job Against Undocumented Workers (Sept. 2003) [hereinafter NELP Press Release], available at <http://www.nelp.org/news/pressreleases/interamctopress09300.cfm>.

31. Arriving at a hemispheric number of undocumented people and unauthorized workers is a difficult matter. For example, few reliable estimates of the undocumented immigrant population in Canada are available because funding for research has been withheld by the Canadian government. One author estimated there to be at least 200,000 undocumented immigrants in Canada. J. Samuel, *Temporary and Permanent Labour Immigration into Canada: Selected Aspects*, in *THE JOBS AND EFFECTS OF MIGRANT WORKERS IN NORTHERN AMERICA—THREE ESSAYS* 22 (1995). Other piecemeal estimates regarding undocumented populations in Central and South America and the Caribbean can be identified, see, e.g., INTER-AM. C.H.R., *FOURTH PROGRESS REPORT OF THE RAPPORTEURSHIP ON MIGRANT WORKERS AND THEIR FAMILIES*, paras. 30–31 (2003) (estimating that 120,000 undocumented Peruvians live in Argentina and that 12,900 undocumented Peruvians live in Chile), available at <http://www.cidh.org/annualrep/2002eng/chap.6>.

32. See American Convention on Human Rights, Nov. 22, 1969, arts. 63, 68, 1144 U.N.T.S. 123, reprinted in *BASIC DOCUMENTS*, *supra* note 29, at 27 [hereinafter American Convention]; Dinah Shelton, *Reparations in the Inter-American System*, in *INTER-AMERICAN HUMAN RIGHTS*, *supra* note 13, at 151.

II.

THE HISTORICAL AND POLITICAL CONTEXT OF *OC-18*:
MEXICAN MIGRANT LABOR AND MEXICO'S CAMPAIGN
FOR ITS NATIONALS ABROAD

The history of conflict and interdependence between Mexico and the United States has shaped the evolution of labor relations between the two countries. The Mexican-American war, which ended in 1848, resulted in the surrender of massive territory to the United States, including present-day Texas, California and much of New Mexico,³³ and created a definitive link between the two countries. The people whose lands, family ties, loyalties, and ambitions were split between the two countries continue to bind Mexico and the United States in a close and contentious relationship.³⁴ The persistent legacy of racism played a critical role in the development of this historical relationship, and frames the background for Mexico's advisory request in *OC-18*. As interactions between Anglo, Hispanic, and Indigenous cultures expanded exponentially in the 1930s and 40s, "racial hatred and violence . . . created a climate of conflict that has endured for generations. In the long history of this confrontation antagonisms between Anglos and Mexican Americans have continued to fester."³⁵ The need to protect unauthorized workers abroad reflects awareness of the discrimination and antagonism faced by migrants in the host country.

Large-scale recruitment of Mexican nationals dates back to at least the 1870s, ironically initiated by an economic downturn: the depression of the mid-1870s sparked a series of anti-Asian immigrant measures, which effectively cut off employment-related immigration from Asia.³⁶ This cutoff, combined with expansion of irrigation in the Southwest and continued growth of the railroad, in turn, created a labor shortage. At the turn of the century, agricultural industries and railroads began recruiting large numbers of Mexican nationals in the

33. See THOMAS E. SKIDMORE & PETER H. SMITH, *MODERN LATIN AMERICA* 229-30 (4th ed. 1997). In 1854, the United States purchased an additional 30,000 square miles in what is now southern Arizona and New Mexico. David Thelen, *Rethinking History and the Nation-State: Mexico and the United States*, 86 J. AM. HIST. 439, 453 (1999).

34. The relationship can be seen as interdependent, in light of occasional Mexican successes in influencing the U.S. on matters of bilateral concern and the "'interconnectedness of the two societies.'" See Kevin J. Middlebrook, *The Ties That Bind: "Silent Integration" and Conflict Regulation in U.S.-Mexican Relations*, LATIN AM. RES. REV. 261, 264-71 (1991) (reviewing and citing BILATERAL COMMISSION ON THE FUTURE OF UNITED STATES-MEXICAN RELATIONS, *THE CHALLENGE OF INTERDEPENDENCE: MEXICO AND THE UNITED STATES* (1991) and RIORDAN ROETT, *MEXICO AND THE UNITED STATES: MANAGING THE RELATIONSHIP* (1988)). On the other hand, it can be characterized as a relationship of Mexican dependence, viewed in terms of the differential economic strength of the two countries; Mexico's failure to diversify its external economic relations; and the record of U.S. intervention in Mexico's domestic politics. *Id.*

35. MATT S. MEIER & FELICIANO RIBERA, *MEXICAN AMERICANS; AMERICAN MEXICANS: FROM CONQUISTADORS TO CHICANOS* 68 (1993).

36. *Id.* at 110-11. These laws were the Chinese exclusion laws of 1882, 1892, and 1902, and the 1907 Gentlemen's Agreement with Japan. *Id.*

Southwest, and in the following decades, Southwestern industries successfully lobbied to keep the U.S.-Mexico border porous.³⁷ However, the policy of labor recruitment subsequently gave way to increased immigration control. In 1924 the United States launched the Border Patrol, against the wishes of large-scale employers of Mexican nationals, and in 1929 Congress outlawed unauthorized crossings.³⁸ These measures, as well as other restrictionist efforts that did not pass, were linked to sentiments of ethnic nativism.³⁹

The decades following continued the alternating pattern of opportunity and obstruction for Mexican migrant workers in the United States. Hundreds of thousands of Mexican nationals legally entered the United States in the early decades of the twentieth century; however, after the 1929 stock market crash, an estimated half-million Mexican nationals, an unknown number of them U.S. citizens, repatriated voluntarily and involuntarily to Mexico.⁴⁰ Mexican immigration came to a relative standstill during this period, and did not revive until the initiation of the Bracero program in 1942. The Bracero program was a three-wave program originally designed in response to a wartime shortage in agricultural workers in the Southwest.⁴¹ The program allowed for the temporary, legal entry of agricultural workers, and was so popular with Southwestern growers that it was renewed twice and expanded seven-fold after the war ended.⁴² Ironically, the program sparked a parallel wave of illegal entries, because the promotion, travel, and work arrangements put in place for legal entrants established routes for illegal migration flows. This dramatic increase in illegal entries, combined with public exposure of horrific working and living conditions, finally brought about the end of the program in 1964.⁴³

The period from 1968 to 1986 marked a sharp reduction in available visas for Mexican entrants into the United States. In 1952, the U.S. government implemented a guestworker scheme known as the "H-2" program, which permits various categories of laborers to enter the United States and remain for limited periods for the purposes of completing work in industries with seasonal employment demand.⁴⁴ During this period, the Mexican population grew and

37. *See id.* at 111.

38. *Id.* at 114, 126.

39. For example, Representative John C. Box of Texas called Mexicans "peonized, illiterate and unclean" as he rallied support for a bill placing Mexican nationals into the immigration quota system. MEIER & RIBERA, *supra* note 35, at 126–27.

40. *Id.* at 127.

41. Philip L. Martin & Michael S. Teitelbaum, *The Mirage of Mexican Guest Workers*, 80 FOREIGN AFF. 117, 122 (2001).

42. *Id.*

43. *Id.*

44. Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.). The H-2 program has been controversial from many perspectives, with labor rights concerns about the program's explicitly limited scheme of worker rights and protections, and employer concerns about the limited number of available H-2 visas. *See HELENE*

the Mexican economy declined, creating even more demand for the limited number of visas.⁴⁵ The number of migrants greatly exceeded the number of available visas, which generally numbered around 25,000 per year.⁴⁶ In 1986, the United States passed the Immigration Reform and Control Act,⁴⁷ which offered an immigration amnesty for undocumented people with long U.S. work histories, as well as for their immediate families. At the same time, the law created an explicit sanction for hiring unauthorized workers. More than three million people, nearly 2.3 million of them Mexicans, received permanent immigration status under this program.⁴⁸

As of 2001, an estimated 9.8 million Mexican nationals lived in the United States.⁴⁹ Of those, roughly 2.5 to 3.5 million are estimated to be undocumented, or illegally present in the United States.⁵⁰ The H-2 program currently provides legal work to about 100,000 laborers per year, a small number compared to the

HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 30–31 (2001); Laura C. Oliveira, *A License to Exploit: The Need to Reform the H-2A Temporary Agricultural Guest Worker Program*, 5 SCHOLAR 153 (2003) (discussing the effectiveness of the current H-2A visa program and problems that temporary agricultural guest workers face).

45. DOUGLAS S. MASSEY ET AL., BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 41–45 (2002).

46. See HAYES, *supra* note 44, at 27–32.

47. Pub. L. No. 99-603, 100 Stat. 3360 (codified as amended at 8 U.S.C. § 1324a (2000)).

48. MASSEY, *supra* note 45, at 90.

49. Jeffrey Passel, *Mexican Immigration to the U.S.: The Latest Estimates*, Migration Information Source, Migration Policy Institute [hereinafter Passel, *Mexican Immigration*], at <http://www.migrationinformation.org/USfocus/> (Mar. 1, 2004). There is, however, some disagreement on the statistics. United States immigration officials have placed the figure at eleven million, see Robert L. Jamieson, Jr., *Illegal Immigrants Live Life in the Shadows*, SEATTLE POST-INTELLIGENCER, July 5, 2001, at B1, available at http://seattlepi.nwsource.com/jamieson/30037_robert05.shtml (last visited Apr. 20, 2004), and at least one source has placed the figure at an estimated eight million, see CENTER FOR IMMIGRATION STUDIES, NUMBERS AND GEOGRAPHIC DISTRIBUTION, at <http://www.cis.org/articles/2001/mexico/numbers.html> (2001). Mexican nationals make up approximately twenty-eight percent of all foreign nationals living legally in the United States and approximately three-fifths of the undocumented population. See Demetrios G. Papademetriou, *The Mexico Factor in US Immigration Reform*, Migration Information Source, Migration Policy Institute, at <http://www.migrationinformation.org/USfocus/> (Mar. 1, 2004); Passel, *Mexican Immigration*, *supra*. The demographic mix of Mexican immigrants to the United States has changed in recent decades, to include a greater percentage of women and families, people possessing higher levels of skills and education, and people with origins in urban areas of Mexico. Enrico A. Marcelli & Wayne A. Cornelius, *The Changing Profile of Mexican Migrants to the United States: New Evidence from California and Mexico*, LATIN AM. RES. REV. 105, 106 (2001).

50. See CENTER FOR IMMIGRATION STUDIES, LABOR MARKET CHARACTERISTICS OF MEXICAN IMMIGRANTS IN THE UNITED STATES, at <http://www.cis.org/articles/2001/mexico/labor.html> (2001). See also Jason Felch & Todd Dayton, *The Waiting Game—Mexican Immigrants Face Tough Choices Amid Recession, Terror Fallout: Stay Jobless or Go Home*, N. Gate News Online, UC Berkeley Graduate School of Journalism, at <http://journalism.berkeley.edu/ngno/reports/newworld/immigrants.html> (last visited Apr. 20, 2004). For a description of the derivation of these numbers, see Frank D. Bean, et al., *Circular, Invisible, and Ambiguous Migrants: Components of Difference in Estimates of the Number of Unauthorized Mexican Migrants in the United States*, 38 DEMOGRAPHY 411 (2001).

number of unauthorized Mexican workers currently living in the United States.⁵¹ No other sending country approaches this high number of emigrants living in undocumented status in the United States. Of the one-half to one-third of the non-Mexican undocumented population in the United States, roughly 1.9 million come from other nations in Latin America, and 1.1 million come from Asia.⁵²

Undocumented people from all countries experience significantly abridged rights in the U.S. workplace. The intersection of labor and employment law with immigration law results in differential treatment for authorized workers and unauthorized workers in the United States.⁵³ Most significantly, unauthorized workers are required to pay all U.S. taxes⁵⁴ but are not entitled to key work-related benefits such as social security and unemployment insurance.⁵⁵ Some states deny workers' compensation benefits, in whole or in part, to unauthorized workers.⁵⁶ As described in more detail below, unauthorized workers are not entitled to lost wages remedies for work that could not be performed as a result of a discriminatory firing or as a result of a termination that was in retaliation for the worker's labor union activity.⁵⁷ A wave of state-level drivers' license policy changes has resulted in the denial of drivers' licenses to an increasing number of unauthorized workers.⁵⁸ Finally, undocumented people are not entitled to assistance from Legal Services Corporation civil legal services attorneys, creating an obstacle to enforcement of their labor rights.⁵⁹

In contrast to their vulnerability abroad, Mexican nationals have great

51. See generally THOMAS A. ALENIKOFF ET AL, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* (5th ed. 2003) [hereinafter ALENIKOFF ET AL, *IMMIGRATION AND CITIZENSHIP*].

52. Passel, *Mexican Immigration*, *supra* note 49; PASSEL ET AL., *UNDOCUMENTED IMMIGRANTS*, *supra* note 17. The major sending countries apart from Mexico are El Salvador, Guatemala, Colombia, Honduras Ecuador, and China. A few hundred thousand undocumented immigrants are of European, Canadian, or African origin. USCIS ESTIMATES, *supra* note 17. See also Jeffrey Passel, *New Estimates of the Undocumented Population in the United States*, Migration Information Source, Migration Policy Institute [hereinafter Passel, *New Estimates*], at <http://www.migrationinformation.org/USfocus/> (May 22, 2002) (estimating that aside from Mexico the largest sources of undocumented immigrants include El Salvador, Guatemala, Peru, Colombia, the Dominican Republic, India, China, Korea, and the Philippines).

53. A detailed description of U.S. employment and labor laws is beyond the scope of this article. For fuller discussion of the differential rights and remedies accorded to unauthorized workers in the United States, see Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001); Lyon, *supra* note 3.

54. See ALENIKOFF ET AL, *IMMIGRATION AND CITIZENSHIP*, *supra* note 51.

55. 8 U.S.C. § 1611(c)(1)(B) (2000).

56. See generally Jason Schumann, *Working in the Shadows: Illegal Aliens' Entitlement to Workers' Compensation*, 89 IOWA L. REV. 709 (2004) (proposing that states include explicit language incorporating undocumented workers in workers' compensation statutes).

57. See *infra* Part III (discussing *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002)).

58. See REBECCA SMITH ET AL, *LOW PAY, HIGH RISK: STATE MODELS FOR ADVANCING IMMIGRANT WORKERS' RIGHTS*, NATIONAL EMPLOYMENT LAW PROJECT 36-37 (2003).

59. 45 C.F.R. §§ 1626.2-1626.4 (2002).

economic and political significance at home. Undocumented and documented Mexican nationals residing in the United States constitute ninety-eight percent of all Mexican nationals abroad.⁶⁰ In 2002, remittances from the United States to Mexico totaled \$12 billion, more than the foreign income generated by any of the country's industries.⁶¹ Mexican nationals residing in the United States also have a strong influence on the Mexican government. In 1998, Mexico revised its own nationality laws to permit Mexican citizens to retain their Mexican nationality after becoming naturalized U.S. citizens, and to permit children born in the United States to Mexican parents to claim Mexican nationality.⁶² This policy change sparked a wave of U.S. naturalizations by Mexican nationals,⁶³ entitling them to voting rights in the United States, and enabling them to reside in Mexico indefinitely without forfeiting their ability to return to the United States.⁶⁴ The long-term effect of this policy change remains to be seen, but one likely outcome is that the dual citizenship policy will enhance the importance of this population's concerns to the Mexican government.

To aid its nationals abroad, Mexico has been willing to use aggressive diplomacy to challenge U.S. practices. For example, in 1997, the Mexican government requested that the Inter-American Court of Human Rights issue an advisory opinion on the right to information on consular assistance.⁶⁵ Mexico stated that its request

came about as a result of the bilateral representations that the Government of Mexico had made on behalf of some of its nationals,

60. Louie Gilot, *Mexico Moves Toward Extending Dual Citizenship*, EL PASO TIMES, March 27, 2003, at 5B.

61. Luis Alonso Lugo, *Remittances are Mexico's Biggest Source of Income, Says Fox*, ATLANTA J.-CONST., Sept. 25, 2003, available at http://www.ajc.com/news/content/news/atlanta_world/0903/25mexico.html (last visited Apr. 10, 2004).

62. See James F. Smith, *Mexico's Dual Nationality Opens Doors: Measure That Takes Effect Today Won't Grant Voting Rights But It Lets U.S. Citizens Invest in Homeland*, L.A. TIMES, March 20, 1998, at A1. See also CONSTITUCION POLITICA DE LOS ESTADOS UNIDOS MEXICANOS, title I, ch. II, art. 30, 32–33. Under the law, which is retroactive, dual nationals are not considered to be Mexican citizens, a distinction that means that after naturalizing in the United States they may not vote in Mexican elections nor may they hold high office. See *id.* ch. III, art. 33.

63. Jorge Durand, Douglas S. Massey & Emilio A. Parrado, *The New Era of Mexican Migration to the United States*, 86 J. AM. HIST. 518, 533 (1999) (estimating that 3.3 million non-citizen Mexicans were encouraged to seek United States citizenship after the passage of Mexico's dual citizenship law), available at <http://www.indiana.edu/~jah/mexico/jdurand.html> (last visited Apr. 10, 2004).

64. See *Schneider v. Rusk*, 377 U.S. 163 (1964) (holding that statute providing for denationalization of naturalized citizen residing continuously for three years in country of his birth violated due process). Lawful permanent residents are permitted to leave the United States for only six months at a time before losing their status. 8 U.S.C. § 1101(a)(13)(c)(ii) (2000). If they leave the country for more than a year, their lawful permanent resident status is likely to be revoked. *Id.*

65. Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of Due Process of Law*, Inter-Am. Ct. H.R. (Oct. 1, 1999), para. 1.

whom the host State had allegedly not informed of their right to communicate with Mexican consular authorities and who had been sentenced to death in ten states in the United States.⁶⁶

The court ruled that detained foreign nationals have a right under the American Convention of Human Rights ("American Convention") to information about access to consular assistance.⁶⁷ The court further ruled that death sentences carried out without providing this information would constitute an arbitrary deprivation of life in violation of the American Convention.⁶⁸

The close yet contentious U.S.-Mexican relationship has continued under the present administration. Vicente Fox assumed the Mexican presidency the year before George Bush became president of the United States. Once Governor of the Mexican state of Guanajuato and Governor of Texas, they were again counterparts, and their prior relationship seemed to augur well for close Mexican-U.S. relations.⁶⁹ In short order, the governments were holding talks around the possibility of an immigration amnesty and expansion of the guestworker programs (H-2A and H-2B).⁷⁰ Attorney General John Ashcroft and Secretary of State Colin Powell met with their Mexican counterparts, Interior Minister Santiago Creel and Foreign Minister Jorge Castaneda, to discuss possibilities ranging from amnesty to enhanced guestworker programs in August, 2001.⁷¹ However, the terrorist attacks of September 11, 2001, interceded, and amnesty negotiations ceased.⁷² President Fox has continued to pressure the U.S. government to honor promises made before 9/11, and the Bush administration has continued to move slowly toward some type of legalization program.⁷³

66. *Id.* para. 2.

67. *Id.* para. 137.

68. *Id.* para. 137. The American Convention on Human Rights is the region's primary human rights treaty. See American Convention, *supra* note 32.

69. Dana Milbank & Mary Beth Sheridan, *Bush-Fox Friendship Serves Both*, WASH. POST, Sept. 3, 2001, at A1.

70. Michelle Mittelstadt & Alfredo Corchado, *Powell, Mexicans Discuss Migration; Detailed Plan on Amnesty for Illegal Immigrants Could Come in Mid-2002*, PITTSBURGH POST-GAZETTE (Pennsylvania), Aug. 10, 2001, at A10.

71. *Id.*

72. See Gary Martin, *Lawmakers Want Tighter Border; Rights Groups Urge Restraint on Reforms*, SAN ANTONIO EXPRESS-NEWS (Texas), Sept. 19, 2001, at 8A. One proponent of reducing legal immigration asserted that the terrorist attacks relegated the proposed amnesty "to the trash bin of history." *Id.*

73. See Susana Hayward, *Fox Still Seeks Border Opening; Security Not His Only Goal*, SAN ANTONIO EXPRESS-NEWS (Texas), March 6, 2002, at 12A. Presidents Bush and Fox met in Washington, D.C., in the week before September 11, 2001, and made a joint appearance at which President Bush clearly expressed a hope for eventual amnesty for over 3 million undocumented Mexicans residing in the United States. Mike Allen, *Mexican President Urges Immigration Law Changes*, WASH. POST, Sept. 9, 2001, at A30.

III.

BACKGROUND OF THE ADVISORY OPINION

A. *The Implications of Hoffman Plastic*

Against this backdrop of faltering amnesty negotiations and heightened security concerns, the U.S. Supreme Court issued its decision in *Hoffman Plastic*, a controversial opinion severely limiting the rights of unauthorized workers. The case involved a common situation affecting unauthorized workers in the United States who attempt to assert their rights. In 1988, Jose Castro took a job operating chemical mixing machines for Hoffman Plastic Compounds, a California company that custom-formulates chemical compounds for businesses that manufacture pharmaceutical, construction, and household products.⁷⁴ Mr. Castro, a Mexican national, was not entitled to work under U.S. immigration law and showed the employer a purchased work authorization document in order to obtain the job.⁷⁵ He was later fired, along with other co-workers, for his organizing activities.⁷⁶

The National Labor Relations Board ("NLRB") ordered the employer to cease and desist, to post a notice that it had violated the law, to reinstate Mr. Castro, and to provide him with back pay for the time he was not working due to his illegal termination.⁷⁷ During a hearing on his case, Mr. Castro had admitted that he had used false documents to establish his eligibility for work, and that he was an unauthorized worker.⁷⁸ Under previous interpretations of the National Labor Relations Act, a victim of an illegal anti-union firing was entitled to payments to compensate her for wages she would have earned had she not been wrongfully fired, notwithstanding the victim's immigration status.⁷⁹ Hoffman Plastic Compounds appealed the decision to the Supreme Court.⁸⁰ The U.S. government pursued Castro's case and defended the position that he was entitled to back pay before the U.S. Supreme Court.⁸¹

The U.S. Supreme Court reversed the appellate court, holding that unauthorized workers cannot receive back pay under the National Labor Relations Act ("NLRA"). The Court pointed to a change in immigration policy in the years

74. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S.137, 140.

75. *Id.*

76. *Id.*

77. *Id.* at 140-41.

78. *Id.* at 141.

79. See *NLRB v. Apollo Tire Co.*, 604 F.2d 1180 (9th Cir. 1979).

80. See Petition for Writ of Certiorari, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595).

81. See Oral Argument, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595).

since the NLRB formed its policy regarding unauthorized workers.⁸² U.S. immigration law had been substantially altered by the 1986 Immigration Reform and Control Act ("IRCA"), which simultaneously granted amnesty to longstanding undocumented residents of the United States and established an employer sanctions regime imposing criminal and civil penalties on businesses employing unauthorized workers.⁸³ According to the Court, the IRCA's prohibition on employer hiring of unauthorized workers, and on workers' acceptance of employment without work authorization, requires the National Labor Relations Board to deny back pay to these workers, because back pay would compensate these workers for work they cannot lawfully perform.⁸⁴

No provision of IRCA or the NLRA prohibits back pay awards to unauthorized workers. However, the Court did not defer to the NLRA's enforcement scheme because it reasoned that to do so would trump Congressional immigration policy.⁸⁵ Writing for the *Hoffman* majority,⁸⁶ Chief Justice Rehnquist stated that the NLRA must be read in light of the IRCA, and the NLRB cannot order back pay for unperformed work for which the worker was not lawfully available, because such remedies will encourage illegal immigration.⁸⁷ In turn, the *Hoffman* dissent⁸⁸ argued that full remedies would actually further the objectives of IRCA by discouraging employers from hiring unauthorized workers. The dissent noted that the Attorney General's office, which administers immigration laws, supported the NLRB and argued that full labor rights enforcement, even where it incidentally benefits people working in contravention of immigration law, promotes the objectives of the IRCA.⁸⁹ Full enforcement, argued the dissent, raises the cost to employers of hiring unauthorized workers and thus reduces the economic incentive to hire such individuals, a primary goal of the IRCA.⁹⁰

The Mexican government expressed deep concern at the *Hoffman* decision,⁹¹ which rejected a policy of full labor rights and remedies for unauthorized workers, the majority of whom are Mexican nationals. In May, 2002, President Fox expressed his frustration with the pace of immigration reform in the United States, alluding to the Supreme Court's decision and Fox's

82. *Hoffman*, 535 U.S. at 148-49.

83. *Id.* at 147-48.

84. *Id.* at 150-51.

85. *Id.* at 149.

86. In the majority were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas.

87. *Hoffman*, 535 U.S. at 150.

88. In the dissent were Justices Breyer, Ginsburg, Souter, and Stevens.

89. *Hoffman*, 535 U.S. at 158.

90. *Id.* at 155.

91. Press Release, Foreign Ministry of Mexico, The Mexican Government Reiterates Its Concern Regarding the United States Supreme Court Decision (Apr. 23, 2002) [hereinafter Foreign Ministry Press Release], available at <http://www.sre.gob.mx/e-bulletins/2002/abr/B-75.htm>.

own promises to his country to improve the conditions of unauthorized workers abroad.⁹² The Mexican government was also alarmed that the *Hoffman Plastic* decision would have far-reaching implications for unauthorized workers in the United States.⁹³ In addition to its effect on labor law remedies, the Supreme Court's decision threatened workers' rights in other areas of the law. Within months of the decision, the Equal Employment Opportunity Commission (EEOC) rescinded its longstanding policy that unauthorized petitioners are entitled to the same remedies as other victims of workplace discrimination laws.⁹⁴ *Hoffman* has prompted litigation revisiting the rights of unauthorized workers under Title VII⁹⁵ and the Americans with Disabilities Act.⁹⁶ *Hoffman Plastic* was also cited in state appellate court cases limiting or removing protections for unauthorized workers in Michigan⁹⁷ and Pennsylvania.⁹⁸

In addition to noting employer filings raising the *Hoffman* issue in these cases, immigrant rights' advocates also recognized that the *Hoffman* decision would have profound implications beyond its effect on the law, namely that it would alter the climate within which employers and unauthorized workers perceive their respective legal rights. For example, the immigrant worker advocacy community reported a widespread misconception among employers and workers alike that unauthorized workers are no longer entitled to pay for work actually performed.⁹⁹ In May 2002, the government of Mexico filed a

92. *The Week in Mexico*, SAN DIEGO UNION-TRIBUNE, May 12, 2002, at A22.

93. See Foreign Ministry Press Release, *supra* note 91.

94. See EEOC, Directives Transmittal No. 915.002, Rescission of Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (June 27, 2002) (rescinding EEOC, Notice No. 915.002, Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws (Oct. 26, 1999)).

95. See MEXICAN AM. LEGAL DEF. AND EDUC. FUND & NAT'L EMP. L. PROJECT, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE *HOFFMAN PLASTIC COMPOUNDS V. NLRB* 4-5 (2003) [hereinafter USED AND ABUSED] (stating that *Hoffman* prompted employer-defendant in Title VII case to move for reconsideration of existing protective order). The district court denied the motion, see *Rivera v. NIBCO, Inc.*, No. CVF99-6443 A WISMS, 2001 WL 1688880 (E.D. Cal. Dec. 21, 2001), and the Ninth Circuit heard oral arguments on the case in July of 2003. See United States Court of Appeals for the Ninth Circuit, Calendar for San Francisco, California (July 3, 2003), at [www.ca9.uscourts.gov/ca9/Calendar.nsf/465828FA2AB15DA488256D59000A9DC9/\\$file/sf07_03.pdf?openelement](http://www.ca9.uscourts.gov/ca9/Calendar.nsf/465828FA2AB15DA488256D59000A9DC9/$file/sf07_03.pdf?openelement).

96. In *Lopez v. Superflex, Ltd.*, No. 01 CIV. 10010(NRB), 2002 WL 1941484 (S.D.N.Y. Aug. 21, 2002), an employer-defendant claimed that, following *Hoffman*, a plaintiff in an ADA lawsuit must plead that she is working legally in order to obtain damages for emotional distress and punitive damages. The district court disagreed but did not reach the issue of whether or not *Hoffman* precludes relief where the plaintiff is an unauthorized worker. *Id.*

97. See *Sanchez v. Eagle Alloy Inc.*, 658 N.W.2d 510, 519-521 (Mich. Ct. App. 2003).

98. See *Reinforced Earth Co. v. Workers' Comp.* Appeal Bd., 810 A.2d 99, 110-111 (Pa. 2002) (Newman, J., dissenting).

99. See USED AND ABUSED, *supra* note 95, at 2-3 (describing lower numbers of worker complaints in the wake of *Hoffman* as well as an increase in the number of cases where employers insist that immigrant workers have lost all labor rights).

request with the Inter-American Court for an advisory ruling on the labor rights of unauthorized workers.¹⁰⁰

B. *Procedural Posture of the Advisory Opinion Request*

Unauthorized worker rights came before the court by way of a relatively unusual procedural mechanism: the advisory opinion request. Matters come before the court in one of two postures: (1) as contentious cases involving complaints against OAS member states by individuals, OAS organs, or other states; and (2) as requests for advisory opinions regarding clarification on matters of human rights law. As its case number implies, the *OC-18* decision represents only the eighteenth advisory opinion that the court has issued in its 25-year history.¹⁰¹ By contrast, the court has issued more than one hundred decisions in cases arising under its contentious jurisdiction.¹⁰² The court's advisory jurisdiction arises from article 64 of the American Convention of Human Rights, which is the court's founding document and one of the regional treaties the court is charged with interpreting and applying.¹⁰³

OAS member states and organs¹⁰⁴ may lodge advisory opinion requests

100. See Request for Advisory Opinion, *supra* note 5. As the *OC-18* procedure unfolded, Mexico took action in other international fora. In June 2002, Mexico requested a similar ruling on the rights of unauthorized workers from the International Labour Organization (ILO). See Interpretation of decisions of the International Labour Conference, Migrant Workers (Supplementary Provisions) Convention, 1975 (143) (Article 9, paragraph 1 and Part I (Migration in abusive conditions), Memorandum by the International Labour Office, para. 1 (Nov. 1, 2003) [hereinafter ILO Interpretation] (on file with author). Mexico also pursued its earlier advocacy with the Inter-American Court on the issue of consular access for Mexican nationals facing criminal charges in the United States. In January 2003, the Mexican government filed a complaint against the United States in the International Court of Justice. See Memorial of Mexico, *Avena and Other Mexican Nationals (Mexico v. United States of America)* I.C.J. (June 20, 2003), available at http://212.153.43.18/icjwww/ldocket/imus/imuspleadings/imus_ipleadings_toc.htm. The complaint alleged that the United States had violated the Vienna Convention on Consular Relations with respect to fifty-four Mexican nationals who did not have access to consular assistance at the early stages of their capital cases in the United States and were subsequently sentenced to death. *Id.* On March 31, 2004, the International Court of Justice ruled that the United States had violated the Vienna Convention on Consular Relations. *Avena and Other Mexican Nationals (Mexico v. United States of America)* I.C.J. (March 31, 2004), available at http://212.153.43.18/icjwww/ldocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf.

101. The OAS General Assembly approved the creation of the Inter-American Court in 1979. BASIC DOCUMENTS, *supra* note 29, at 14 (2003).

102. See Inter-American Court of Human Rights, Series C: Judgments and Opinions, at http://www.corteidh.or.cr/seriecing/index_serie_c_ing.html (last visited Apr. 10, 2004).

103. American Convention, *supra* note 32, art. 64.

104. The organs of the OAS are the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, the Councils, the Inter-American Juridical Committee, the Inter-American Commission on Human Rights, the General Secretariat, the Specialized Conferences, and the Specialized Organizations. Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3, art. 53, reprinted in BASIC DOCUMENTS, *supra* note 29, at 211 [hereinafter OAS Charter]. Specialized Organizations include the Pan American Health Organization, the Inter-American Children's Institute, the Inter-American Commission of Women,

with the court.¹⁰⁵ Jurisdiction over contentious cases is more limited: only American Convention States Parties (meaning governments that have ratified the Convention) and the Inter-American Commission on Human Rights ("Inter-American Commission" or "Commission") may lodge these contentious cases with the court.¹⁰⁶ Moreover, these parties may file complaints only against American Convention States Parties that have explicitly accepted the jurisdiction of the court.¹⁰⁷ Twenty-two countries currently recognize the court's jurisdiction in cases filed against them by the Commission.¹⁰⁸ Of those twenty-two, only nine accept the court's jurisdiction in cases filed against them by another State Party to the American Convention.¹⁰⁹ Jurisdiction over contentious cases is also limited by the fact that such cases must first work their way through the Inter-American Commission petition and reporting process before the court may consider them.¹¹⁰ As a result, contentious cases before the court begin with petitions filed as complaints against States Parties with the Inter-American Commission.¹¹¹ The Commission thus acts as the region's human rights court of first instance; then, after issuing a final report in a petition against an OAS member, the Commission assumes a prosecutorial role in selected cases that it forwards to the court.¹¹² Although the Commission has jurisdiction to consider petitions filed against all thirty-five countries in the Americas,¹¹³ it may only forward a case against a government over which the court has jurisdiction.¹¹⁴

Typically in the past the Commission has lodged advisory opinion requests, generally seeking legal clarification about a situation relevant to more than one country or focused on a concern with a country that is concurrently engaged with the Commission on the particular issue that is the subject of the request. For example, in Advisory Opinion 11, the Commission requested that the court determine whether indigence and lack of access to counsel excused the requirement that potential petitioners exhaust domestic remedies before approaching the

the Pan American Institute of Geography and History, the Inter-American Indian Institute, and the Inter-American Institute for Cooperation on Agriculture. BASIC DOCUMENTS, *supra* note 29 at 3.

105. American Convention, *supra* note 32, art. 64.

106. *Id.* art. 61(1).

107. *Id.* art. 62(3).

108. American Convention, *supra* note 32.

109. *Id.* The nine countries are: Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela. *Id.*

110. See American Convention, *supra* note 32, art. 61(2).

111. States Parties can also bring contentious cases by directly challenging practices in other American states. Only countries that have accepted the Court's jurisdiction with respect to State-to-State complaints can be brought before the Court in this manner. *Id.* art. 45(2).

112. See Inter-American Commission on Human Rights: Organization of American States, Commission Processing of Individual Cases, at <http://www.cidh.oas.org/what.htm> (last visited Apr. 10, 2004).

113. See Rules of Procedure of the Inter-American Commission on Human Rights, art. 49, reprinted in BASIC DOCUMENTS, *supra* note 29, at 141, 160.

114. *Id.* art. 44(1).

Commission.¹¹⁵ In its request to the Inter-American Court, the Commission made clear that the question of access to legal counsel and domestic remedies related to the practices of multiple States.¹¹⁶ A smaller group of requests have arisen from Member States asking for an interpretation of Convention provisions to address situations occurring in their own countries.¹¹⁷ A few requests have come from States seeking to clarify the Commission's own powers under the Convention.¹¹⁸ The use of the Advisory Opinion mechanism seen in *OC-18*, in which a Member State seeks a ruling on an issue tied to the practices of another state, is a relatively recent phenomenon. As described above, Mexico was one of the first to use this mechanism when it sought clarification of the laws on consular access.¹¹⁹ In each of these cases, in order to address concerns over the human rights of its nationals abroad through the region's highest human rights tribunal, Mexico was forced to present a generic request for clarification of the law because the Inter-American Court has no direct jurisdiction over the United States.

Mexico put the question before the court in 2002.¹²⁰ In its May 2002 advisory opinion request and at oral argument in February 2003, Mexico cited five primary reasons for its request: (1) the growth of migration at the global level,¹²¹ (2) the recent growth of transnational human rights programs and mechanisms addressing the rights of migrant workers;¹²² (3) the high number of

115. Advisory Opinion OC-11/90, Exceptions to the Exhaustion of Domestic Remedies (Art. 46(1), 46(2)(a) and 46(2)(b) American Convention on Human Rights), Inter-Am. Ct. H.R. (Aug. 10, 1990), paras. 1–2 [hereinafter *OC-11*].

116. *Id.* para. 3.

117. See, e.g., Advisory Opinion OC-4/84, Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica, Inter-Am. Ct. H.R. (Aug. 15, 1984) [hereinafter *OC-4*]; Advisory Opinion OC-5/85, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Inter-Am. Ct. H.R. (Aug. 15, 1985).

118. See Advisory Opinion OC-13/93, Certain Attributes of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights), Inter-Am. Ct. H.R. (July 16, 1993) [hereinafter *OC-13*] (request by Argentina and Uruguay seeking clarification the Commission's power to address the merits in an inadmissibility decision); Advisory Opinion OC-15/97, Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights), Inter-Am. Ct. H.R. (Nov. 14, 1997) (request by Chile seeking a ruling on the Commission's power to modify final reports).

119. See *supra* notes 65–68 and accompanying text.

120. See Request for Advisory Opinion, *supra* note 5.

121. Oral Intervention of Mexico, Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), para. 7 (on file with author) [hereinafter Oral Intervention of Mexico].

122. Request for Advisory Opinion, *supra* note 5, at 1–6. To show the accretion of bilateral and international mechanisms, the Mexican government described (1) language about migrant workers in the 1993 World Conference on Human Rights, *id.* at 2–3, and the 1997 appointment and objectives of the Inter-American Commission on Human Rights Special Rapporteur on migrant workers and members of their families, *id.* at 5–6. An additional significant development took place after the Advisory Opinion Request filing: the July 2003 entry into force of the

Mexican nationals working outside Mexico (5,998,500), nearly half of whom (2,490,000) are unauthorized;¹²³ (4) "a resurgence of racism, xenophobia toward migrants"¹²⁴ and a hardening of "the migratory policies of receiving States"¹²⁵ that causes downward pressure on employment rights¹²⁶ and excludes or restricts unauthorized migrant workers from the exercise of their human rights,¹²⁷ and (5) "the positive economic contribution of migrants in their countries of destination."¹²⁸ Because the advisory opinion mechanism is designed for addressing generic questions of human rights law, Mexico's advisory opinion request could not be framed as a request for a ruling on the United States itself. For example, the request discussed Mexican nationals "working outside Mexico;" as noted above, virtually all Mexican emigrants are in the United States.¹²⁹ However, the *Hoffman Plastic* decision, which Mexico had earlier cited as the reason for its request to the court,¹³⁰ appeared only once in the advisory opinion request, in a footnote.¹³¹

In its oral intervention, or statement, to the court, the government of Mexico summarized its request: "[T]he Honorable Court is called, in the exercise of its consultative function, to establish which are the fundamental labor rights, filling gaps and clarifying the extent of new rights."¹³² In its written request, the

International Convention on the Protection of the Rights of All Migrant Workers and Their Families, creating the U.N. Committee on the Protection of the Rights of All Migrant Workers and Their Families. *See infra*, Part VI(A).

123. Request for Advisory Opinion, *supra* note 5, at 4–5.

124. Oral Intervention of Mexico, *supra* note 121, para. 9.

125. *Id.* para. 7.

126. *Id.* para. 8.

127. *Id.* para. 9.

128. *Id.* para. 8.

129. Gilot, *supra* note 60 (noting that 98 percent of all Mexicans living abroad are in the United States).

130. Foreign Ministry Press Release, *supra* note 91.

131. Request for Advisory Opinion, *supra* note 5, at 3 n.10.

132. Oral Intervention of Mexico, *supra* note 121, para. 70. In its earlier written request for an advisory opinion, the Government presented four questions for the Court to address:

1) Can an American state establish in its labor legislation a distinct treatment from that accorded legal residents or citizens that puts undocumented migrant workers at a disadvantage in the enjoyment of their labor rights, so that the migratory status of the workers impedes *per se* the enjoyment of such rights? Request for Advisory Opinion, *supra* note 5, at 10–11.

2.1) Should Article 2, paragraph 1, of the Universal Declaration, Article II of the American Declaration, Articles 2 and 26 of the Covenant, and Articles 1 and 24 of the American Convention be interpreted in the sense that an individual's legal residence in the territory of an American State is a necessary condition for that State to respect and ensure the rights and freedoms recognized in these provisions to those persons subject to its jurisdiction? *Id.* at 13.

2.2) In the light of the provisions cited in the preceding question, can it be considered that the denial of one or more labor right, based on the undocumented status of a migrant worker, is compatible with the obligations of an American State to ensure non-discrimination and the equal, effective protection of the law imposed by the above-

Mexican government stated its view that “an authoritative opinion from the Inter-American Court of Human Rights on this matter would not only be supportive of the measures that the Government itself is taking in favor of undocumented Mexican workers, but would benefit, in general, the migrant workers of other countries who are in a similar situation in the inter-American region.”¹³³

Governments in the Americas region, the international community, and domestic interest groups participated in *OC-18*, offering the court a range of perspectives on how to define the rights of unauthorized workers as well as on which specific rights should be protected. This broad participation generated a range of arguments on the international rights of unauthorized workers. The arguments before the court addressed three major questions: (1) which international human rights are implicated by differential treatment of unauthorized workers; (2) what test should be used to apply the right of non-discrimination to differential treatment of unauthorized workers; and (3) under international law, which specific domestic labor and employment protections should unauthorized workers receive on an equal basis with their authorized counterparts.

In addition to the government of Mexico, the governments of Canada,¹³⁴ Costa Rica,¹³⁵ El Salvador,¹³⁶ Honduras,¹³⁷ and Nicaragua¹³⁸ offered written

mentioned provisions? *Id.*

3) What would be the validity of an interpretation by any American State which, in any way, subordinates or conditions the observance of fundamental human rights, including the right to equality before the law and to the equal and effective protection of the law without discrimination, to achieving migration policy goals contained in its laws, notwithstanding the ranking that domestic law attributes to such laws in relation to the international obligations arising from the International Covenant on Civil and Political Rights and other obligations of international human rights law that have an *erga omnes* character? *Id.* at 15.

4) What is the nature today of the principle of non-discrimination and the right to equal and effective protection of the law in the hierarchy of norms established by general international law and, in this context, can they be considered to be the expression of norms of *ius cogens*? If the answer to the second question is affirmative, what are the legal effects for the OAS Member States, individually and collectively, in the context of the general obligation to respect and ensure, pursuant to Article 2, paragraph 1, of the Covenant, compliance with the human rights referred to in Articles 3(1) and 17 of the OAS Charter? *Id.* at 17–18.

133. Request for Advisory Opinion, *supra* note 5, at 7.

134. See Request for an Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights: Observations of Canada (Jan. 13, 2003) [hereinafter Observations of Canada] (on file with author).

135. See *Solicitud de Opinión Consultiva Presentada por el Gobierno de los Estados Unidos Mexicanos ante la Corte Interamericana de Derechos Humanos: Observaciones de la República de Costa Rica* (Jan. 14, 2003) [hereinafter Observations of Costa Rica] (on file with author); see also *OC-18*, *supra* note 4, paras. 20, 32.

136. See *Observaciones del Estado de El Salvador a la Solicitud de Opinión Consultiva OC-18*, Presentada por los Estados Unidos Mexicanos a la Corte Interamericana de Derechos Humanos (Jan. 13, 2003) [hereinafter Observations of El Salvador] (on file with author); see also *OC-18*

and oral interventions in *OC-18*. An additional seven governments attended the oral arguments as observers: Argentina, Brazil, the Dominican Republic, Panama, Paraguay, Peru and Uruguay.¹³⁹ Several inter-governmental organizations intervened in the case as well, including the Inter-American Commission of Human Rights and the Consejo Centroamericano de Procuradores de Derechos Humanos, which presented written and oral interventions;¹⁴⁰ the United Nations High Commissioner for Refugees, which made an oral presentation at the non-governmental session;¹⁴¹ and the U.N. Special Rapporteur for the Human Rights of Migrants, who attended the governmental hearings as an observer.¹⁴² Although the vast majority of the civil society interveners were U.S.-based,¹⁴³ the United States government itself never spoke publicly in *OC-18*.¹⁴⁴ The government interventions supplemented the Mexican government's request by suggesting additional analytical legal approaches and additional legal authorities. The government participants also added factual support for Mexico's submission, by, for example, reciting the ways in which unauthorized workers receive equitable treatment under their own labor and employment schemes.¹⁴⁵ By contrast, Costa Rica noted the differential treatment experienced by the undocumented in its own country, owing to the bureaucratic obstacles that prevent an undocumented person from receiving the social benefits otherwise available to those with lawful status.¹⁴⁶

supra note 4, paras. 15, 32.

137. See República de Honduras: Comentarios Referidos a la OC 18-014 Que Somete el Gobierno de los Estados Unidos Mexicanos a La Honorable Corte Interamericana de Derechos Humanos (Nov. 12, 2002) [hereinafter Comments of Honduras] (on file with author); see also *OC-18*, *supra* note 4, paras. 8, 32.

138. Letter from Norman Caldera Cardenal, Minister of Foreign Affairs of Nicaragua, to Manuel E. Ventura Robles, Executive Secretary, Inter-American Court of Human Rights (Nov. 25, 2002) [hereinafter Observations of Nicaragua] (on file with author); see also *OC-18*, *supra* note 4, paras. 10, 32.

139. *OC-18*, *supra* note 4, para. 32.

140. See Opinión Consultiva OC-18: Discriminación en el Empleo en Virtud de Status Migratorio: Corte Interamericana de Derchos Humanos: Dictamen de la Comisión Interamericana de Derechos Humanos en aplicación de los Artículos 57 y 64 de la Convención Americana sobre Derechos Humanos (Jan. 13, 2002) [hereinafter Inter-American Commission Observations] (on file with author); see also *OC-18*, *supra* note 4, paras. 16, 32; see also *id.* para. 40.

141. See *OC-18*, *supra* note 4, para. 39.

142. See *id.* para. 32.

143. See *infra* Part V.

144. See *OC-18*, *supra* note 4, para. 17 (describing a note submitted by the United States on January 13, 2003, informing the Court that it would not present observations).

145. See, e.g., Request for an Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights: Observations of Canada, Jan. 13, 2003, at 6 (listing the "vast majority of *Charter* rights and freedoms [that] may be invoked by any person in Canada, regardless of citizenship or immigration status").

146. See Observations of Costa Rica, *supra* note 135, at 15 (noting that "many of the social services relating to health, job security and other strictly labor-related services presuppose a series of bureaucratic procedures that a person who is undocumented cannot carry out.").

Many representatives of civil society also intervened as amici curiae in *OC-18*, including amici from eleven universities, in both their individual and representative capacities,¹⁴⁷ two private law firms,¹⁴⁸ and fifty-seven non-governmental organizations (fifty-three of them signatories to one brief).¹⁴⁹ The

147. The universities were: (1) and (2) the Academy of Human Rights and International Humanitarian Law of the Washington College of Law, American University and the Human Rights Program of the Universidad Iberoamericana de México, (writing jointly), *see OC-18, supra* note 4, para. 30; (3) the Legal Clinic for the Rights of Immigrants and Refugees of the School of Law of the Universidad de Buenos Aires (writing jointly with the Center for Legal and Social Studies (CELS) and the Ecumenical Service for the Support and Orientation of Immigrants and Refugees (CAREF)), *see id.* para. 46; (4) the Universidad Nacional Autónoma de México (UNAM) (with separate briefs and presentations from the Faculty of Law and the Juridical Research Institute), *see id.* paras. 14, 39, 41, 44; (5) and (6) the Harvard University and Boston Law Schools (jointly writing and presenting through the Harvard Immigration and Refugee Clinic of the Greater Boston Legal Services and the Working Group on Human Rights in the Americas of the Harvard and Boston College Law Schools, also with the Global Justice Center), *see id.* paras. 18, 28, 39; (7) the Northwestern University School of Law Center for International Human Rights, *see id.* paras. 31, 39, 45; (8) las Clínicas Jurídicas del Colegio de Jurisprudencia de la Universidad San Francisco de Quito, *see id.* paras. 11, 39; and (9) and (10) University of Texas School of Law and Villanova University School of Law (writing jointly with the National Employment Law Project and representing 53 labor, civil rights, and immigrants' rights organizations in the United States, including (11) the Brennan Center for Justice at the New York University School of Law), *id.* paras. 27, 29; 39. *See also* In the Matter of Request for Advisory Opinion Submitted by the Government of the United Mexican States: *OC-18: Brief of Amicus Curiae: Labor, Civil Rights and Immigrants' Rights Organizations in the United States*, reprinted in Sarah Cleveland, Beth Lyon & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 Seattle J. Soc. Just. 795 (2003) [hereinafter Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States].

148. The law firms were the Delgado Law Firm, *see OC-18, supra* note 4, para. 13, and the Law Office of Sayre & Chavez (with Thomas A. Brill and Javier Juárez presenting separate briefs for the firm), *see id.* paras. 24, 25, 39.

149. The non-governmental organizations included: the Global Justice Center, *see id.* paras. 18, 28, 39 and the National Coalition of Hispanic Organizations, *see id.* para. 23; The following coalition, represented by counsel from the University of Texas, Villanova University, and the National Employment Law Project, submitted one brief under the designation Labor, Civil Rights and Immigrants' Rights Organizations in the United States: Association of Community Organizations for Reform Now (ACORN); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); American Federation of State, County and Municipal Employees (AFSCME); Asian Law Caucus; Asian American Legal Defense and Education Fund (AALDEF); Asian Pacific American Legal Center (APALC); Brennan Center for Justice at New York University School of Law; California Rural Legal Assistance Foundation; CASA (Maryland); Casa Marianella (Texas); CATA (Farmworkers Support Committee) (New Jersey); CAUSA (Coalition of grassroots immigrants' rights organizations in Oregon); Center on Policy Initiatives (California); Center for Economic and Social Rights (Brooklyn, New York); The Citizenship Project (Salinas, California); Chicago Interfaith Committee on Worker Issues; Coalition for the Human Immigrants Rights of Los Angeles; El Centro, Inc. (Kansas City, Kansas); Employment Unit at Greater Boston Legal Services (Massachusetts); Equal Justice Center (Texas); D.C. Employment Justice Center; Farmworker Justice Fund, Inc.; Friends of Farmworkers, Inc. (Pennsylvania); Florida Immigrant Advocacy Center; Hotel Employees and Restaurant Employees International Union; Hispanic Organizations Leadership Alliance; Labor Council for Latin American Advancement (LCLAA); IUE-CWA (the Industrial Division of the Communication Workers of America, AFL-CIO); International Labor Rights Fund; Legal Aid Society,

amici curiae came from at least seven countries.¹⁵⁰ In their written and oral interventions, amici supplemented the advisory opinion request by further detailing the Mexican government's factual claims regarding the vulnerability of unauthorized workers, and also by elaborating on or challenging the Mexican government's legal arguments.

IV.

QUESTIONS PRESENTED AND LEGAL TESTS PROPOSED TO THE COURT

In order to evaluate whether the differential treatment of unauthorized workers violates regional human rights norms, the court first had to determine which rights are implicated by diminished protections for unauthorized workers. The Mexican government analyzed the problem as a potential violation of the international right to non-discrimination and equality before the law. Most of the other submissions to the court relied on non-discrimination and equality before the law as well. A few interventions argued that differential treatment might also violate substantive economic, social and cultural human rights norms, such as the right to freedom of association and the right to employment injuries benefits. However, economic, social and cultural rights were not comprehensively argued to the court. Nor did the court hear any arguments about the importance of analyzing the deprivations of unauthorized workers using economic, social and cultural rights.

A. Non-Discrimination and Equality Before the Law

The non-discrimination arguments presented two novel questions to the court. First, the court was asked to determine whether non-discrimination and equality before the law have risen to the level of *jus cogens*. As described in further detail below, *jus cogens* is body of international legal norms that are binding on all nations of the world whether or not the governments have

Employment Law Center (California); Migrant Farmworker Justice Project (Florida); National Asian Pacific American Legal Consortium (NAPALC); National Coalition of Hispanic Organizations; The National Council of La Raza (NCLR); National Employment Lawyers Association (NELA); National Immigration Project of the National Lawyers' Guild; National Lawyers Guild Labor and Employment Committee; Immigrants Legal Assistance Project, North Carolina Justice and Community Development Center; Oregon Law Center, Inc.; Oregon Public Employees Union, SEIU Local 503; SEIU Local 503 Latino Caucus; Pineros y Campesinos Unidos del Noroeste (PCUN) (Oregon); Puerto Rican Legal Defense and Education Fund; Robert F. Kennedy Memorial Center for Human Rights; Service Employees International Union (SEIU); Sweatshop Watch; International Union; United Automobile, Aerospace, and Agricultural Implement Workers of America (UAW); United Electrical, Radio, and Machine Workers of America (UE); Teamsters Local 890; The Workplace Project; Virginia Justice Center for Farm and Immigrant Workers; United Farmworkers Union, AFL-CIO. See Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 866; see also *OC-18*, *supra* note 4, paras. 27, 29, 39, 43.

150. Argentina, Chile, Costa Rica, Ecuador, Guatemala, Mexico, and the United States.

accepted these standards voluntarily, for example through treaty ratification.¹⁵¹ Second, the court also had to adopt a non-discrimination test for use in the context of unauthorized immigrant worker rights. The parties set forth several possible formulations for the test that would determine whether a particular form of differential treatment violates non-discrimination. To aid the court in applying a non-discrimination test, the parties further provided the court with comprehensive evidence about the importance of labor and employment rights to unauthorized workers. To a lesser extent, the court also received arguments tipping the balance in favor of giving governments the discretion to differentially deny these rights to the unauthorized.

1. *Non-Discrimination and Equality Before the Law as Peremptory Norms*

Various parties contended that human rights norms prohibiting discrimination and establishing the right to equality before the law bind every nation, and also that unauthorized workers have the right to invoke these rights against their countries of employment. The parties pointed out that these rights appear in a broad range of international human rights documents.¹⁵² The Mexican government argued that, in addition to their widespread recognition, these rights are so “instrumental to the main political objectives of the present times”¹⁵³ and to the “democratic foundations of the American states”¹⁵⁴ that they have become binding on all states through complementary doctrines known as *jus cogens* and obligations *erga omnes*.¹⁵⁵

Jus cogens and obligations *erga omnes* are complementary international law concepts that expand the possibilities of enforcing certain widely endorsed norms. *Jus cogens* is a body of norms that have been so widely recognized that they are applicable to all states, including states that have not explicitly accepted the norms by ratifying a treaty.¹⁵⁶ The Vienna Convention on the Law of

151. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 57-58 (7th ed. 1997).

152. See, e.g., Inter-American Commission Observations, *supra* note 140, at 3-7; Solicitud de Opinión Consultiva Presentada por el Gobierno de los Estados Unidos Mexicanos: Amici Curiae presentado por Centro por la Justicia y el Derecho Internacional (CEJIL) at 4-7 (May 15, 2003) [hereinafter Brief of Amicus Curiae CEJIL] (on file with author); Solicitud de Opinión Consultiva Presentada por el Gobierno de los Estados Unidos Mexicanos: Amici Curiae presentado por Centro de Estudios Legales y Sociales (CELS), Servicio de Apoyo y Orientación a Inmigrantes y Refugiados (CAREF), Clínica Jurídica para los Derechos de Inmigrantes y Refugiados (Facultad de Derecho de la Universidad de Buenos Aires, CELS, y CAREF) (May 15, 2003) at 15-17 [hereinafter Brief of Amici Curiae CELS, CAREF, and University of Buenos Aires] (on file with author).

153. Oral Intervention of Mexico, *supra* note 121, para. 42 (quoting MAURIZIO RAGAZZI, *The Concept of International Obligations Erga Omnes*, in OXFORD MONOGRAPHS IN INTERNATIONAL LAW 133-34 (1997)).

154. *Id.* para. 43.

155. *Id.* paras. 50(b), 54.

156. See generally, Jochen Abr. Frowein, *Jus Cogens*, in 3 ENCYCLOPEDIA OF PUBLIC

Treaties of 1969 defines a peremptory norm (another term for a standard that has risen to the level of *jus cogens*) as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."¹⁵⁷ Norms belonging to the canon of *jus cogens* include self-determination, humanitarian law in armed conflict, freedom on the high seas, the prohibition against slavery, and the prohibition against torture.¹⁵⁸ Obligations *erga omnes* is a related concept that describes the body of norms that are of such fundamental importance that even states not directly affected by an offending government's action may take non-violent action to punish a breach.¹⁵⁹ Thus these concepts act together to define a body of norms that simultaneously require non-ratifying states to comply and empower those states not directly affected to take action. The International Court of Justice has described obligations *erga omnes* as obligations which "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, and also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."¹⁶⁰

Having urged the Inter-American Court to recognize the right to non-discrimination and equality before the law as *jus cogens* norms binding on all governments, the Mexican government requested that "the Court declare that a person's migratory situation cannot be considered . . . as an indispensable requirement for the enjoyment of fundamental rights such as equality before the law and non-discrimination."¹⁶¹ It was also argued that under the standard principle of international human rights law that governments owe human rights obligations to any individuals under their control, an undocumented worker is entitled to invoke these norms against her country of employment.¹⁶²

INTERNATIONAL LAW 65 (Rudolf Bernhardt ed., 1997).

157. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

158. See Frowein, *supra* note 156, at 67; *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

159. See generally, Jochen Abr. Frowein, *Obligations Erga Omnes*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 757 ("Although the notions *jus cogens* and obligations *erga omnes* refer to different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States must be seen to have a legal interest.").

160. *Barcelona Traction (Belg. v. Spain)*, 1970 I.C.J. 3, para. 34 (Feb. 5).

161. Oral Intervention of Mexico, *supra* note 121, para. 31.

162. See, e.g., American Convention, *supra* note 32, art. 1.1 (requiring that all parties to the Convention "undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms").

2. *Non-Discrimination and Equality Before the Law: Tests Proposed to the Court*

The parties that argued that the rights to non-discrimination and equality before the law apply to all unauthorized workers in the hemisphere then addressed the question of whether these norms permit governments to differentially restrict worker rights based on immigration status. The Mexican government began its non-discrimination analysis by pointing out that the term "discrimination" has an "imminently negative connotation."¹⁶³ The government adopted the term "prejudicially distinct treatment" to describe restricted or lesser rights for unauthorized workers.¹⁶⁴ The parties set forth various tests that might aid the court in determining which prejudicially distinct treatment would be considered valid under the norms of non-discrimination and equality before the law. Various non-discrimination analyses were urged on the court using a range of formulations and tests. In order to analyze and compare the major elements of these arguments, the following discussion separates them into three categories: (1) a fundamental rights analysis; (2) a tiered scrutiny analysis; and (3) a unitary balancing test.

a. Fundamental Rights Analysis

Several parties proposed that the court apply non-discrimination and equality before the law by way of a fundamental labor rights analysis. The fundamental rights analysis involved a three-stage analysis. First, each proponent of the fundamental labor rights analysis laid out a balancing test.¹⁶⁵ The purpose of the balancing test is to ensure that the restrictions imposed are tailored to the circumstances, are indispensable to reaching those needs, and are only imposed in the absence of a less restrictive alternative.¹⁶⁶ Many non-discrimination balancing tests appear across international and regional human rights law. For example, the Mexican government laid out one formulation of the non-discrimination analysis used in the Inter-American system, which requires that any facially discriminatory restrictions be "justified by collective objectives of such importance that they clearly outweigh the social necessity to guarantee the full exercise of the rights guaranteed by the Convention, and that they be no more restrictive than strictly necessary."¹⁶⁷

The second stage of the fundamental rights analysis was the argument that there is a group of fundamental labor rights that are so important that their

163. Oral Intervention of Mexico, *supra* note 121, para. 18.

164. *Id.* para. 18.

165. *See id.* para. 27.

166. *Id.*

167. *Id.* para. 29 (quoting *X and Y v. Argentina* Case 10.506, Inter-Am. C.H.R., OEA/ser.L/V/II.95, doc. 7 rev. 50 (1997), para. 58).

observance should not be subject to a balancing test. This formulation tracks the approach to labor rights favored in the 1990s by the International Labour Organization ("ILO"), which attempted to consolidate the numerous conventions it monitors by categorizing and highlighting those related to four fundamental labor rights norms: the prohibition of slavery, the prohibition of child labor, the right to freedom of association (union rights), and the elimination of workplace discrimination.¹⁶⁸ The result of this stage would be to carve out a set of labor and employment rights with priority over any asserted competing governmental interest.

Finally, the third stage of the fundamental rights analysis would be the application of the selected balancing test to any rights not found to be fundamental. Applying such a test in the context of a general advisory opinion would be complex and require a detailed examination of the potential rights in issue and of the potential governmental interests; once having urged a set of fundamental rights on the court, the parties using the fundamental rights analysis did not proceed to propose particular guidelines for the application of the third stage of this analysis.

b. Tiered Scrutiny Analysis

Several parties suggested that the court apply the right to non-discrimination through a tiered scrutiny analysis. This analysis places the burden on the government to justify differential treatment depending on two factors: (1) the level of vulnerability of the people disadvantaged by the treatment; and (2) whether or not the characteristics of people thus disadvantaged appear on a list of characteristics singled out for protection in the non-discrimination provisions in applicable human rights treaties. Under this analysis, groupings created by differential treatment affecting people with particular characteristics would be considered suspect categories, triggering a heightened level of scrutiny of the government's motives for the differential treatment in question. In support of this approach, the Inter-American Commission on Human Rights argued that, although migrants do not appear explicitly on any lists of prohibited categories in the many different treaties containing non-discrimination provisions, the treaties do make clear that the lists are intended to be "merely by way of example."¹⁶⁹ In the Americas, the Commission pointed out that Article II of the American Declaration of the Rights and Duties of Man (American Declaration), the regional equivalent of the Universal Declaration of Human Rights, prohibits "distinction as to race, sex, language, creed or any other factor,"¹⁷⁰ while

168. See ILO Interpretation, *supra* note 100, at 6.

169. Inter-American Commission Observations, *supra* note 140, at 2.

170. American Declaration of the Rights and Duties of Man, May 2, 1948, Ninth Int'l Conf. of American States, Bogotá, Colombia, art. II, *reprinted in* BASIC DOCUMENTS, *supra* note 29 [hereinafter American Declaration].

American Convention Article 1.1 prohibits “any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”¹⁷¹ The Commission argued that international adjudicators should use “an unusually strict degree of scrutiny” with regard to distinctions that governments have made on the basis of the categories enumerated in the treaty provisions, and that such distinctions should be considered presumptively improper.¹⁷² In addition, the Commission argued, the court should apply its own general non-discrimination test to restrictions on other categories of persons in order to determine whether the proper balance has been struck in the case of a particular law limiting the rights of persons in a non-enumerated category.¹⁷³ The Commission quoted the following statement of the court’s non-discrimination test, set forth in a 1984 Advisory Opinion, *OC-4*:

[N]o discrimination exists if the difference in treatment has a legitimate purpose and if it does not lead to situations which are contrary to justice, to reason or to the nature of things. It follows that there would be no discrimination in differences in treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review. These aims may not be unjust or unreasonable, that is, they may not be arbitrary, capricious, despotic or in conflict with the essential oneness and dignity of humankind.¹⁷⁴

Some intervenors also argued for a tiered scrutiny test, beginning with an analysis of whether people singled out for differential treatment constitute a suspect class.¹⁷⁵ The Centro por la Justicia y el Derecho Internacional (CEJIL), the premier non-governmental group litigating in the Inter-American human rights system, argued that migrant workers should be considered a suspect class not only because of their vulnerability but also because discrimination against migrant workers is “intimately tied to [their] nationality, ethnicity or race”¹⁷⁶

171. American Convention, *supra* note 170, art. 1.1.

172. Inter-American Commission Observations, *supra* note 140, at 10–11.

173. *Id.* at 2. The Commission proposed that the non-discrimination test be applied using the following five factors:

(1) the content and scope of the rule that discriminates between categories of persons; (2) the consequences of this discriminatory treatment for the persons disfavored by the policy or practice of the State; (3) the possible justifications offered for that differential treatment, particularly its relationship to a legitimate interest of the State; (4) the rational relationship between that legitimate interest and the discriminatory policy or practice; (5) the existence or non-existence of means or methods less prejudicial to the affected parties that would obtain the same legitimate ends.

Id.

174. *OC-4*, *supra* note 117, para. 57.

175. See Brief of Amicus Curiae CEJIL, *supra* note 152, at 8.

176. *Id.* at 18; see also Brief of Amici Curiae CELS, CAREF, and University of Buenos

An influential group of South American organizations argued that any differential labor standards based on immigration status had to meet two criteria in order to pass muster. First, unauthorized workers' labor rights could only be restricted to the extent that the restriction advances legitimate government goals contemplated in international human rights treaties: "democratic necessity, public order, national security, the common good, public health and morals."¹⁷⁷ Second, the government's action would face a presumption of invalidity that could only be rebutted through proof that: (1) there was an intimate connection between the means utilized and the legitimate end sought; and (2) the measure selected was the least restrictive means available.¹⁷⁸

c. Unitary Balancing Test

Arguments relying on a unitary balancing test analysis relied on existing formulations of the non-discrimination balancing test and laid out the equities in a single step. Proponents of this test did not engage in a threshold analysis identifying a "class" designation for unauthorized workers, and also did not attempt to carve out a set of fundamental rights. Instead, the unitary balancing test involves consideration of all the factors involved in tiered analyses—for example, the vulnerability and/or culpability of unauthorized workers, or the core importance of a right considered to be fundamental—and weighs them in a single step. As with the analytical methodologies described above, the parties employing a unitary test had to select among a number of potential formulations of the international non-discrimination balancing test. In general the existing balancing tests involve an examination of the reasonableness of the prejudicially distinct treatment at issue. For example, the Costa Rican government stated that government actions against foreigners must be limited by a reasonableness test.¹⁷⁹

d. Implications of the Proposed Tests

The three analytical approaches described above—the fundamental rights approach, the tiered scrutiny analysis, and the unitary balancing test—were not neatly divided amongst the parties. Some parties argued in the alternative, searching for different ways to convey the vulnerability of unauthorized workers and the importance of the rights at stake. Moreover, the court was presented

Aires, *supra* note 152, at 17–22 (arguing that immigrants constitute a suspect class based on international law and the character of migrant labor).

177. Brief of Amici Curiae CELS, CAREF, and University of Buenos Aires, *supra* note 152, at 34.

178. *Id.* at 36.

179. Observations of Costa Rica, *supra* note 135, at 7–9; *see also* Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 828–40 (arguing that, under the International Covenant on Civil and Political Rights, discrimination against aliens is prohibited absent "reasonable and objective criteria").

with few arguments about the relative merits of these different analytical approaches. However, several potential implications emerged from the various parties' application of the suggested standards to the situation of unauthorized workers.

The fundamental rights approach offered a straightforward basis for extending equal entitlement to a cluster of at least four key rights that would, between them, cover many of the issues of concern to unauthorized workers. The Inter-American Court has relatively little experience with the application of labor standards, and falling back on a cluster of core rights recently endorsed by the ILO, an agency with an established record on the issue, would seem to provide a coherent framework for the human rights obligations of American states and a convenient mechanism for incorporating new developments in ILO standards into post-*OC-18* interpretations. The strengths of the fundamental rights approach were also its limitations. Having engaged in a fundamental rights analysis, the court might have difficulty defining a list of fundamental rights should it wish to depart from the list of four generated by the ILO. Additional rights could be incorporated by arguing that they were elements of, or necessary to, the enumerated four. For example, the Inter-American Commission argued that the right to pay for work performed should be included as a fundamental right under the theory that it is a necessary condition for the protection of the prohibition on slavery.¹⁸⁰ However, important rights could be excluded from even this more expansive reading of the ILO fundamental rights list, including the right to employment injuries benefits.¹⁸¹ Even under a fundamental rights approach as laid out in the briefing to the court, any right considered to be non-fundamental would then be balanced against the competing interest asserted by the government, and presumably some such rights would survive such balancing. However, some parties were concerned that exempting a set of rights from the balancing test might have the unintended effect of unnecessarily weakening the importance of the non-designated rights in relation to a State Party's assertion of its sovereign interests in controlling immigration. Such an unintended effect might skew the outcome of the third stage of the fundamental rights analysis toward disproportionate consideration of the government's interest.

The tiered scrutiny analysis gave the court the opportunity to undertake a more nuanced examination of the equities in question. It also represented a departure from the court's previous analytical framework and created the possibility of exploring its application in other settings where the tiered approach

180. See Inter-American Commission Observations, *supra* note 140.

181. See Memorial Amicus Curiae of the Center for International Human Rights of Northwestern University School of Law, Request for Advisory Opinion OC-18, Submitted by the Government of the United Mexican States, at 13 (2003) [hereinafter Northwestern University Memorial] (on file with author).

had been an established rule, such as the United States Supreme Court¹⁸² and the European Court of Human Rights.¹⁸³ One concern with the multi-tiered approach, from the enforcement perspective, is the application of strict scrutiny to discrimination against a population that is by definition violating immigration laws.¹⁸⁴ For example, amicus curiae Northwestern University School of Law noted that this concern raises questions as to whether immigration status should be a basis of any non-discrimination analysis at all, let alone a trigger for strict scrutiny.¹⁸⁵ Certainly I am aware of no precedent for applying a higher level of scrutiny to protect a group legally defined by its own lawbreaking behavior, no matter how highly correlated the group might be with other protected characteristics. At the same time, the existence of domestic definitional laws, such as laws creating an untouchable or slave class, which employer sanctions arguably do, could themselves create the conditions warranting such heightened protection under international law. Several parties raised the point that in most countries with employer sanctions regimes, the laws sanctioning unauthorized work are very rarely enforced against employers, particularly when compared with the number of deportations carried out each year.

An additional question about the tiered scrutiny analysis, from the worker rights enforcement perspective, was to what extent a grafted-on test adopted from another body (or in this case, bodies) of jurisprudence brings with it jurisprudential baggage.¹⁸⁶ For example, in the United States, the existence of a

182. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); *Loving v. Virginia*, 388 U.S. 1 (1967).

183. See, e.g., *McCann & Others v. United Kingdom*, 21 Eur. H.R. Rep. 97 (1995). The European Court's jurisprudence is notable for the court's incorporation of the multi-tiered approach, in addition to a more long-standing analytical tool called the "margin of appreciation." Alexander H. E. Morawa, *The Concept of Non-Discrimination: An Introductory Comment*, J. ETHNOPOLITICS & MINORITY ISSUES IN EUR. at 2 (2002), at http://www.ecmi.de/jemie/download/Focus3-2002_Morawa.pdf. "The 'margin of appreciation' doctrine stems from the Court's case-law relating to the restriction clauses contained, for instance, in Article 10(2) of the Convention permitting states to restrict rights for certain enumerated reasons, but only as far as such limitations are 'necessary in a democratic society.'" *Id.* at 2 n.10 (quoting *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, art. 10(2), 312 U.N.T.S. 221). The margin of appreciation allows international tribunals to accord deference to governments' decision-making authority, and it can serve the same purpose as a tiered scrutiny analysis. See *id.* ("[H]owever, that margin will be quite narrow or, in other words, states would have to advance 'very weighty reasons' for their measures to survive judicial scrutiny, when a differentiation is based solely on what may be called a 'suspect criterion', such as race or sex." (quoting *Willis v. United Kingdom*, 35 Eur. H.R. Rep. 547, 549 (2002))). In its advisory opinion on Costa Rica's naturalization laws, the Inter-American Court discussed the State's margin of appreciation to set immigration policy in the non-discrimination context, see *OC-4*, *supra* note 117, para. 58, but the parties in *OC-18* did not put forth a margin-of-appreciation approach.

184. Northwestern University Memorial, *supra* note 181, at 39–40.

185. See *id.*

186. Commenting on the logical flaws in the Supreme Court's equal protection tests, one scholar argued:

suspect class has imposed a limitation on some affirmative remedial measures based on the same factors of vulnerability that originally led to the designation of the suspect class.¹⁸⁷ Meanwhile, the Inter-American human rights system has affirmed the importance and obligation of states to provide such affirmative measures.¹⁸⁸ Given the dominance of the United States in the Americas, some amici feared that these limitations might have a greater effect on the development of an Inter-American tiered scrutiny jurisprudence. U.S. groups also felt that the use of a parallel test such as tiered scrutiny, tied to significantly different outcomes, might negatively impact the long-term adoption of Inter-American jurisprudence into U.S. domestic norms.

Finally, some groups analyzed the problem presented to the court using a single step or unitary balancing test. Various unitary balancing tests appear in international and Inter-American non-discrimination jurisprudence. One disadvantage of the continued use of this test would be that by making only one level of scrutiny available to the court, the court would afford less scope to challenge governmental decisions at either extreme of the spectrum of affected class vulnerability. For example, under the court's unitary balancing test, a clearly racist law, such as a statute providing less education funding to biracial children than other children, would only be examined for "reasonable relationship of proportionality" to a legitimate government purpose. At the same time, a law revoking the ownership rights of property tax evaders would also receive a "reasonable proportionality" examination, when in a tiered approach it would most likely be tested for nothing more than a rational relationship to a legitimate government purpose.

[T]he complexity of the court's distinctions among "suspect," "quasi-suspect," and "non-suspect" classifications, and corresponding standards of review, can only ever express those differences in imprecise terms . . . [T]he Justices' intractable differences [in formulating standards of review] raise questions about whether the determinacy of its standards of review can go much further than sheer formal structure; and whether, for all their seeming intricacy, those standards are ultimately indistinguishable from the more prosaic "reasonableness" or "proportionality" standards used by non-US courts.

ERIC HEINZE, *THE LOGIC OF EQUALITY* 118 (2003). This deconstruction of the Supreme Court's multi-tiered approach does not negate the method's utility or importance, but does point up the relative arbitrariness of selecting one analytical methodology over another.

187. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to federal program that used racial classifications in assigning contracts in effort to benefit disadvantaged business enterprises); *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (holding that city program requiring that thirty percent of value of subcontracts be awarded to minority business enterprises did not meet constitutional muster because city did not demonstrate compelling governmental interest, and plan was not narrowly tailored to meet objective of remedying effects of past discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (observing that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination").

188. See *OC-18*, *supra* note 4, para. 104.

3. *Equities Argued to the Court*

Any formulation of the non-discrimination analysis ultimately requires a weighing of the equities: the importance of the challenged rule and the governmental policy goal it serves versus the importance of protecting the right that has been differentially restricted. The parties to *OC-18* laid out arguments on both sides of the non-discrimination equation. The vast majority of equity arguments focused on the extreme vulnerability of migrant workers and thus supported giving greater weight to the interests of unauthorized workers. The Inter-American Commission on Human Rights, through its Special Rapporteur on Migrant Workers and their Families in the Hemisphere, and the United Nations High Commissioner for Refugees (UNHCR) offered direct proof of the vulnerability of forced migrants throughout the region.¹⁸⁹ In its oral intervention, the UNHCR emphasized the nexus between asylum and migration,¹⁹⁰ pointing out that within any migrant population there is some percentage of refugees who are fleeing, or fear, persecution if deported.¹⁹¹ This nexus, UNHCR argued, militates in favor of broad protection of labor rights.¹⁹² The non-governmental amici provided extensive statistical and anecdotal evidence to the court regarding the seriousness of the human rights situation under consideration. Amici described the manner in which the roots of the modern political economy lie in the history of slavery, racism, and colonialism in the Americas, and emphasized the magnitude of migrant flows and unauthorized worker populations. Evidence of deprivations facing unauthorized migrant workers covered each phase of the migrant worker experience, including: (1) extreme poverty and persecution driving them from their homes; (2) danger and extortion encountered in their travels; (3) exploitation by smugglers, corrupt officials, and employers; (4) poverty; (5) fear of deportation; and (6) reduced legal protections compounded by obstacles to rights enforcement awaiting in the country of employment.¹⁹³ Amici described the legal and

189. See Inter-American Commission Observations, *supra* note 140, at 16–18; *OC-18*, *supra* note 4, para. 47, at 73.

190. See *OC-18*, *supra* note 4, para. 47, at 74 (summarizing oral statement of UNHCR).

191. *Id.*

192. See *id.*

193. See e.g., *OC-18*, *supra* note 4, para. 47, at 29–34, 77–84 (summarizing arguments of Jorge A. Bustamante, Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México (UNAM); Universidad San Francisco de Quito; and Central American Council of Ombudsmen with the support of its Technical Secretariat (Inter-American Institute of Human Rights)); Brief of Amicus Curiae CEJIL, *supra* note 152, at 22; Brief of Amici Curiae CELS, CAREF, and University of Buenos Aires, *supra* note 152, at 18; Brief Amici Curiae of the Harvard Immigration and Refugee Clinic, Working Group on Human Rights in the Americas of Harvard and Boston College Law Schools, Global Justice Center (Centro de Justiça Global) (Feb. 11, 2003), (on file with author) (describing the situation of unauthorized workers in Argentina, Brazil, Chile, the Dominican Republic, Mexico, and the United States); Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 803–21 (describing the

practical situation of unauthorized workers in countries throughout the region, creating an uncontradicted record of extreme disadvantage. Various parties emphasized the importance of the domestic employment and labor rights at issue owing to their parallel protection under international law. These rights included: the right to freedom of association,¹⁹⁴ the right to fair remuneration, the right to proper working conditions, the right to effective recourse to the courts, the right to civil legal aid services,¹⁹⁵ and the right to social security.¹⁹⁶

Finally, the parties supporting parity of equal labor and employment rights for unauthorized workers addressed the relationship between differential treatment and government objectives. Many groups argued that the limitation of unauthorized worker labor and employment rights could not be viewed as reasonably promoting government migration control objectives.¹⁹⁷ In fact, many groups argued that parity of protection is actually the best way to *discourage* employers from hiring unauthorized workers, because the law then offers fewer economic incentives to employers to break the law.¹⁹⁸ Migration policy concededly outweighs other rights, such as the right of an undocumented person to obtain work or to remain in the country, but, these groups argued, sovereign control over borders could not reasonably be held to outweigh the right to equal labor and employment protections.¹⁹⁹

Three primary arguments were advanced on the other side of the equation, in favor of according states the discretion to differentially abridge unauthorized workers' workplace rights. First, most participating governments and some amici curiae stipulated that setting immigration policies is a central perquisite of state sovereignty.²⁰⁰ Governments are entitled, these parties noted, to control their borders and make immigration policy, albeit within the bounds of their obligations under international human rights law. A second factor weighed against unauthorized workers' claim to equal workplace rights: the fact that they are, by definition, lawbreakers.²⁰¹ The court heard a third argument against extending non-discrimination protection to the workplace rights of the

situation of unauthorized workers in the United States).

194. See Inter-American Commission Observations, *supra* note 140, at 21; Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 822-24.

195. See Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 901.

196. Brief of Amicus Curiae CEJIL, *supra* note 152, at 30.

197. See, e.g., Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 834-35; Brief of Amicus Curiae CEJIL, *supra* note 152, at 22.

198. Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 802.

199. See *id.* at 834-35.

200. See, e.g., Comments of Honduras, *supra* note 137, para. 7; Inter-American Commission Observations, *supra* note 140, at 1-2.

201. See, e.g., Northwestern University Memorial, *supra* note 181, at 40.

unauthorized. Specialized international human rights standards protecting migrant workers are gaining acceptance more slowly than other emerging human rights standards. The International Convention on the Protection of the Rights of All Migrant Workers and Their Families ("ICMW") is the primary treaty on this issue.²⁰² Thirteen years elapsed between the treaty's promulgation and its ratification by the twenty states needed for it to go into force. This slow ratification process indicates a lack of consensus, a significant issue given the voluntary nature of the international human rights law system. A second concern regarding the strength of the specialized standards relating to unauthorized workers is that the twenty states parties to the ICMW are virtually all governments that would be considered migrant-"sending" as opposed to "receiving" states,²⁰³ meaning that the Committee charged with implementing the treaty will not have jurisdiction to review the practices of the states whose policies greatly affect the rights the ICMW enshrines.²⁰⁴ This slow acceptance would seem to diminish the urgency of calls for progressive jurisprudence interpreting general standards to achieve specialized protections that have received little support by way of accession.²⁰⁵

B. Which Protections Should Extend to Unauthorized Workers?

In addition to proposing various international legal bases and non-discrimination tests for deriving a list of labor and employment rights for unauthorized workers, many parties generated their own suggested lists or categories of required rights for the court. Many parties also laid out additional rights that they argued unauthorized workers may *not* claim in deference to receiving governments' right to control migration and national borders. As noted above, the Mexican government argued that, under its proposed non-discrimination test, to restrict the "fundamental" labor rights of unauthorized workers in the name of migration policy would violate non-discrimination and equality before the law.²⁰⁶ The government did not, however, take the argument

202. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, U.N. Doc. A/RES/45/158 (1990) [hereinafter ICMW].

203. The twenty-five state parties to the Migrant Worker Convention are: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Uganda, and Uruguay. *See id.* While some of these states are categorized by the World Bank as "middle-income economies," none of the ratifying countries would be classified as "high-income economies." *See* World Bank Group: Data and Statistics: Country Groups, *available at* <http://www.worldbank.org/data/countryclass/classgroups.htm> (last visited June 2, 2004).

204. *See* Northwestern University Memorial, *supra* note 181, at 43-44; Virginia A. Leary, *Labor Migration*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 227, 236-39 (T. Alexander Aleinikoff & Vincent Chetail, eds., 2003).

205. *See* Leary, *supra* note 204, at 238-39.

206. Request for Advisory Opinion, *supra* note 5, at 11-12.

to the next stage and propose which employment rights might be considered to be “fundamental.” Instead, the government’s written advisory opinion request and oral intervention left open the possibility that not all employment rights should be considered to be of such importance that unauthorized workers should be equally entitled to enjoy them, and did not guide the court as to which rights might fall into this category. The government of El Salvador went further than Mexico had in its advisory opinion request, advocating the adoption of a standard forbidding any kind of labor or employment-law related distinctions that might disfavor unauthorized workers.²⁰⁷ El Salvador argued:

[F]rom the moment in which one establishes a work relationship in an American country with a migrant worker, the employer is required to guarantee and recognize their human rights established in the international human rights instruments, including those relating to the right to work and social security, without any discrimination and recognizing the principle of equality before the law.²⁰⁸

The Costa Rican government argued that governments should not be permitted to tolerate differential pay, advantages, or working conditions for unauthorized workers.²⁰⁹

The Inter-American Commission concluded that unauthorized workers should enjoy fundamental labor rights, including the prohibition on forced labor, the right to pay for work performed, the right to union association, elimination of workplace discrimination, and abolition of child labor.²¹⁰ The Commission reasoned that the ILO’s list should be supplemented with the right to pay for work performed because this right is a necessary condition for abolishing forced labor.²¹¹ Going further, the Consejo Centroamericano de Procuradores de Derechos Humanos argued that unauthorized workers had to be guaranteed the following rights: the right to work, the right to remuneration enabling a suitable standard of living, the right to upward mobility, stability of employment, safety and hygiene at work, special protections for minor workers, a reasonable limitation of working hours, the right to leisure time, the right to social security, trade union rights, and legal aid to secure all of these rights.²¹²

C. Limited Arguments Based on Economic, Social and Cultural Rights

Nearly all the parties involved in *OC-18* focused on non-discrimination and

207. See Observations of El Salvador, *supra* note 136, para. 9.

208. *Id.*

209. Observations of Costa Rica, *supra* note 135, at 15.

210. Inter-American Commission Observations, *supra* note 140, at 20–22.

211. See *id.*

212. Observations of Consejo Centroamericano de Procuradores de Derechos Humanos con el Apoyo de su Secretaría Técnica (Instituto Interamericano de Derechos Humanos) (on file with author).

the right to equality before the law. However, these are not the only international human rights implicated in the situation of unauthorized workers. International human rights law also includes a series of standards traditionally referred to as economic, social and cultural rights, often contrasted with the body of guarantees identified as civil and political rights. These rights provide substantive minimum guarantees relating to a range of basic human needs, such as the right to work, to housing, and to adequate nutrition.

There are several significant differences between examining the prejudicially distinct treatment of unauthorized workers as an economic, social and cultural rights violation and as a violation of non-discrimination and equality before the law. The first key difference is that non-discrimination cannot ensure that unauthorized workers will enjoy a particular cluster of rights, only that they will be given those rights if their authorized counterparts enjoy the rights. For example, in a national context where authorized (legally present and employed) immigrant workers are not given a right to workers' compensation protection, non-discrimination norms would not entitle unauthorized workers to workers' compensation protection. On the other hand, an economic, social and cultural rights approach might allow all of the workers to claim that the denial of workers' compensation violates their right to health or the right to adequate working conditions. Economic, social and cultural rights set a floor below which, in the context of the *OC-18* case, the government may not allow any worker to sink, whatever their immigration status. Thus a non-discrimination approach might give more latitude to governments in determining how to treat all workers but might give governments less latitude in selectively restricting the rights of certain groups.

How significantly non-discrimination protections differ from economic, social and cultural rights can also depend on how non-discrimination is applied. Non-discrimination can be interpreted to permit or even to require affirmative measures to compensate for factual disadvantages experienced by a particular group that prevent the group members from enjoying their rights on an equal footing.²¹³ For example, in the case of unauthorized workers, some common obstacles to enjoying employment and labor rights include: employer resistance, fear of deportation, fear of termination, language barriers, differing cultural norms about enforcing rights, lack of education and literacy, lack of information, pressure from other workers, youth, isolation from support networks, fear of physical assault, lack of access to legal assistance, and—in the case of trafficked persons—fear of reprisals to family in the home country. Affirmative measures for this population could include government outreach efforts, language accessibility in the domestic employment rights enforcement mechanisms, and immigration law accommodations for rights enforcement, such as reentry

213. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 154–57 (1995).

permits to participate in litigation and immigration relief for victims of rights violations.

While the non-discrimination approach might or might not achieve substantive protections, economic, social and cultural rights norms necessarily include non-discrimination guarantees. This is so because the major economic, social and cultural rights treaties include provisions guaranteeing the right to non-discriminatory protection under the rights those treaties establish.²¹⁴ Matthew Craven notes that

[I]t is very much apparent that a notion of equality runs through the heart of the [International Covenant on Economic, Social and Cultural Rights] . . . Certainly the Covenant does not envisage an absolute equalization of result in the sense of achieving an equal distribution of material benefits to all members of society, but it does recognize a process of equalization in which social resources are redistributed to provide for the satisfaction of the basic rights of every member of society.²¹⁵

Thus the court did not face a choice of analyzing the treatment of unauthorized workers as either a potential non-discrimination or economic, social and cultural rights violation. Rather the court had to decide whether to analyze the problem as a potential economic, social and cultural rights violation *in addition* to its non-discrimination analysis.

The Inter-American Court declined the opportunity to develop economic, social and cultural rights law for the region. In part this may have related to the fact that Mexico's advisory opinion request cast the question solely in terms of non-discrimination and equality before the law; this may also have reflected a cautious sensibility in advancing workers rights on a less controversial legal foundation. However, none of the parties to the advisory opinion seriously challenged the court to move beyond the non-discrimination framework. Various parties argued that the treatment of unauthorized workers should be evaluated for conformance with some of the minimum guarantees of economic, social and cultural rights.²¹⁶ Most parties argued that unauthorized workers are protected by the four "fundamental" labor rights contained in ILO treaties, namely the prohibition on slavery and child labor, the right to freedom of association and the right to protection from workplace discrimination. The Inter-American Commission asserted that the right to pay for work performed is also a fundamental right of all workers, including unauthorized workers.²¹⁷ Amicus Delgado Law Firm asserted that all workers have the right to earn a living and to

214. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2(2), 993 U.N.T.S. 3, 5 [hereinafter ICESCR].

215. CRAVEN, *supra* note 213, at 157–58.

216. See, e.g., Observations of El Salvador, *supra* note 136, paras. 6, 11.

217. See Inter-American Commission Observations, *supra* note 140.

legal representation.²¹⁸ The coalition of U.S. labor and immigrants' rights groups argued that the United States' refusal to award full remedies to unauthorized victims of labor rights violations constitutes a violation of the right to freedom of association.²¹⁹ The U.S. groups further listed a series of rights that, the groups argued, are binding to some degree on the United States, including the right to fair remuneration, the right to proper working conditions, and the right to effective recourse through legal aid.²²⁰ However, no party provided a full analysis for the court based on all the economic, social and cultural rights standards in force in the region. Nor did any parties address at a theoretical level the importance of analyzing unauthorized workers' economic, social and cultural rights in addition to their rights to non-discrimination and equality before the law. Finally, the parties did not attempt to persuade the court that it had the authority to expand its analysis beyond the non-discrimination rights outlined in Mexico's request for an advisory opinion. Instead, the parties made the strategic choice to present the cause of unauthorized worker rights through the more established paradigm of non-discrimination.

V.

THE COURT'S OPINION: A STEP FORWARD FOR UNAUTHORIZED WORKERS

On September 17, 2003, the Inter-American Court issued Advisory Opinion OC-18/03, entitled "Legal Status and Rights of Undocumented Migrants."²²¹ The decision was unanimous,²²² with four members of the six-judge panel issuing separate concurring opinions.²²³ The case appears to have been a victory for migrant workers, establishing for the first time that, under the international prohibition on discrimination, unauthorized workers are entitled to labor and employment rights on an equal basis with other workers. The court also held that the prohibition on discrimination has risen to the level of *jus cogens*, giving rise to obligations *erga omnes*. The *jus cogens* portion of the decision could have the greatest long-term impact on Inter-American human rights juris-

218. Brief of Amicus Curiae Delgado Law Firm, at 12 (n.d.) (on file with author).

219. See, e.g., Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 822-24.

220. See *id.* at 881.

221. OC-18, *supra* note 4.

222. *Id.* para. 173.

223. See Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), (Abreu, J., concurring) [hereinafter OC-18 Abreu Concurrence], available at http://www.corteidh.or.cr/serie_a_ing/sa_abreu_18_ing.doc; OC-18 Cançado Concurrence, *supra* note 1; Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), (García, J., concurring) [hereinafter OC-18 García Concurrence], available at http://www.corteidh.or.cr/serie_a_ing/sa_garcia_18_ing.doc; Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), (Salgado, J., concurring) [hereinafter OC-18 Salgado Concurrence], available at http://www.corteidh.or.cr/serie_a_ing/sa_salgado_18_ing.doc.

prudence. Indeed, this decision marked the first time that a human rights tribunal has designated non-discrimination as a *jus cogens* norm giving rise to obligations *erga omnes*. One implication of this decision for migrant workers in the United States is that a *jus cogens* norm may be invoked in U.S. courts where many treaty provisions may not. Following on its determination that non-discrimination and equality before the law belong to the canon of *jus cogens* norms, the court reasoned that every migrant worker is entitled to non-discrimination and equality before the law, no matter what their migratory status might be.²²⁴ The court also decided that every migrant worker is entitled to due process.²²⁵

The court went on to apply a non-discrimination analysis to the differential treatment of unauthorized workers. In his concurrence, Judge Hernán Salgado Pesantes elaborated on the test used by the court in determining which government practices constitute impermissible discrimination and which are permissible distinctions. He first quoted the court's advisory opinion in *OC-4*, defining a permissible distinction as one based on “*substantial factual differences and [. . .] a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.*”²²⁶ The concurrence then added several factors to be weighed in a non-discrimination analysis. To be permissible, the concurrence concluded, a distinction must: (1) be “relevant, have sufficient importance to justify a different treatment;”²²⁷ (2) reflect “proportionality between the factual and juridical difference, between the chosen means and the ends;”²²⁸ and (3) “be necessary and not merely convenient or useful.”²²⁹ Finally, the “common denominator” among all these factors must be “reasonableness.”²³⁰

The suggestion made by the Commission and some of the parties amici curiae that the court adopt a tiered scrutiny test²³¹ does not appear to have been wholly adopted in the opinion. Nowhere in the opinion is there an analysis holding a government to a standard greater than reasonableness to justify abridged workplace rights for unauthorized workers. While the court's opinion did not appear to utilize a differentiated level of scrutiny, Judge García Ramírez's concurrence endorses the argument that unauthorized migrant workers are sufficiently vulnerable to warrant designation as a “suspected category.”²³² In his concurrence, Judge Salgado also endorsed this approach: examining the

224. See *OC-18*, *supra* note 4, para. 119.

225. See *id.* para. 121.

226. See *OC-18* Salgado Concurrence, *supra* note 223, para. 6 (citing *OC-4*, *supra* note 117).

227. See *id.* para. 7.

228. See *id.* para. 8.

229. See *id.* para. 7.

230. See *id.* para. 10.

231. See *infra* Part IV(A)(1)(b).

232. *OC-18* García Concurrence, *supra* note 223, para. 11.

reasonableness of a distinction, he concluded, allows one to "identify the presence of discrimination in a 'suspect category,' represented in this case by the undocumented migrant workers."²³³

Applying its reasonableness test to policies regarding unauthorized migrant workers, the Inter-American Court affirmed that governments have the right to selectively encroach upon unauthorized workers' right to liberty of the person when necessary to prevent illegal entry and to carry out deportations, as long as other relevant human rights, such as the right to due process, are upheld.²³⁴ The court also confirmed that governments and their private citizens and employers have the additional right to refuse employment to unauthorized workers.²³⁵ In other words, governments do not have a duty to uphold the right of unauthorized workers to obtain work. However, said the court, governments may not tolerate labor and employment discrimination against unauthorized workers because of their migration status.²³⁶ The court specified that the rights to which unauthorized workers are entitled include but are not limited to:

[T]he prohibition of obligatory or forced labor; the prohibition and abolition of child labor; special care for women workers, and the rights corresponding to: freedom of association and to organize and join a trade union, collective negotiation, fair wages for work performed, social security, judicial and administrative guarantees, a working day of reasonable length with adequate working conditions (safety and health), rest and compensation.²³⁷

Moreover, the court affirmed that unauthorized workers are also entitled to the protection of labor rights guaranteed through national law, whether through the constitution, labor statutes, executive orders, or local practices.

To reach its conclusion that worker rights apply equally to unauthorized workers, the court acknowledged the vulnerability of this group.²³⁸ In his concurring opinion, Judge Alirio Abreu Burelli underscored this point, noting in particular the human tragedy in cases of forced migration.²³⁹ This acknowledg-

233. See *OC-18 Salgado Concurrence*, *supra* note 223, para. 10.

234. *OC-18*, *supra* note 4, para. 119.

235. *Id.* para. 135.

236. *Id.* para. 136.

237. *Id.* para. 157.

238. *OC-18*, *supra* note 4, para. 112 ("Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents).").

239. *OC-18 Abreu Concurrence*, *supra* note 223.

Thus, the tragedy of all those who, against their will, abandon their country of origin, their home, their parents, their spouse, their children, their memories, in order to confront generally hostile conditions and become the target of human and labor exploitation owing to their particularly vulnerable situation, should [give] us cause for reflection.

Id. at 168.

ment of the equities favoring parity of protection for unauthorized workers showed the heavy weight accorded to their interests in the non-discrimination balancing test. It also underscored involuntary aspects of the migration decision, thus providing an indirect response to the arguments advanced to the court about the lawbreaking characteristics of the unauthorized worker's situation.

The court also emphasized that the internal mechanisms of a state do not excuse failure to respect international human rights. The source of a violation, be it an administrative regulation or a founding document, does not matter under international law; a state must first and foremost comply with its international legal obligations. Judge García Ramírez stated that governments should not sanction violations of immigration law with measures unrelated to the migratory offense.²⁴⁰ Judge Hernán Salgado Pesantes wrote that selectively restricting the worker rights of unauthorized workers "is at odds with the State's main function, which is to respect and ensure the rights of every individual who, for labor-related reasons, and with or without documents, is subject to its jurisdiction."²⁴¹ This concurrence also drew a connection between worker rights and the right to life, as expressed by the right not only "not to be deprived of [] life arbitrarily, but also the right [not to be] prevented from having access to the conditions that guarantee a dignified existence."²⁴² The court also underscored the fact that governments must take the necessary measures to enable unauthorized workers to realize their rights in practice.²⁴³ Ensuring this practical access, noted the court, requires allaying unauthorized workers' fears of deportation so that they can assert their rights.²⁴⁴

In his concurring opinion, Judge A.A. Cançado Trindade hailed *OC-18* as a "pioneering" step by the court.²⁴⁵ His concurrence provided a history of international human rights law that identified the development of *jus cogens* and obligations *erga omnes* as important indications of the rise of a universal juridical conscience (*opinio juris communis*). The development of the universal juridical conscience, advanced in *OC-18*, represents a shift from an emphasis on the authority of the state to a concern for the dignity of the human person.²⁴⁶

VI.

IMPLICATIONS OF *OC-18*

OC-18 represents a significant advance for international law and for many

240. *OC-18* García Concurrence, *supra* note 223, para. 25.

241. *OC-18* Salgado Concurrence, *supra* note 223, para. 14.

242. *Id.* para. 15 (citing Case of the "Street Children" (Villagrán Morales et al), Inter-Am. Ct. H.R. (Nov. 19, 1999), para. 144).

243. *OC-18*, *supra* note 4, para. 149.

244. *See id.* paras. 159–160. For further discussion of the difficulty unauthorized workers have invoking protection, see *OC-18* García Concurrence, *supra* note 223, paras. 36–39.

245. *See OC-18* Cançado Concurrence, *supra* note 1, para. 1.

246. *See id.* para. 23–26.

migrant workers in the region. International standards on migrant workers are evolving slowly, and *OC-18* is the most progressive ruling on this issue to date. It is a definitive statement granting unauthorized workers rights beyond preexisting interpretations of international law. With its *jus cogens* and *erga omnes* obligations analyses, *OC-18* has many general implications for international and regional human rights law. A detailed analysis of *jus cogens* is beyond the scope of this article, but two implications that are particularly pertinent to unauthorized workers in the United States are the expanded panoply of employment rights the opinion confers on migrant workers, and the possibilities for enforcement of economic, social and cultural rights in the region.

A. Progressive Development in International Migrant Worker Rights Standards

Modern international human rights law arose following the Second World War as a relatively limited set of generalized standards accompanied by a few parallel regimes focusing on protection for workers, refugees, and nationals of former colonies. Over the intervening decades, international human rights law has evolved, developing specialized standards grouped around new poles of vulnerability, such as disability²⁴⁷ and sexual orientation.²⁴⁸ As described briefly in Part IV(A)(3) above, the most notable among these efforts is the International Convention on the Protection of the Rights of All Migrant Workers and Their Families ("ICMW"),²⁴⁹ which went into effect on July 31, 2003,²⁵⁰ and now takes its place as one of the seven primary U.N. human rights treaties. The ICMW splits its substantive provisions between rights that are available to "all migrant workers and their families"²⁵¹ and those that are available only to "[m]igrant workers and members of their families who are documented or in a regular situation."²⁵² The ICMW withholds from unauthorized workers the following rights that appear to have been conferred, for the purposes of non-

247. For example, in 1975, the United Nations established under the Declaration of Rights of Disabled Persons that people with disabilities carry the same civil and political rights as non-disabled individuals. See Declaration on the Rights of Disabled Persons, 30 U.N. GAOR Supp. No. 34 at 88 (1975). For a general discussion of the development of disabilities rights in an international human rights context, see Arlene S. Kanter, *The Globalization of Disability Rights Law*, 30 SYRACUSE J. INT'L L. & COM. 241 (2003).

248. See, e.g., *Toonen v. Australia*, U.N. Hum. Rts. Comm., No. 488, U.N. Doc. CCPR/c/50/D/488 6/1992 (1994) (finding that Tasmania's anti-sodomy law violated established human rights norms under the International Covenant on Civil and Political Rights); see also James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994).

249. See ICMW, *supra* note 202.

250. Press Release, United Nations, Convention on Protection of Rights of Migrant Workers to Enter into Force Next July (March 3, 2003).

251. ICMW, *supra* note 202, arts. 8-35.

252. *Id.* arts. 36-56.

discrimination, by the Inter-American Court: (1) the right to form associations and trade unions; (2) the right to vocational rehabilitation; (3) freedom from taxes, duties, or charges higher than those imposed on nationals in similar circumstances; (4) the right to deductions or exemptions from taxes and tax allowances applicable to nationals in similar circumstances; (5) equality of treatment in protection against dismissal; (6) the right to equality of treatment in unemployment benefits; and (7) the right to protest violation of work contract terms to the authorities. All the other rights conferred exclusively on authorized workers in the ICMW appear to relate directly to remaining in the receiving country or to obtaining work, rights that the Inter-American Court concedes unauthorized workers do not enjoy under international law. Thus, as applied in countries where any of the seven rights named above are granted to authorized workers but withheld from unauthorized workers, *OC-18* represents a significant legal advance.

B. The Court Declines an Opportunity to Clarify International Economic, Social and Cultural Rights Norms

Virtually all of the rights to which unauthorized workers are now equally entitled under *OC-18* could be classified as economic or social rights. However, as discussed in Part IV(B) above, international economic, social and cultural rights form a body of human rights law traditionally set apart from international civil and political rights.²⁵³ The Universal Declaration of Human Rights²⁵⁴ and the American Declaration on the Rights and Duties of Man,²⁵⁵ which are considered the founding pronouncements of human rights in the UN and in the Americas, both contain economic, social and cultural rights, in addition to civil and political rights. Two additional treaties provide even greater general authority for economic, social and cultural rights obligations in the Americas: the International Covenant on Economic, Social and Cultural Rights ("ICESCR")²⁵⁶ and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the "Protocol").²⁵⁷ Both the Protocol and the American Declaration set forth

253. See STEINER & ALSTON, *supra* note 26, at 256-60. Although many governments support equal status for economic and social rights, they fail to take the steps necessary to provide concrete protections. Except for the Carter administration and part of the Clinton administration, the United States has generally been skeptical of the notion of economic, social and cultural rights, and has not ratified the United Nations Covenant on Economic, Social and Cultural Rights. See also NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION*, 74-78 (1990).

254. Universal Declaration of Human Rights, Dec. 10, 1948, U.N. G.A. Res. 217 (III 1948).

255. American Declaration, *supra* note 170.

256. ICESCR, *supra* note 214.

257. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: "Protocol of San Salvador," Nov. 17, 1988, O.A.S. T.S. No. 69, reprinted in *BASIC DOCUMENTS*, *supra* note 29, at 73 [hereinafter Protocol of San

numerous labor, employment-related, and economic rights that arguably provide unauthorized workers with the protections that Mexico sought from the Inter-American Court.²⁵⁸

However, Mexico framed its request to the court in terms of non-discrimination and equality norms, which are applicable to the United States through a treaty the United States has ratified: the International Covenant on Civil and Political Rights.²⁵⁹ And, as described above, none of the parties raised serious concerns with this choice, and ultimately the court based its findings in non-discrimination. This rationale for decision is consistent with the Inter-American Court's jurisprudence to date. At the same time, two *OC-18* concurrences recognized the importance of economic, social and cultural rights.²⁶⁰ "In light of the interrelation and indivisibility of human rights, equality and non-discrimination are rights that form a platform on which others are erected, particularly economic, social, and cultural rights, whose content cannot omit the former."²⁶¹ While this acknowledgement of economic, social, and cultural rights is encouraging, a fairer description might be that principles of non-discrimination and equality before the law provide a limited mechanism for partially invoking this body of rights.

One concern for the court may have been the fact that norms of non-discrimination and equality before the law are better established in international law. As the court demonstrated in its opinion, these norms are so firmly entrenched in international law as to warrant serious consideration for inclusion in the limited list of rights that have risen to the level of *jus cogens*. Meanwhile, as discussed above, economic, social, and cultural rights remain at the level of obligations that must be voluntarily assumed. Moreover, the region's primary economic, social and cultural rights treaty, the Protocol of San Salvador,²⁶² went into force only in November 1999, some thirty years later than the American Convention. To date, only twelve of the thirty-five OAS member nations have ratified the Protocol and only a further seven are signatories pending ratification.²⁶³ By contrast, twenty-five governments have ratified the American

Salvador]. Article 26 of the American Convention also incorporates economic, social and cultural rights, *see* American Convention, *supra* note 32, art. 26.

258. *See, e.g.*, Brief of Labor, Civil Rights and Immigrants' Rights Organizations in the United States, *supra* note 147, at 881.

259. Dec. 16, 1966, arts. 2.1 (non-discrimination), 26 (equality before the law), 999 U.N.T.S. 171.

260. *OC-18* García Concurrence, *supra* note 223, para. 27 (arguing that ESCRs "have the same status as the so-called 'civil and political' rights. Mutually dependent or conditioned, they are all part of the contemporary statute of the individual; they form a single extensive group, part of the same universe, which would disintegrate if any of them were excluded"); *OC-18* Salgado Concurrence, *supra* note 223, para. 1.

261. *OC-18* Salgado Concurrence, *supra* note 223, para. 1.

262. Protocol of San Salvador, *supra* note 257.

263. *See id.*

Convention and one has signed pending ratification.²⁶⁴ In part due to these differing levels of state acceptance, the Inter-American Court has a less extensive record of enforcing economic, social and cultural rights as opposed to civil and political rights.²⁶⁵

An additional concern for the court may have been that the advisory opinion request was narrowly framed and focused on two rights, and that the court did not have the discretion to pronounce on rights that were not part of the original query. However, as the court has noted, the advisory opinion power conferred on the court is quite broad. In *OC-1*, the court observed that “the Court enjoys an important power of appreciation” when deciding whether to grant a request for an advisory opinions, “enabling it to weigh the circumstances of each case.”²⁶⁶ The court could have chosen to engage in *sua sponte* consideration of economic, social and cultural rights in the instant case, but instead it chose to limit its discussion to the rights raised by the Government of Mexico. The court may furthermore interpret any treaty “dealing with the protection of human rights” and “applicable in the American States,”²⁶⁷ opening up the court’s ability to examine the interpretations of the specialized UN bodies charged with interpreting the ICESCR and the ILO Conventions, i.e., the UN Committee on Economic, Social and Cultural Rights and the ILO. By rendering an expansive opinion, the court could begin the process of incorporating and adapting these interpretations into the less extensively interpreted substantive labor and employment rights provisions in the Americas. By interpreting and applying only non-discrimination and equality before the law standards, the court provided the strongest legal protection for unauthorized workers in wealthier

264. See American Convention, *supra* note 32.

265. See Matthew Craven, *The Protection of Economic, Social and Cultural Rights Under the Inter-American System of Human Rights*, in INTER-AMERICAN HUMAN RIGHTS, *supra* note 13, at 289; Beth Lyon, *The Inter-American Human Rights System: Multifaceted Powers for Addressing Economic Injustice*, 13 INTERRIGHTS BULL. 47, 50 (2000). On the other hand, twenty-eight of the region’s thirty-five countries have ratified the International Covenant on Economic, Social and Cultural Rights, as compared with thirty that have ratified its sister treaty, the International Covenant on Civil and Political Rights. These numbers represent a significant level of voluntary acceptance on the part of governments in the hemisphere. Therefore, it is fair to argue that the Inter-American region is a particularly appropriate setting within which to develop and enforce economic, social and cultural rights standards.

266. Advisory Opinion OC-1/82, “Other Treaties” Subject to the Consultative Jurisdiction of the Court, Inter-Am. Ct. H.R. (Sept. 24, 1982), para. 29 (interpreting Article 64 of the American Convention) [hereinafter *OC-1*]. An example of the Court’s exercise of its “power of appreciation” to examine an advisory issue that was broader than stated in the request arose in *OC-13*. In that advisory opinion request, the governments of Argentina and Uruguay requested information on the powers of the Inter-American Commission to issue opinions about legislation on the basis of petitions alleging violations of three particular American Convention rights. *OC-13*, *supra* note 118, para. 21 (interpreting Articles 41, 42, 44, 46, 47, 50, and 51 of the American Convention). The Court proceeded to expand the list of rights under consideration to include all the rights contained in the Convention. See *id.* para. 22.

267. *OC-1*, *supra* note 266, para. 52.

countries with more extensive worker protections and benefits programs for authorized workers. Unauthorized workers in countries with fewer worker benefits will be unable to invoke *OC-18* if the rights they seek are simply unavailable to the working class as a whole.

C. Implications for Unauthorized Workers in the Americas

As noted above, the Inter-American Court of Human Rights has contentious jurisdiction over 22 of the 35 countries in the region, including countries whose policies significantly affect migrant workers: Brazil, Chile, Costa Rica, the Dominican Republic, Mexico, Panama, and Venezuela.²⁶⁸ The court has ordered and enforced significant damage awards, settlements, and complex reparations packages.²⁶⁹ The court's endorsement of unauthorized worker rights in *OC-18* and history of taking proactive measures to protect victims of human rights violations creates a significant resource for unauthorized worker policy advocates in the Americas.

OC-18 may also be helpful to unauthorized workers in Canada and the United States, although neither country is subject to the court's contentious jurisdiction. In the United States, *OC-18* may be a tool for empowering workers and cautioning employers. These groups experienced widespread misinformation about their respective rights when the U.S. Supreme Court issued *Hoffman Plastic*, resulting in a wave of harassment, firings and even employer litigation seeking to expand the *Hoffman* holding to deny any pay at all to unauthorized workers, including pay for work performed.²⁷⁰ U.S. advocates are exploring the possibility of importing the *OC-18* standards into U.S. domestic law.²⁷¹ The Alien Tort Claims Act permits causes of action involving violations of the "law of nations,"²⁷² which includes violations of *jus cogens* norms.²⁷³ Moreover, even in the United States, there appears to be a slight opening toward the application of international legal norms. The U.S. Supreme Court cited international legal sources in addressing individual rights in two 2003 term decisions,²⁷⁴ and, according to Justice Ginsburg, "our 'island' or 'lone ranger'

268. See American Convention, *supra* note 32. The ratifying countries are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, México, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad y Tobago, Uruguay, and Venezuela. *Id.* A further nine governments have accepted the Inter-American Court's jurisdiction over contentious state-to-state complaints: Argentina, Chile, Colombia, Costa Rica, Ecuador, Jamaica, Peru, Uruguay, and Venezuela. *Id.*

269. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 221–23 (1999).

270. See USED AND ABUSED, *supra* note 95, at 8–9.

271. Telephone interview with Raven Lidman, Professor of Law, Seattle University School of Law (Jan. 30, 2004).

272. 28 U.S.C. § 1350; see *Filartiga*, 630 F.2d 876.

273. See *Alvarez-Machain v. United States*, 331 F.3d 604, 650 n.8 (9th Cir. 2003) (O'Scannlain, J., dissenting).

274. See *Lawrence v. Texas*, 123 S.Ct. 2472, 2481 (2003) (citing *Dudgeon v. United*

mentality is beginning to change,” as Justices “are becoming more open to comparative and international law perspectives.”²⁷⁵

Finally, the new standard could become directly applicable to Canada and the United States through litigation in the Inter-American Commission on Human Rights, importing into the international law obligations of the United States standards not currently available in the North American Agreement on Labor Cooperation (NAFTA NAALC). Migrant worker advocates are considering a claim against the United States with the Commission.²⁷⁶ In addition to challenging multiple instances of differential treatment in substantive rights, they will argue that *OC-18* requires the United States to provide meaningful, as well as equal, remedies for the worker rights to which unauthorized workers are entitled. The Commission has shown a commitment to working with Canadian and U.S. petitioners and governments on a range of civil rights and social justice issues, and can influence results at the margins by lending its international imprimatur to rights-based arguments at various stages of a case and by attracting additional attention to the issue.

VII.

CONCLUSION

In *OC-18*, the Inter-American Court of Human Rights substantially altered the definition of rights of unauthorized workers in the Americas. It is appropriate that this court leads the way in affirming the rights of unauthorized workers whose situation is often peculiarly associated with the Western hemisphere because of the vast numbers of Mexican nationals living in undocumented status in the United States. Given the large-scale population of undocumented Mexican nationals living in the United States, the Fox administration has actively worked to secure an immigration amnesty to gain permanent residence for its nationals. While the two governments continue to work toward amnesty negotiations, the courts remain an important forum for the dialogue on the rights of migrant workers. When the Supreme Court in *Hoffman* stripped the right to monetary damages from an undocumented Mexican national who was the target of an unlawful, retaliatory termination, the decision threatened to affect many other rights of unauthorized workers in the United States. Mexico's petition to the Inter-American Court of Human Rights, seeking clarification of the rights of unauthorized workers, was an indirect response to

Kingdom, 45 Eur. Ct. H.R. ¶ 52 (1981)); *Grutter v. Bollinger*, 123 S.Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination, 5 I.L.M. 352 (1966), and the Convention on the Elimination of All Forms of Discrimination Against Women, Dec.18, 1979, 19 I.L.M. 33 (1980). See also Charles Lane, *Thinking Outside the U.S.*, WASH. POST, Aug. 4, 2003, at A13.

275. Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 8 (2003).

276. NELP Press Release, *supra* note 30.

the Supreme Court's ruling.

The Inter-American Court's ruling that the human rights norms of non-discrimination and equality have risen to the level of *jus cogens* imposing obligations *erga omnes* on receiving states has tremendous significance for international law and will potentially lay the groundwork for securing greater protections for unauthorized workers in the United States. By holding that, under the non-discrimination obligation, no receiving country may limit any labor right on a discriminatory basis, the court made an important step toward protecting the rights of unauthorized workers in the Americas. It expands the rights owed to unauthorized workers by existing international and domestic law regimes and also signals an opening in the Inter-American system toward economic, social and cultural rights, with implications for the future interpretation of these rights. With *OC-18*, Mexico has invoked the OAS in its intimate and contentious relationship with the United States, asserting the rights of nationals in the United States. In the process, the opinion Mexico requested aims to expand significantly the rights of all migrant workers in the Americas and strengthen the international prohibition on discrimination as a persuasive precedent for human rights tribunals worldwide.