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COMMISSION ON HUMAN RIGHTS  
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**SPECIFIC GROUPS AND INDIVIDUALS: MIGRANT WORKERS**

**Written statement\* submitted by Human Rights Advocates,  
a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 February 2005]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

THIS STATEMENT ADDRESSES MIGRANT WORKERS' CONDITIONS WHEN THEY CROSS BORDERS ILLEGALLY AND THE RIGHT TO ORGANIZE

MIGRANT WORKERS' RIGHT TO LIFE

1. Despite the numerous International Treaties and Covenants protecting the human rights of migrant workers, violations of their rights to life continue to plague the approximately 175 million worldwide migrant workers.<sup>1</sup>
2. Throughout the last decade of the 20<sup>th</sup> century and continuing into the 21<sup>st</sup> century, the demand for workers is shifting between developing and developed nations.<sup>2</sup> Migration is a natural consequence of this demand and of the right to self-determination granted under the same treaties.
3. States have enacted policies with the goal of deterring illegal migration. However, these policies have not stemmed the flow of illegal migrants.
4. For example, whereas the U.S. has been increasing its border security budget since 1996 with the intent of controlling the flow of drugs, of deterring illegal immigration and protecting the country from terrorists,<sup>3</sup> the number of illegal migrants in the U.S. is estimated to have increased by 280% from 5 million to approximately 12 million between 1996 and 2004.<sup>4</sup> Spain significantly emphasized border control in its immigration policy when the conservative party came into power in 1996.<sup>5</sup> Nonetheless, the number of illegal migrants in Spain increased by 368% between 1997 and 2003.<sup>6</sup>
5. These examples show that deterrence policies and practices do not stop the flow of illegal immigrants. They only lead to an increase in violations of migrant workers rights to life while crossing borders.

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<sup>1</sup> "Protection, International Norms and ILO Migrant Workers Standards," W. R. Bohning, International Labour Organization – SEAPAT (6-8 December 1999), <http://www.ilo.org/public/english/region/asro/mdtmania/speeches/mistanda.htm>.

<sup>2</sup> "6 million jobs could move overseas [from the U.S.] in the next decade," "How Many Jobs Are Involved?," Public Citizen (A National Non-Profit Public Interest Organization), <http://citizen.org/trade/offshoring/jobs/index.cfm>; "Since 2001, the [U.S.] has lost more than 2.5 million manufacturing jobs and more than 850,000 service and information sector jobs," "Shipping Jobs Overseas: How Real Is the Problem?," AFL-CIO, [http://www.aflcio/yourjobeconomy/jobs/outsourcing\\_problems.cfm](http://www.aflcio/yourjobeconomy/jobs/outsourcing_problems.cfm); The number of immigrants holding jobs in the U.S. increased by 2.9 million (half by illegal immigrants) in the period 2000 to 2004. "A Jobless Recovery? Immigrant Gains and Native Losses," Steven A. Camarota, Center for Immigration Studies (October 2004), <http://www.cis.org/articles/2004/back1104.html>.

<sup>3</sup> Adding 5,000 border guards between 1996 and 2001 & increasing expenditures in 2003 to 2005 by 20% in the Department of Homeland Security for Immigration, Customs, and Coast Guard, "Summary: FY 2005 National Drug Control Budget," Executive Office of the President of the United States, February 2004 and "Fact Sheet – The President's Fiscal 2003 Immigration Budget," Office of Public Affairs, Immigration and Naturalization Service (2/04/2002).

<sup>4</sup> 5 million in 1995, "5 Million Illegal Immigrants: An Analysis of New INS Numbers," Steven A. Camarota, Center for Immigration Studies (Spring 1997), <http://www.cis.org/articles/1997/IR28/5million.html>; 11 million in 2001, "Advocates Should Use Applicable International Standards to Address Violation of Undocumented Migrant Workers' Rights in the United States," Connie de la Vega and Conchita Lozano-Batista, page 2; increase in illegal migrant workers from 2000-2003 of 1.15 million, "Immigration in a Time of Recession: An Examination of Trends Since 2000," Steven A. Camarota, Center for Immigration Studies (November 2003).

<sup>5</sup> "Spain as a Recent Country of Immigration: How Immigration Became a Symbolic, Political and Cultural Problem in the New Spain," Belén Agrela, The Center for Comparative Immigration Studies, Working Paper No. 57 (August, 2002).

<sup>6</sup> "Spain estimates there are between 100,000 and 150,000 illegal immigrants in the country [as of 1997]." Migration News, [http://migration.ucdavis.edu/mn/comments/php?id=1652\\_0\\_4\\_0](http://migration.ucdavis.edu/mn/comments/php?id=1652_0_4_0). "The census 2001 counted 1.57 million foreigners as against 1.11 million foreigners with valid residence permits (INE) [in Spain]." "Estimates on the Numbers of Illegal Smuggled Immigrants in Europe," Michael Jandl, International Centre for Migration Policy Development (17.9.2003) <http://www.icmpd.org/default.asp?nav=related&folderid=-1&id=296&relatedid=257>

6. For example, since 1994 an estimated 3,200 undocumented migrants died in the while crossing the Mexican boarder into the U.S.<sup>7</sup> This is the result of the heightened security at urban borders that, rather than decreasing the number of immigrant crossings, has shifted the crossings from lower risk, safer crossings at urban centers to higher risk, desert and river crossings at rural points along the border.<sup>8</sup> Since 1997, 3,600 migrants and asylum seekers died while attempting to reach Spain from Africa.<sup>9</sup>
7. Although all nations have a right under international law to govern the admission of migrant workers and members of their families, migrant workers' rights cannot be violated.
8. There are alternatives to managing the flow of immigrants that could prevent unnecessary deaths. For example, Mexican border authorities have distributed 1 million illustrated handbooks that illegal migrants on the danger of crossing borders, i.e. difficult geographic and climatic conditions, as well as smugglers.
9. Countries can focus more on employer's that violate laws regarding the hiring of migrants and on protecting the rights migrant workers are entitled to under international law. None of the increases in the U.S. budget to control immigration was allocated to the enforcement of laws that prohibit employers from hiring illegal immigrants. In 2002, only 13 employers were fined for hiring illegals.<sup>10</sup> In 2001, there were only 300 full-time INS agents enforcing such laws,<sup>11</sup> While at the same time the U.S. government planned to increase the number of border agents to 11,000.<sup>12</sup>
10. Governments would benefit more by focusing on the supply and demand issues related to illegal migration rather than continuing to focus on policies that violate the rights of migrant workers when crossing borders.

#### RIGHT TO UNIONIZE

11. Although countries have the right to regulate undocumented workers, basic human rights protections are applicable to all workers, regardless of immigration status. These basic human rights in the workplace include the right to reasonable working hours, safe and healthy working conditions, fair wages, not be discriminated against, freedom of association, and the right to a remedy for violations of these rights.
12. Undocumented migrant workers are often subject to human rights violations, as they accept slavery-like working conditions in fear of deportation if they report abuses by their employers. For example, migrant workers on a U.S. egg farm were required to wade through dung and dead birds without protective clothing and were secluded from the public to live in

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<sup>7</sup> Press bulletin regarding the 2004 migrants death statistics compiled by the Secretaria de Relaciones Exteriores (July 24, 2005), provided by Claudia Smith, California Rural Legal Assistance Foundation.

<sup>8</sup> "Causes and Trends in Migrant Deaths along the U.S. Mexico Border, 1985-1998." K, Hagan, JM., and Rodríguez, NP. 2001, University of Houston, Center for Immigration Research Working Paper #01-4, <http://www.uh.edu/cir/death.htm>.

<sup>9</sup> "Spanish government immigration policy costs migrant lives," Keith Lee (26 August 2004) <http://www.wsws.org/articles/2004/aug2004/spai-a26.shtml>.

<sup>10</sup> "Should the United States get Tough on Illegal Workers? Yes," Mark Krikorian, *The New York Daily News* (December 26, 2004).

<sup>11</sup> "Controlling Illegal Immigration, There are Ways, But Little Will," Mark Krikorian, *Investor's Business Daily* (May 21, 2001).

<sup>12</sup> "Bush Administration 2002 Immigration Budget Proposal," Bush Administration 2002 Immigration Budget Proposal – US Department of State, [http://usinfo.state.gov/eap/Arvhive\\_Index/Bush\\_Administration\\_2002\\_Immigration\\_Budget](http://usinfo.state.gov/eap/Arvhive_Index/Bush_Administration_2002_Immigration_Budget).

crowded, poorly heated trailers.<sup>13</sup> They were forbidden from seeing people outside the company premises and denied raises.<sup>14</sup> In Australia, undocumented migrant workers at a Hindu temple in the suburbs of Sydney were paid only \$45 a month.<sup>15</sup> The exploitation of undocumented workers is a world-wide problem.

13. Article 26 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Worker Convention") gives migrants and their families the right to join unions and to seek their aid and assistance without any restrictions.
14. Both Article 22(1) of the International Covenant on Civil and Political Rights ("ICCPR") and Article 8 of the International Covenant on Economic, Social, and Cultural Rights hold that everyone shall have the right to freedom of association, including the right to form and join trade unions. The exercise of this right is subject only to restrictions based on national security, public safety, public health or morals, or the rights and freedoms of others.
15. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") also protects the rights to freedom of association and to join and form trade unions. The General Recommendations to this Convention articulate that distinctions between citizens and non-citizens under the Convention only apply to rights particular to citizenship status, such as participating in elections, the right to vote, and the right to stand for election.<sup>16</sup>
16. The ICCPR and the Migrant Worker Convention also protect the right to an effective legal remedy; and Article 8 of the Universal Declaration provides that "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law."
17. In a recent case in the United States, *Hoffman Plastic Compounds v. NLRB*, the United States Supreme Court inhibited the ability of undocumented migrant workers to unionize.<sup>17</sup> In *Hoffman*, an employee was illegally fired after he participated in a union organizing campaign. The Court found that although this clearly violated his right to unionize under the National Labor Relations Act, the employee could not receive back pay because he was an undocumented worker. As such, the only repercussion for employers that violate undocumented workers' right to unionize is a cease and desist order.
18. Without an explicit remedy for labor law violations, undocumented workers have little incentive to report workplace abuses, which in turn decreases the accountability of employers who exploit the migrant workforce. Since *Hoffman*, United States employers have attempted to use *Hoffman* as a way to deteriorate other workplace protections and remedies of migrant workers.<sup>18</sup>

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<sup>13</sup> Alfredo Corchado, *Mexico Settles Lawsuit that Alleged Laborers Worked in Slavelike Conditions in Maine*, DALLAS MORNING NEWS, (2 July 2002).

<sup>14</sup> *Id.*

<sup>15</sup> Kristine Gough, *Jobs body blocks illegal labour ban*, THE AUSTRALIAN, (19 April, 2002).

<sup>16</sup> Committee on the Elimination of Race Discrimination, *General Recommendation 20: Non-discriminatory implementation of rights and freedoms*, A/51/18(1996) 124 at ¶ 3.

<sup>17</sup> *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002).

<sup>18</sup> See Connie de la Vega and Conchita Lozano-Batista, "Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States,": in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACE PERSONS AND MIGRANT WORKERS: ESSAYS IN HONOR OF JOAN FITZPATRICK AND ARTHUR HELTON, (Anne F.

19. The *Hoffman Plastic* decision was contrary to established international norms that protect all workers' rights to unionize. Both the International Labor Organization ("ILO") and the Inter-American Court of Human Rights ("Inter-American Court") spoke against this decision.
20. The American Federation of Labor and the Congress of Industrial Organizations ("AFL-CIO") and the Confederation of Mexican Workers ("CTM") alleged that the *Hoffman* decision violated three ILO Conventions (87, 98, and the Declaration of Fundamental Principles and Rights at Work) that clearly articulate all workers' rights of association.<sup>19</sup> The ILO found that the post-*Hoffman* remedies available to migrant workers in the United States were not adequate to ensure effective protection against anti-union discrimination, as there is now no direct penalty aimed at dissuading anti-union discrimination.<sup>20</sup> The ILO also recommended that the United States amend labor law to bring it into conformity with freedom of association principles and ensure "effective protection for all workers against acts of anti-union discrimination in the wake of the Hoffman decision."<sup>21</sup> The ILO issued a similar opinion after the General Union of Workers of Spain filed a complaint against Spain.<sup>22</sup>
21. In an advisory opinion, the Inter-American Court determined that states could not discriminate against *any* workers in their labor rights, regardless of their immigration status. The Court determined that as a result of an employment relationship, the migrant worker acquires rights as an employee, irrespective of his regular or irregular status in the State where he is employed.<sup>23</sup>

## RECOMMENDATIONS

22. Human Rights Advocates urges the Commission to continue to protect the lives of migrant workers by:
  - A. Calling on all countries to assess the ways in which their immigration policies increase the incidence of border deaths.
  - B. Asking the Special Rapporteur to study and make recommendations on strategies for border reform that will prevent migrant deaths.
  - C. Continue to encourage the ratification of the Convention on Migrant Worker Rights.
  - D. Asking countries to protect the right of freedom of association and to provide remedies for violations for all workers regardless of their immigration status.

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Bayesky, Editor, Martinus Nijhoff publisher, forthcoming 2005) (articulating employer attempts to limit migrant workers' rights under Title VII of the Civil Rights Act, tort law and disability protections; attempting to limit recovery for work already performed; and intimidating workers by using Hoffman to request immigration information in discovery).

<sup>19</sup> Case No. 2227 (*United States*), ILO Committee on Freedom of Association, 332nd Report of the Committee on Freedom of Association, GB.288/7 (Part II) (November 2003) 142 available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf>.

<sup>20</sup> *Id.* at ¶ 610.

<sup>21</sup> *Id.* at ¶ 613.

<sup>22</sup> Case No. 2121 (*Spain*), Complaint against the Government of Spain presented by General Union of Workers of Spain (UGT) Report No. 327, Case(s) No(s). 2121, 327th Report of the Committee on Freedom of Association, available at <http://www.ilo.org/ilolex/english/newcountryframeE.htm>.

<sup>23</sup> *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, 17 September 2003, Inter-Am. Ct.H.R. (Ser. A) No. 18/03 (2003) at 113-114, paras. 9 and 10. (Page numbers for are cited to the Word version of the decision on the Court's website, available at <[www.corteidh.or.cr/juris\\_ing/index.html](http://www.corteidh.or.cr/juris_ing/index.html)>).