

**PRIMER OR MANUAL ON THE RIGHTS OF MIGRANT
WORKERS AND THEIR FAMILIES**

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTIONS OF THE INTERAMERICAN JURIDICAL COMMITTEE

The Inter-American Juridical Committee, at its 70th regular session held from February 26th to March 9th 2007 in the city of San Salvador, El Salvador, adopted resolution CJI/RES. 127 (LXX-O/07) called “The Legal Status of Migrant Workers and their Families in International Law”, which claims that migrant workers and their families, whether documented or not, is a subject that concerns all the States of the American continent; that it is necessary to study the legal aspects of human migration, especially with regard to human rights, so that the fate of migrant workers can be considered; that the work carried out in the Inter-American System on this issue should be borne in mind; that the Inter-American Juridical Committee, on considering this topic at its 71st regular session held in Rio de Janeiro, Brazil, from July 30th to August 10th 2007, adopted resolution CJI/RES. 131 (LXXI-O/07), which referred to reports CJI/doc.266/07 and CJI/doc.269/07 called “The Legal Status of Migrant Workers and their Families in International Law” presented respectively by Drs. Jorge Palacios Treviño and Ana Elizabeth Villalta Vizcarra; that in item 3 of this resolution the Inter-American Juridical Committee resolved to “To request the proposal of the co-rapporteurs to prepare a draft brochure or handbook that delineates the rights of migrant workers and their families, based on international law, with the objective of allowing migrants to demand compliance therewith”.

Pursuant to resolution CJI/RES. 131 (LXXI-O/07), as one of the rapporteurs of the topic, the author presents at this 72nd regular session of the Inter-American Juridical Committee this draft “Primer or Manual on the Rights of Migrant Workers and their Families”, taking into account the work carried out in the Inter-American System on the matter, based on the following international instruments:

II. AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MEN

This Declaration was adopted at the Ninth International American Conference held in Bogota, Columbia in 1948, its main purpose being to protect the essential rights of men, rights not inherent to the fact that they are born citizens of a determined State but based on the attributes of the human person.

III. CHARTER OF THE ORGANIZATION OF THE AMERICAN STATES (OAS)

This Charter was adopted at the Ninth International American Conference held in Bogota, Columbia in 1948, which establishes that the true sense of American solidarity and the spirit of good neighbors can be no other than to consolidate a system of individual freedom and social justice in this continent, within the framework of democratic institutions, based on respect for the essential rights of mankind.

Among the principles mentioned in this Charter is the one that determines that “The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex”.¹⁷

This same Charter created the Inter-American Commission on Human Rights, whose main function is to promote compliance with and defense of human rights.

IV. AMERICAN CONVENTION ON HUMAN RIGHTS: THE “SAN JOSE PACT”

This Convention was signed at the Inter-American Specialized Conference on Human Rights held in San Jose, Costa Rica on 22 November 1969.

¹⁷ Article 3, literal I) of the Charter of the OAS.

The Convention recognizes that the essential rights of men are not born of the fact that they are citizens of any particular State but based on the attributes of the human person, which justifies international protection of a conventional nature to complement the protection offered by the internal law of each State.

Article 1 of this Convention establishes the obligation to respect human rights:

1. The States Parties to this 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, without 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.¹⁸

It also rules on the means of protecting human rights in the Inter-American System through the competent bodies: the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights.

V. ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN RESPECT TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS: “THE SAN SALVADOR PROTOCOL”

This protocol was signed at the Eighteenth Regular Session of the General Assembly of the OAS held in San Salvador, El Salvador on 17 November 1988.

The protocol deals with:

... the close relationship that exists between economic, social and cultural rights, and of civil and political rights in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person, for which reason both require permanent protection and promotion if they are to be fully realized, and the violation of some rights in favor of the realization of others can never be justified.¹⁹

VI. ADVISORY OPINION OC-16 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: “THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE IN THE FRAMEWORK OF THE GUARANTEES OF DUE LEGAL PROCESS”

This Opinion of the Convention of Vienna on Consular Relations, the principal objective of which is to “establish an equilibrium between States”, also concerns protection of the fundamental rights of the person in the American continent, seeing that the paramount function of consular staff is to lend assistance to nationals of the State in defending their rights before the authorities of the receiving State. In this sense, article 36 of the Convention of Vienna on Consular Relations deals with consular assistance in a particular situation: deprivation of freedom, ruling expressly on “the right to information and Consular Notification”.

Accordingly, the right of an alien to be duly informed that he can count on consular assistance is part of the set of minimum guarantees comprising due legal process. Since the right to information on consular assistance constitutes a way to defend detainees, non-fulfillment or obstruction of this right affects the guarantees of due legal process, so the State must fulfill its duty to inform detainees on the rights recognized in this precept at the moment they are deprived of their freedom, and in any case before making their first deposition before the authorities.

This Opinion was emitted by the Inter-American Court of Human Rights in San Jose, Costa Rica on October 1st, 1999.

VII. ADVISORY OPINION OC-18 OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS: “LEGAL STATUS AND RIGHTS OF MIGRANT WORKERS WITHOUT DOCUMENTS”

This Opinion was emitted by the Inter-American Court of Human Rights in San Jose, Costa Rica on 17 September 2003. According to this opinion, the Inter-American Court of

¹⁸ Article 1 of the American Convention on Human Rights.

¹⁹ Preamble to the Protocol of San Salvador”.

Human Rights understands “migrant worker” to be any person who carries out, is going to carry out or has carried out any remunerated activity in a State of which he is not a national, and “migrant worker without documents or in an irregular situation” any person not authorized to enter or remain and exercise remunerated activity in the State of employment, in accordance with the laws of that State and the international agreements to which it is a signatory State, and who nevertheless performs such activity.

In this Advisory Opinion, notwithstanding the previous one, States are obliged to respect and guarantee human rights in accordance with international instruments on the matter, as manifested by the Inter-American Court of Human Rights in this Advisory Opinion, when it sets forth that:

All persons have attributes inherent to their human dignity that may not be harmed; these attributes make them possessors of fundamental rights that may not be disregarded and which are, consequently, superior to the power of the State, whatever its political structure.

According to these international instruments and pertinent international jurisprudence, since States also have the general obligation to respect and guarantee fundamental rights, they must avoid taking initiatives that limit or restrict the exercise of such rights.

In this sense, States are obliged to respect and guarantee full and free exercise of rights and liberties without any discrimination; any non-compliance with this obligation on the part of the State through any discriminatory treatment implies international responsibility, since there is a universal duty for States to respect and guarantee the human rights, as set forth in the Principle of Equality and Non-Discrimination.

In this sense, States have the obligation not to introduce discriminatory regulations into their juridical system, and to rid their systems of such regulations, as well as to combat discriminatory practices.

Advisory Opinion OC-18 of the Inter-American Court of Human Rights considers that the Principle of Equality and Non-Discrimination before the law are part of *jus cogens* norms as well as general international law.

For this reason, States have the general obligation to respect and guarantee human rights without any discrimination and based on equality, abstaining from carrying out actions that in any way whatsoever are designed directly or indirectly to produce situations of discrimination, whether *de jure* or *de facto*. In this sense, the Inter-American Court of Human Rights considers that the right to due legal process should be recognized in the framework of the minimum guarantees that should be offered to all migrant workers, regardless of their migrant status.

Following this line of thinking, the Inter-American Court of Human Rights considers that those who enter a State and establish working relations acquire their human working rights in that State of employment, whatever their migrant status, since respect for and guarantee of enjoying and exercising these rights should preclude all and any discrimination. On assuming a working relation, migrant workers acquire rights as workers that must be recognized and guaranteed regardless of their regular or irregular status in the State of employment. Such rights are the consequence of the working relation. States should not allow their private employees to violate workers’ rights, nor let their contractual relations jeopardize minimum international standards.

Taking into account these international instruments of human rights within the framework of the Inter-American System, this report presents the following “Draft Primer or Manual on the Rights of Migrant Workers and their Families”. “Migrant worker” is understood to be anyone who has a working relation in the State of employment, regardless of his or her migrant status.

Primer or Manual on the Rights of Migrant Workers and their Families

1. All migrant workers have the right to life, freedom and security of their person.

2. All migrant workers are equal before the law and enjoy the rights and duties enshrined in the American Declaration of the Rights and Duties of Men, without distinction of race, gender, language, religion or of any other nature.
3. All migrant workers are entitled to protection of the law against abusive attacks on their honor, reputation and private and family life.
4. All migrant workers have the right to constitute a family, the fundamental element of society, and to obtain protection for their family.
5. All women migrant workers, while pregnant or breastfeeding, have the right to special protection, care and assistance.
6. All migrant workers have the right to inviolability of their homes.
7. All migrant workers have the right to preservation of their health by sanitary and social means, as regards food, clothes, housing and medical assistance compatible with the level allowed by public and community resources.
8. All migrant workers have the right to work in proper conditions and to pursue their vocation freely to the extent that the existing opportunities of employment permit.
9. All migrant workers who work have the right to receive remuneration in keeping with their capacity and skill in order to ensure them a standard of living fitting for them and their families.
10. All migrant workers have the right to rest, honest recreation and the opportunity to use their free time in a useful manner for the benefit of their spiritual, cultural and physical betterment.
11. All migrant workers have the right to social security to protect them against the consequences of unemployment, old age and incapacity caused by any other condition against their will that make it impossible for them physically or mentally to obtain proper means of subsistence.
12. All migrant workers have the right to recognition anywhere as subjects of rights and obligations, and to enjoy fundamental civil rights.
13. All migrant workers can resort to the Courts to have their rights honored. To do so, they should have a simple, short procedure available for Justice to protect them against acts of authorities that jeopardize them by infringing a constitutionally enshrined fundamental right.
14. All migrant workers have the right to associate with others in order to promote, exercise and protect their legitimate interests of a political, economic, religious, social, cultural, professional, trade-union or any other nature.
15. No migrant worker can be subjected to slavery or servitude, nor can he be forced to do forced or obligatory labor.
16. Migrant workers deprived of their freedom have the right to appeal before a judge or competent tribunal for them to make an immediate decision regarding the legality of their arrest or detention and to order their release if the arrest or detention was illegal.
17. All migrant workers have the right to a hearing, with the due guarantees and within a reasonable timeframe, with a judge or competent, independent and impartial tribunal previously established by the law, for the purpose of substantiating any penal accusation made against them, or to determine their rights and obligations of a civil, labor, fiscal or any other nature.
18. All migrant workers accused of any crime have the right to be presumed innocent until legally proved guilty. During the process they have the right to full equality and the minimum guarantees of due legal process.
19. All migrant workers have the right to information concerning consular assistance in the framework of the guarantees of due legal process established in article 36.1.b) of

the Convention of Vienna on Consular Relations, this being one of the duties related to the function of the receiving State.

20. All detained migrant workers who are not allowed access to the information mentioned in article 36.1.b) of the Convention of Vienna on Consular Relations are protected by the guarantees of due legal process. Accordingly, the imposition of the death penalty constitutes a violation of the right not to be deprived of life arbitrarily, in the terms of the relevant provisions of the Treaties of Human Rights, with the juridical consequences inherent to a violation of this nature, that is to say, concerning the international responsibility of States and the duty of reparation.
21. All migrant workers have the right to enjoy and exercise their human rights, including those concerned with work.
22. All migrant workers, upon assuming a working relation, acquire rights as workers that must be recognized and guaranteed, regardless of whether their status in the State of employment is regular or irregular. These rights are a consequence of the working relationship.
23. All migrant workers, as holders of labor rights, should have available all the appropriate means to exercise them. Migrant workers without documents possess the same labor rights as the other workers in the State of employment, and the latter must take all the necessary steps for this to be recognized and for this practice to be observed.
24. All migrant workers have the right to enjoy all the labor rights to which all the workers are entitled within the framework of the corresponding international instruments in the State of employment, whatever their migrant status may be.

This “Primer or Manual on the Rights of Migrant Workers and their Families” is based on the Inter-American System of Human Rights, this being one of the best structured on the matter, and also because the problem of migrant workers and their families particularly affects the American sphere, although it can be complemented with the Universal System.

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