I. INTRODUCTION

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers’ Convention or MWC) entered into force on July 1, 2003.\(^1\) This event was celebrated as a major milestone in the effort to provide human rights protections to migrant workers all over the world – including the large number of women who migrate for work. Certainly, the existence of a binding human rights convention that provides explicit and extensive protections for migrant workers is a singular achievement. However,
given that none of the primary receiving — “host” — countries have ratified the treaty,\(^2\) and that few are likely to do so in the near future,\(^3\) this victory is a limited one, even for human rights advocates accustomed to celebrating small victories. For those concerned about the rights of women migrants, a dominant focus on the Migrant Workers’ Convention could be detrimental — not only because such a focus would siphon off needed energy more wisely placed elsewhere — but also because it would allow states to marginalize the obligations they owe to women migrants under existing human rights law regardless of their decision to sign, ratify, or ignore this new treaty. Further, as I will demonstrate in this article, even if the MWC were widely ratified, it should never be relied upon as the only instrument for migrants’ rights, because it alone cannot protect against the multiple forms of exploitation and discrimination that migrant women face — including abuses based on race, sex, ethnicity, and other axes of discrimination, as well as on the basis of alien status.

The temptation to counter-productive compartmentalization is by no means new or unique to advocates for migrants’ rights: it is instead the product of the traditional single-variable human rights analysis still prevalent among human rights practitioners, U.N. experts, and those charged with implementing treaty norms at the national level. By focusing on a single aspect of experience — that of being a member of a racial minority, or a woman, for instance — and on the standards that seem most obviously to apply to those variables — such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) or the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) — human rights professionals often fail to examine and articulate the ways in which rights standards can be enlisted to provide strong protections for individuals whose experience crosses the pre-set institutional lines. Through the lens of such single-variable analysis, migrant workers appeared to be radically unprotected before the entry into force of the MWC, and seem to remain so in light of the failure of most relevant states to ratify the treaty. This misapprehension — that the MWC is the only relevant standard for those who are migrant workers, since the treaty explicitly responds to the status “migrant” — casts the problem of human rights enforcement as one of too little law. Viewed through the framework of what I will call applied international intersectionality on the other hand, it will become clear that there is plenty of law in existence, and that all of the other major treaties have significant contributions to make to the empowerment of women migrant workers. The problem, then, is not one of missing norms, but one of missing interpretations, and of course, missing enforcement.

Intersectionality is an approach in which the different forms of exploitation and discrimination that individuals face are seen as mutually constitutive instead of separate or compounded.\(^4\) Intersectionality insists that the discrimination a Filipina woman faces while working as a domestic servant in Singapore, for example, will be substantively distinct from that experienced

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\(^2\) As of March 5, 2005, the following states had ratified or acceded to the MWC: Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Kyrgyzstan, Libya, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Timor-Leste, Turkey, Uganda, and Uruguay. UNOHCHR, Status of Ratification of the Convention on the Protection of the Rights of All Migrant Workers and their Families, available at: http://www.ohchr.org/english/countries/ratification/13.htm.

\(^3\) See Piper & Iredale and Taran, supra note 1.

\(^4\) For a more extensive discussion, see infra Section III A.
by an Indonesian woman in the same context. While both will face gender discrimination, that discrimination will be intertwined with discrimination based on other axes of identity, such as nationality, ethnicity, and religion. For instance, while working in Singapore, both women will be regularly subjected to state-mandated pregnancy tests, and will be deported if they test positive. Both will also be asked to sign contracts affirming their duty to be obedient to their employers. On the other hand, the Indonesian woman is almost certain to be paid less than the Filipina, no matter what her educational attainments may be, since Indonesian “girls” are perceived to be less “intelligent” as a group than Filipinas, and salaries are generally pegged to nationality as opposed to individual experience. The Indonesian woman is also likely to be subject to greater restrictions concerning unsupervised socialization outside the home/workplace due to stereotypes of Indonesians as naïve village “girls” who could be easily led “astray.” Indeed, this latter concern is one of the primary reasons that Indonesian maids rarely have a day off, while Filipina women are regularly given one day off per week to attend the Saturday school their compatriots have set up for skills training. Finally, while Filipina domestic workers are often encouraged to attend church-related activities, their Indonesian counterparts are commonly told not to pray or fast in the home/workplace, a restriction that functionally bars them from practicing Islam, given that they are only rarely allowed to circulate freely outside the home.

Intersectionality posits that anti-discrimination frameworks that cannot account for these differences will systematically misapprehend the complexity of individuals’ varied experiences of discrimination and subordination, and will therefore fail to provide adequate redress. In this article, I intend to build on this insight, transforming it from a critique into a methodology for interpreting human rights treaties. I will argue that when intersectionality is used as an interpretive methodology, the resulting analysis allows for the identification of robust standards relating to individuals who otherwise appear to be unprotected by the human rights framework. Other scholars, writing in a critical mode, have eloquently demonstrated the ways in which the failure to use an intersectional approach leads to the erasure of experience by groups that suffer overlapping forms of discrimination. Still others have suggested that the same critique applies to human rights law when intersectionality is used internationally. Adding to this body of scholarship, I will argue here – more affirmatively – that when used as a methodology, intersectionality can reveal a wide variety of empowering norms that advocates can begin to use right away. Applied international intersectionality makes visible the ways that human rights treaties can be brought to bear – together – on overlapping axes of discrimination and exploitation. In the process, this approach both captures the experiences of women migrants more accurately and uncovers new opportunities for empowerment.

Applied international intersectionality also contributes to efforts to overcome the most glaring and pressing predicament facing human rights advocates: the problem of how to close the gap between theory and practice, between the existence of protective norms and the inability to halt egregious rights violations. The legal analysis contained in this article will reveal just how large

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5 These are hypothetical examples drawing on the following: Noorashikin Abdul Rahman, Brenda S.A. Yeoh & Shirlena Huang, “Dignity Over Due”: Transnational Domestic Workers in Singapore, paper presented at the “International Workshop on Contemporary Perspectives on Asian Transnational Domestic Workers” (on file with author), at 6, 8 (explaining the nationality-stratified wage structure for domestic workers in Singapore and setting out the prevailing stereotypes of domestic workers from the Philippines, Indonesia, and Sri Lanka); Abdul Rahman, Negotiating Power: A Case Study of Foreign Domestic Workers in Singapore (Ph.D. Dissertation, Curtin University of Technology, 2003), at 187-215; and Abdul Rahman, “Singapore Girl?” Inside Indonesia Jan-Mar. 2002 (67).
that gap is. Such a revelation, though potentially disappointing, should not be viewed as a weakness of the approach I forward here. It is beyond the scope of this article to discuss the causal mechanisms at work in achieving compliance by states with human rights norms. However, no matter what theory of norm internalization or treaty enforcement is chosen, it is clear that one of the main prerequisites to implementation of rights obligations is their unambiguous articulation under international law. In other words, while normative clarity may not be sufficient to produce compliance, it certainly is a necessary condition. The methodology of applied international intersectionality offered in this article, then, will actually contribute toward closing the gap it reveals by insisting that there is no lack of law to protect women migrant workers; there is instead a lack of robust normative interpretations, coupled with a lack of political will to enforce the norms that already exist.

Further, since there are no real enforcement mechanisms for human rights internationally, much depends on whether – and how – advocates take up the discourse of rights to insist on enforcement. Indeed, outside of the various regional human rights bodies (which have binding authority over states in various forms) human rights institutions and advocates largely rely on their power to “name and shame” as they monitor countries’ compliance with treaties. Despite the international human rights system’s significant limits, it provides advocates with a language and a material practice through which to engage states. Given the powerful transnational processes at work in producing conditions of life for migrant women, international human rights law should be seen as a crucial tool to capture the attention of both sending and receiving countries. What is needed is a skeptical engagement with human rights institutions and a commitment to insisting on enforcement – partly through shaming – once the norms have been clearly named. Armed with clear rules, advocates can design strategies aimed at making states more responsive to the gendered, racialized, and class-specific impacts of economic globalization on women who cross borders to find work.

Through the lens of applied international intersectionality, it is clear that treaty law prohibits governments from reducing policy decisions concerning the treatment of women migrant workers to instrumental calculations about the economic impact of upholding entitlements.

6 There is a growing literature examining the processes through which international norms are made part of domestic legal and political systems. While scholars in this field do not agree on the causal mechanisms at work in producing compliance by states with international law standards, the literature generally points to normative clarity or agreement on a norm’s content as a prerequisite to enforcement. See, for example, Harold Hongju Koh, Bringing International Law Home, 35 Hous. L. Rev. 623 (1998) (setting out key processes involved in “norm internalization,” through which international law norms become part of domestic legal systems); Margaret E. Keck & Kathryn Sikkink, Human Rights Advocacy Networks in Latin America, in ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 79-120 (1998) (describing the emergence of transnational human rights advocacy networks and their role in the implementation and enforcement of rights norms); and Thomas Risse & Kathryn Sikkink, The Socialization of International Human Rights Norms into Domestic Practices, in THE POWER OF HUMAN RIGHTS INTERNATIONAL NORMS AND DOMESTIC CHANGE 1-38 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink, eds.) (1999) (presenting a theory of domestic behavior change linked to international human rights norms). See also Thomas M. Franck, Legitimacy in the International System, 82 Am. J. Intl L. 705 (1988) (arguing that states follow rules that they perceive as fair; one element of a rule’s fairness is its determinacy). I am not making the same claim as these scholars, described by some as embodying the “normative view,” according to which states ratify conventions that they intend to enforce, and enforce conventions they ratify. See Oona Hathaway, The Cost of Commitment, 55 Stan. Law Rev. 1821 (2003) (arguing that treaty ratification is not a meaningful indicator of a state’s compliance, and rejecting the “normative view”). I remain agnostic about the causal mechanisms at work, but I do assert that normative clarity is necessary to enforcement.
While advocates and scholars should welcome the Migrant Workers’ Convention as an interpretive tool and as a potential site for the development of best practices, they should also refocus their attention on the entire range of human rights treaties, insisting that the rights of women migrants are already included in the panoply of standards set out in those instruments. Further, instead of focusing attention on institutional reforms or new instruments, advocates would wisely spend more time identifying, articulating and insisting on norms made visible through applied international intersectionality.

Map of the Article

My argument will unfold as follows: in section II, I situate the experience of women migrant workers by describing the major forces combining to create gendered labor migration flows. In section III, I present the concept of applied international intersectionality, consider the issue of women’s “vulnerability,” and comment on how human rights law can be used to reach “private,” non-state conduct. In section IV, I demonstrate the methodology of applied international intersectionality in relation to several of the major issues that have been identified by rights advocates as especially pressing for women migrant workers. In relation to each of these forms of violation, I examine the ways human rights law can be called upon to require remedial steps and an end to abusive practices. The bulk of the analysis focuses on the experience of women in household service, since domestic work is the most prevalent occupation for women migrants around the world. The analysis draws on the five most relevant major human rights conventions: the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Social, Economic and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination, and the Migrant Workers Convention. Since the article focuses on the norms set out in treaties, it does not include an analysis of the wide range of documents on migration produced by UN bodies in recent years, which draw on the five most relevant major human rights conventions: the Convention on the Elimination of All Forms of Discrimination Against Women, the International Covenant on Social, Economic and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the International Convention on the Elimination of All Forms of Racial Discrimination, and the Migrant Workers Convention.

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7 INTERNATIONAL LABOUR ORGANIZATION [hereinafter “ILO”]. PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE – BOOKLET 1: WHY THE FOCUS ON WOMEN INTERNATIONAL MIGRANT WORKERS 5 (2003) [hereinafter “Booklet 1”]. “[To give a sense of the significance of women migrants in domestic work, some figures can be quoted: in Hong Kong, migrant domestic workers numbered more than 202,900 in 2000; between 1999 to June 2001, 691,285 Indonesian women left their country (representing 72 per cent of total Indonesian migrants) to work mainly as domestic workers abroad; and in Malaysia, there were 155,000 documented (and many more undocumented) migrant domestic workers in 2002; in Italy, 50 per cent of the estimated 1 million domestic workers are non-European Union citizens and in France over 50 per cent of migrant women are believed to be engaged in domestic work.” Id at 10 (citations omitted). Globally, women make up 85% of maids and housekeeping personnel in the world. RICHARD ANKER, GENDER AND JOBS: SEX SEGREGATION OF OCCUPATIONS IN THE WORLD 272 (1998) [hereinafter GENDER AND JOBS].

8 Because this article focuses on women, the Children’s Rights Convention and the rights of girls are not examined here.

9 Since the focus is on international treaty law, outcome documents from relevant world conferences (such as the Beijing Platform for Action and the Declaration and Programme of Action from the World Conference Against Racism) are not examined in this article, though special attention should be drawn to the Declaration and Platform for Action of the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, since it includes very strong language concerning the rights of migrant workers, including women working in domestic service. See Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 2001/52 (U.N. Doc. E/CN.4/2002/94 (15 Feb. 2002) for a discussion of the importance of the Durban documents for migrant workers. The work of relevant Special Rapporteurs is likewise not examined per se, though the factual information included in reports are integrated where relevant.
such as the reports produced by the U.N. Special Rapporteur on the Rights of Migrants\(^{10}\) and the Secretary-General,\(^{11}\) resolutions of the U.N. General Assembly\(^{12}\) and the Commission on Human Rights,\(^{13}\) documents relating to the International Commission on Migration,\(^{14}\) or the outcome documents from the various world conferences of recent years,\(^{15}\) though they were consulted as background. Further, important work being done at the regional level – including the recent advisory opinion affirming the rights of all migrant workers issued by the Inter-American Court of Human Rights – is not examined in this article.\(^{16}\)

In the concluding section, I emphasize the need both to insist on the enforcement of protections identified in existing instruments through applied international intersectionality, and to remain attentive to emerging claims. Such emerging claims may require scholars and advocates to push for new interpretations of human rights standards in order to accommodate claims made by workers who are crossing borders at increasingly rapid rates and facing new forms of exploitation. This article is intended to contribute to the efforts of advocates to interpret and use existing frameworks now, rather than waiting until more states have ratified the MWC, or until the U.N. human rights treaty bodies are effectively working in close coordination. The article also advances scholarly considerations of human rights by demonstrating that the methodology of applied international intersectionality can help close the gap between rules and reality by providing the normative clarity that is a prerequisite to effective rights enforcement. In this final respect, the article demonstrates a methodology that could be usefully applied to other groups whose rights claims appear to fall in the interstices of human rights norms.

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\(^{10}\) For information on the mandate and activities of the Special Rapporteur on the Human Rights of Migrants, see http://www.unhchr.ch/html/menu2/7/b/mmig.htm.


\(^{14}\) The Global Commission on International Migration is an independent commission made up of 15 experts from all regions. The Commission began its work in January 2004 and will deliver its report to the Secretary-General of the U.N. and other key decision-makers during the summer of 2005. See U.N. Department of Public Information, “Win-Win Outcomes Possible if Approach to Migration is Rational, Compassionate, Secretary-General Tells New Global Commission,” http://www.un.org/News/Press/docs/2003/sgsm9064.doc.htm (9 December 2003).


\(^{16}\) Advisory Opinion OC-18/03, Requested by the United Mexican States: Legal Status and Rights of Undocumented Migrants, Inter. Am. C.H.R., OEA. The opinion, though not legally binding, sets out clearly that migrant workers – documented and undocumented – should enjoy human rights, including workers’ rights, without discrimination based on their migration status. Further, the Court holds that the principles of equality before the law and non-discrimination have achieved jus cogens status, and are thus binding on all states. The Court also finds that nondiscrimination and equality require due process of law to be extended to all – including undocumented migrant workers.
II. Feminized Labor Migration in the Context of Globalization

The International Labor Organization estimates that there are between 80 and 100 million migrant workers in the world today. Women account for about half of these workers, and in some countries they make up more than half of all migrant workers. Indeed, many analysts—most notably the ILO—speak of the increasing feminization of migration. This feminization results from a number of worldwide forces in which gender roles and sex discrimination are intertwined with globalization. Trends contributing to this include: the growing demand for labor in fields dominated by women (especially the service sector); the lower cost of production when labor-intensive tasks are shifted to women migrant workers; and the sex-stereotyping of large business enterprises and governments that may see women as cheap, temporary, or supplemental laborers whose “docile” nature makes them easily exploitable.

Other forces are more regional. Women’s widespread participation in the wage labor market in the North, when combined with global income disparities in the South and persisting demands for Northern women to retain responsibility for household and childrearing tasks, has led to a dynamic in which Northern women’s reproductive labor is transferred to women migrants working as domestics, whose reproductive labor is in turn shifted to family members or poor women at home.

18 “[I]n 2000, women represented 68 per cent of the 2.55 million Indonesian migrant workers abroad; 46 per cent of the 2.945 million Filipino documented and 1.840 million irregular migrant workers abroad; and 75 per cent of some 1.2 million Sri Lankan migrant workers abroad.” ILO, Booklet 1, supra note 7, at 9.
22 ILO, Booklet 1, supra note 7, at 19.
23 Scholars have noted that many migrant women workers are part of what one analyst calls the “international transfer of caretaking”: the international transfer of caretaking refers to the three-tier transfer of reproductive labor among women in sending and receiving countries of migration. While class-privileged women purchase the low-wage services of migrant [women] domestic workers, migrant [women] domestic workers simultaneously purchase the even lower wage services of poorer women left behind in their home countries. In light of this transnational transfer of gender constraints that occurs in globalization, the independent migration of [women] domestic workers could be read as a process of rejecting gender constraints for different groups of women in a transnational economy.

RHAEL SALAZAR PARREÑAS, SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK 62 (2001). See also Donna E. Young, Working Across Borders: Global Restructuring and Women’s Work, 2001 UTAH L. REV. 1, 9 (2001) (explaining that “As middle class women enter the workforce, a vacuum is created within the home and housework becomes a commodity exchanged between women. The phenomenon of immigrant women’s domestic work can be scrutinized, therefore, within the context of women’s position within global labor markets and the intimate family setting.”); PIERRETTTE HONDAGNEU-SOTELO, DOMÉSTICA 19-22 (2001) (noting the same dynamic); Hope Lewis, Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas, 5 J. GENDER RACE & JUST. 197 (2001), at 197, 218 (noting that many Afro-Caribbean women migrate to North America to work as domestics “while leaving their own children and parents in the care of relatives or lower-paid women or girls from rural areas in the Caribbean.”); ILO, International Migration Paper #47, Sabika al-Najjar, Women Migrant Domestic Workers in Bahrain 6 (2001) (stating that the entrance of Bahraini women into the wage
economic changes, the employment of foreign women domestic workers has become a status symbol. Other changes include short-term labor shortages in sectors dominated by women, and the increasing participation of women in the labor market in newly industrialized countries.

From the perspective of women seeking work, a wide variety of factors combine to make border-crossing an attractive, acceptable, or – in desperate circumstances – the only viable option. For example, many women cross borders in search of better pay or broader horizons. In countries where structural adjustment policies and privatization have been imposed, broad cuts to the public sector often have a disproportionate impact on women, who make up a sizable proportion of the lower-level public sector jobs in many countries. Unemployment and cuts in social services may send such women abroad in search of new opportunities. In other places, women flee conflict or the aftermath of conflict, or cross borders for personal security, escaping violence and abuse.

Most job opportunities for women migrants are in unregulated sectors, including domestic work, informal/“off the books” industries or services, and criminalized sectors, including the sex industry. This means that even women who cross borders legally may find themselves in unregulated – and often irregular – work situations. In addition, the majority of opportunities that offer legal channels of migration are in male-dominated sectors such as agriculture and construction work, putting women at a great disadvantage. The ILO explains that “the demand for foreign labor reflects the long term trend of informalization of low skilled and poorly paid
jobs, where irregular migrants are preferred as they are willing to work for inferior salaries, for short periods in production peaks, or to take physically demanding and dirty jobs.”

In sum, globalization has ushered in increasing “pull” and “push” factors for women’s migration for labor at the same time as it has resulted in decreasing regulation of the labor market, growth in the informal sector, and the emergence of new forms of exploitation, many of which are gendered. In the midst of these trends, many governments are tightening migration controls while simultaneously allowing private employers and recruiting agencies operate unchecked by regulation or inspection. This interplay of competing incentives sets the scene for abuse of those already disadvantaged through systems of discrimination and marginalization that operate along axes of gender, race, poverty and position within the global economic order.

III. APPLIED INTERNATIONAL_INTERSECTIONALITY, WOMEN’S VULNERABILITY AND THE ROLE OF THE STATE

Although the human rights system is in many ways limited by the single-variable framework described in the introduction, the system is also flexible enough to allow for alternative interpretive methodologies. Through applied international intersectionality, human rights law can effectively be used by advocates to respond to the myriad aspects of women migrant workers’ experience. Further, applied international intersectionality will support carefully crafted responses to discrimination and exploitation that do not reinscribe women as “victims” in need of “protection.” Finally, since states have obligations under treaty law to end discrimination and exploitation carried out by “private” actors, governments’ efforts to end abusive practices should reach employers and recruitment agencies. This section provides a consideration of the rationale behind the intersectional approach, suggests a shift in that approach, and then discusses the issues of women’s “vulnerability” and the state’s obligations in the “private” sphere.

A. Applied International Intersectionality

1. Intersectionality as Critique

Intersectionality should be situated within a family of analytical frameworks designed to explore how individuals’ experiences and identities interact with forms of authority and discipline, including the law. Developed by scholars from around the world, the larger family of critical methodologies in which intersectionality finds its home includes such well-established schools of critique as subaltern studies, postcolonialism, and a range of feminist inquiries in both the global North and South concerned with issues of identity and difference. As others have

30 Id. at 5.
32 For an overview, see Robert J.C. Young, POSTCOLONIALISM: AN HISTORICAL INTRODUCTION (2001).
eloquently demonstrated, intersectionality shares with this much larger family of critiques the commitment to reconceptualizing the model of the “self” as unitary and unchanging.  

Briefly, intersectionality is an approach to understanding discrimination in which the various forms of subordination that people face are taken into consideration as they act together. Instead of conceiving of a Haitian domestic worker, for example, as separately or consecutively disadvantaged by gender and racial discrimination in the United States, intersectionality calls attention to the ways race and gender interact – or intersect – to create specific forms of discrimination and oppression. A Haitian migrant woman’s experience of racism in the U.S. will be different than the racism experienced by a Haitian migrant man in the same location and her experience of gender discrimination will differ from that of a native born American woman of any race; these differences are seen as crucially important by those using intersectional analysis, since they may require different remedial and preventive actions. Further, by focusing on the dynamics of multiple forms of discrimination, intersectionality emphasizes society’s responses to variously situated individuals and groups rather than the characteristics of disparate sets of people.

2. International Intersectionality

The version of intersectionality most familiar to North American legal audiences was formulated in the 1990s by critical race feminists. The American strand of intersectionality has since blended with other forms of intersectional analysis, and has been used and recrafted by scholars, advocates, and jurists in both North America and abroad. The concept of

34 See Ontario Human Rights Commission, An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims (2001) at 2 (noting that “A contextualized approach places less emphasis on characteristics of the individual and more on society’s response to the person”).
36 See infra note 40 for examples of some of these scholars.
38 For a discussion of the use of intersectionality by Canadian courts, see Ontario Human Rights Commission, supra note 36.
“multiple forms of discrimination” - if not intersectionality – has even entered the language of U.N. documents. One of the most important instances is in the Declaration adopted at the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which recognizes that those suffering racial discrimination often “suffer multiple or aggravated forms of discrimination based on other related grounds such as sex, language, religion, political or other opinion, social origin, property, birth or other status.”\(^{39}\) Although the use of this language is an important advance, intersectionality as a mode of critique and advocacy, in which all of the axes of discrimination are systematically understood to work together, has not been truly integrated into the work of the human rights bodies of the United Nations.

Some scholars have pointed out that when combined with various strands of anti-essentialist theory, intersectionality allows analysts to move beyond debates over the ontological “essence” of the myriad identity categories used by individuals, communities, and states – enabling analysis of identities instead as fluid and changeable.\(^{40}\) This transcendence could be especially valuable when examining identities that cross borders, since the conditions that construct and impact on those identities are likely to vary a great deal in different settings. Indeed, I would argue that the anti-essentialist insight is especially important in the international arena, where legal, social and economic regimes differently configure relevant identities. For too long, rights analysis has been forced to respond to discriminatory processes by speaking within those processes’ own terms: accepting specific sets of identities but challenging their exclusiveness and the limitation of available remedies based on single-variable subordinated statuses.

Intersectionality allows analysts to zero in on the processes of discrimination that articulate themselves in the lived experience of each person. The emphasis is then on discriminatory

\(^{39}\) Declaration of the United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, §2. See also CERD Committee, The Gender-related dimensions of racial discrimination, General Recommendation No. XXV, 2000, reprinted in U.N. Doc. No. HRI/GEN/1/Rev.6 (2003), at 216 (noting that “racial discrimination does not always affect women and men equally or in the same way. There are circumstances in which racial discrimination only or primarily affects women, or affects women in a different way, or to a different degree than men. Such racial discrimination will often escape detection if there is no explicit recognition or acknowledgement of the different life experiences of women and men, in areas of both public and private life”).

\(^{40}\) See Bond, supra note 33, at 101-137. Sociologist AnnJanette Rosga has pointed out that some critical race feminists, intending to “disrupt the legal tendency to view identity factors additively—as parts tacked on to a presumed neutral, so that a black woman is treated as a “white woman plus,” in the end fail to challenge the ways in which even legal articulations of multiply constituted identities can still trap analysts into assuming static identity categories as component parts rather than contextually variable formations. See Rosga, Policing the State: Violence, Identity & the Law in Constructions of Hate Crime, 32-33, n.29 (Ph.D. Dissertation, University of California, Santa Cruz, 1998). See also Isabelle V. Barker, Disenchanted Rights: The Persistence of Secularism and Geopolitical Inequalities in Articulations of Women’s Human Rights, CRITICAL SENSE 103, 106-107 (Fall 2002) (noting that intersectionality fails to disrupt “discrete” categories of identity). Similarly, some legal scholars have argued that extensions of intersectionality analysis that include a commitment to anti-essentialism, an examination of multiple forms of discrimination (beyond race and gender), or more complex understandings of processes of subordination, should be called “post-intersectionality” theory. See Darren Lenard Hutchinson, Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination, 6 MICH. J. RACE & L. 285 (2001) (reviewing his own theory of “multidimensionality” as well as that of scholars Francisco Valdes, Elvia Arriola, and Peter Kwan). I am intentionally retaining the term “intersectionality” because I believe it is expansive enough to include all of these later improvements, and because it is the term that has been taken up by rights practitioners internationally.
practices and the ways these practices render salient certain features, characteristics or experiences, depending upon the legal and geographical borders within which individuals find themselves. This shift in emphasis will allow advocates to formulate responses to discrimination that acknowledge particular forms of exploitation as not only intersecting but as mutually constitutive. Such responses would also demand new ways of conceptualizing harm and remedy, rejecting the “additive” approach, in which race, gender, immigration status, and other axes of discrimination are dealt with serially, or where they are seen to “compound” one another.\(^{41}\)

In recent years, a number of scholars have applied intersectionality analysis to international human rights norms and processes.\(^{42}\) In an important 1997 article, Lisa Crooms uses intersectionality to elucidate U.S. obligations under the CERD Convention. In the course of her discussion, Crooms notes how the human rights system – built on treaties that address different forms of discrimination and different groupings of substantive rights – seems to resist intersectionality on an institutional level, while making space for it at a theoretical level\(^ {43}\) – through the concept of indivisibility, which holds that all rights are equally important.\(^ {44}\) If applied holistically and robustly, Crooms concludes, human rights law can respond effectively to women’s intersectional experiences of racism, sexism, and other forms of discrimination.

Similarly, Kimberle Crenshaw – a pioneer of intersectional analysis in relation to U.S. domestic law – has explored the ways in which “[n]either the gender aspects of racial discrimination nor the racial aspects of gender discrimination are fully comprehended within human rights

\(^{41}\) See Ontario Human Rights Commission, supra note 36, at 22-25 (noting that “Although courts and tribunals have acknowledged the reality of discrimination on more than one groups, there are no clear directions on dealing with remedies in these types of claims.”). See also Celina Romany, Themes for a Conversation on Race and Gender in International Human Rights Law, in GLOBAL CRITICAL RACE FEMINISM: AN INTERNATIONAL READER 53, 60-65 (ADRIEN K. WING, ED., 2000) (discussing, inter alia, the “compounded nature of gender and racial inequalities”).

\(^{42}\) See Lisa A. Crooms, Indivisible Rights and Intersectional Identities Or, “What Do Women’s Human Rights Have to Do with the Race Convention?”, 40 HOW. L.J. 619 (1997); Bond, supra note 33; in Romany, supra note 43; Hope Lewis, Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women, 50 ME. L. REV. 309 (1998) (calling for the use of intersectionality and critical race feminism more generally to analyze the discrimination suffered by diverse groups of women, using transnational migrant women from the Caribbean as an example); and Llezlie L. Green, Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law, 33 COLUM. HUMAN RIGHTS L. REV. 733 (2002) (using Kimberle Crenshaw’s model of intersectionality to argue that an intersectional analysis of the targeting of Tutsi women during the Rwandan genocide would “provide a more effective and equitable result for the victims of sexual violence”).

\(^ {43}\) The international human rights system resists intersectionality on an institutional level in that the major treaties and their monitoring bodies each deal separately with particular sets of rights and forms of discrimination – freedom from racial discrimination under CERD, freedom from gender discrimination in CEDAW, for example. The system allows for intersectionality on a theoretical level, however, by insisting on the indivisibility of all human rights: as Crooms explains, “proponents of indivisibility see oppression as caused by interlocking and interdependent institutions…” Crooms, supra note 42, at 625-26, 628 (“Structured in this way, international human-rights law appears to be caught in a schizophrenic space. On the one hand, documents such as the Charter and the UDHR, express rights in a way that permits [interlocking forms of] oppression [to be addressed]. On the other hand, the . . . conceptual stance reflected in the Charter and the UDHR is compromised by the existence of separate covenants, conventions and declarations, the ranking of rights in an overarching hierarchy, and the procedures by which states choose which instruments to ratify and under what conditions they will do so.”)

\(^ {44}\) See Crooms, supra note 42, at 628-632.
discourses.” Discussing the failure of the human rights system to address the ways that multiple forms of subordination interrelate, Crenshaw emphasizes that “the intersectional problem is not simply that one discrete form of discrimination is not fully addressed, but that an entire range of human rights violations are obscured by the failure to address fully the intersectional vulnerabilities of marginalized women and occasionally marginalized men as well.” Crenshaw recommends a number of specific steps that should be taken by the human rights community to implement intersectionality. The majority of her recommendations are institutional or procedural, ranging from improved disaggregation by gender and race of all statistics used in human rights monitoring to the appointment of a Special Rapporteur to develop greater awareness about the conditions of women of color and the convening of joint meetings by the CERD and CEDAW monitoring committees. Crenshaw also recommends that treaty bodies interpret their own mandates as requiring intersectional analysis, though she limits this recommendation to the CERD and CEDAW committees.

Building on this work, Johanna Bond has recently called for renewed attention to intersectionality in the international arena, and has identified specifically the need for both a “theoretical shift” toward using intersectionality, and institutional reforms aimed at encouraging intersectional analyses by the treaty bodies and other UN human rights mechanisms. When it comes to concrete proposals, Bond’s focus is heavily on institutional reforms, with suggestions ranging from the drafting of General Recommendations and Comments that would promote intersectionality to the appointment by treaty committees of cross-treaty liaisons and the development of joint reports by the Special Rapporteurs on Violence Against Women and the Special Rapporteur on Racism and Xenophobia. She also points to the need for more scholarship that applies – rather than theorizing – intersectionality to human rights problems. As she explains:

... the notion of the “intersectionality” of racism, sexism, classism, and heretosexism must inform the way in which we conceptualize women’s human rights. Individuals do not experience neatly compartmentalized types of discrimination based on mutually exclusive forms of, for example, racism and sexism. Rather, individuals experience the complex interplay of multiple systems of oppression operating simultaneously in the world. To deal with this practical reality, intersectionality must [inform the ways in which advocates] promote human rights around the globe.

3. Applied International Intersectionality

Taking up this challenge, I will push this insight to the next level, introducing and then applying the methodology of applied international intersectionality to the situation of women migrant

46 Id. at 7.
47 Id. at 15-18.
48 Id. at 15-16.
49 Bond, supra note 33, at 152-160 (theoretical shifts) and 161-184 (institutional reforms).
50 Id. at 75-76.
51 Id. at 76.
workers. I intend to perform the kind of analysis requested by Crenshaw and Bond and implied by Crooms: examining some major human rights concerns women migrant workers face, I will set out the ways in which race, gender, and other variables interact in the daily lives of women migrant workers. But I also want to move beyond this form of intersectionality as critique, which focuses on identifying forms of discrimination and suggesting institutional reform. Shifting the emphasis from articulating forms of discrimination to also identifying protections, I will also apply international intersectionality to uncover the ways that existing human rights norms could be called upon to fight the subordinating practices made so clear through intersectional descriptions of violations.

The interpretive practice I call applied international intersectionality involves two major elements: first, it requires the interpreter to begin with the lived experiences of those who are seeking protection – here women migrant workers. Armed with a set of carefully described experiences of abuse and discrimination, the next step is to excavate existing protections. To uncover these norms, I recommend three basic moves. The first move is to identify fundamental rights guarantees that are applicable to all individuals, regardless of whether the category under examination (here migration status) is protected by international human rights law. In the context of women migrants, this step will yield norms such as the prohibition on slavery and sexual assault. The second move is for the interpreter to identify claims that can be articulated in terms of the axis of identity in issue. When possible, these claims should be forwarded under human rights treaties that have been interpreted to prohibit discrimination on the basis of migration status. The third and final step is to use the international law standard of substantive equality to transform as many of the remaining claims as possible into discrimination claims on the basis of categories relevant to the group in question that are protected under human rights law. This will be a crucial step for advocates working in locations where migration status is not considered a protected category.

It is important to clarify here that international human rights treaties, to the extent they have been carefully explicated and interpreted by their monitoring bodies, should be understood as embracing a substantive, rather than formal, model of equality. This means that a group’s right to non-discrimination and equality is violated when (a) laws formally treat them differently from other similarly situated groups (unless the different treatment is part of an equality-enhancing scheme), (b) laws or policies that appear to be facially neutral but use categories that are proxies for illegitimate discrimination, (c) when any law, policy, or action has the practical effect of disadvantaging them regardless of whether the policy is facially neutral, and (d) when states fail to take effective affirmative measures to achieve equality among disparate groups. To be clear: under international law, substantive equality requires states to take steps to achieve equality of outcome, not only equality of opportunity.

It may be useful to illustrate with an example: suppose a country’s labor law contains an explicit rule excluding undocumented migrant workers from minimum wage regulations. Empirical research demonstrates that this law has had especially deleterious effects on women migrant workers, almost all of whom are Muslim women from a neighboring country employed as

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52 These standards are set out infra at pp. 21-29.
53 The specific treaty provisions and their interpretations supporting this summary are discussed infra at pp. 21-29. I do not make any claims concerning the model of equality used by the various regional human rights mechanisms.
domestics. This is true because the sectors of the labor force in which male migrants are clustered, predominantly construction work, benefit from legal migration schemes and thus are covered by the minimum wage law. Further, evidence shows that migrants from the sending country (both male and female) suffer ethnic discrimination in the host country regardless of their documentation status, where the ambient population is made up of two ethnic groups that are largely Hindu and Christian and perceive the migrants from the sending country as ethnically and religiously distinct. Finally, domestic workers from the sending state have reported that they are prevented from praying or fasting by their employers, who do not want Islam practiced in their homes.

Using the analysis set out above, we would begin by looking for fundamental human rights guarantees relevant to the problem of low wages. To the extent migrant domestic workers’ wages are either withheld entirely or are so low as to be exploitative, anti-slavery norms and rules against trafficking and debt bondage may come into play. These standards would apply regardless of the documentation status of those suffering exploitation.

The next step is to identify claims that can be framed as migration-based discrimination claims. In this case, the law discriminates on the basis of documentation status, not alien status. As a general matter, the non-discrimination norms included in the major human rights treaties would prevent the exclusion of migrants from minimum wage laws and may be challenged as discrimination on the basis of nationality, and as a violation of equal protection of the law. The situation is more complicated concerning discrimination on the basis of documentation, however. The state could defend its policy by arguing that the exemption of undocumented aliens from wage laws aims at achieving a legitimate purpose under human rights law – for instance, the purpose of ensuring the country’s orderly integration of migrants into its labor market and society.

If migration-based claims fail, the next step is to reframe those claims as discrimination claims using other relevant and protected categories. Given the facts in the example, the law excluding undocumented migrant workers from minimum wage regulations could be cast as a claim against ethnicity-, gender-, or religious-based discrimination. An ethnicity-based claim would be available in countries where the impact of the policy of excluding undocumented migrant workers falls disproportionately on certain ethnic minorities. This would be the case here, where most undocumented migrants are members of a subordinated ethnicity that is perceived to be distinct from – and inferior to – the ambient community. A gender-based claim would also be cognizable, since women migrants are disproportionately impacted by the regulation, given their predominance among undocumented migrants, a phenomenon that is itself produced by the lack of available legal options for migration into domestic work. Finally, advocates could fashion a religious-based discrimination claim by showing that the exception of undocumented workers from the minimum wage law falls disproportionately on Muslim workers, who are also the target of discriminatory restrictions in the workplace.

Since the purpose of this article is to demonstrate a new interpretive methodology and not to identify winning claims, I do not evaluate the merits of these arguments here. Such an evaluation would require a contextual examination of the purpose of the policies being

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54 See discussion infra at pp. 21-29.
challenged and their legitimacy under human rights principles, on the one hand, and issues such as the ways in which the group at issue is perceived by the ambient community, whether the policy in question furthers the equality of disadvantaged groups, and how the policy works along various axes of discrimination to disadvantage groups other than those named on the face of the policy. All of these inquiries, as well as other contextual questions, would be relevant under a substantive equality analysis.

In sum, applied international intersectionality takes indivisibility seriously, and refuses to cordon off women’s experience of gender discrimination from their experience of racism, xenophobia, or exploitation as workers in unregulated sectors. The analysis is also necessarily doctrinal, requiring the interpreter to sort through the intricacies of the various human rights instruments and how they have been interpreted and applied to various different forms of discrimination. Finally, it is practical, aimed as it is at locating protections that exist now, in addition to those that may be recognized tomorrow.

B. On Women’s “Vulnerability”

Although necessary, rooting an analysis of human rights violations in women’s lived experiences is fraught with danger. As Ratna Kapur has explained, this kind of focus can lead to “victimization rhetoric,” in which women – usually from the global South – are presented as nothing other than the sum of their vulnerability, abuse, and victimhood:

In the context of law and human rights, it is invariably the abject victim subject who seeks rights, primarily because she is the one who has had the worst happen to her. The victim subject has allowed women to speak out about abuses that have remained hidden or invisible in human rights discourse. . . However, an exclusive reliance on the victim subject to make claims for rights and for women’s empowerment has some serious limitations.

Kapur explains that there are three main problems with this kind of approach: (1) it relies on gender essentialism, or “overgeneralized claims about women” (2) “it is a position based on cultural essentialism” in which “[w]omen in the Third World are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West,” and (3) the rhetoric of victimization “has invited protectionist, and even conservative, responses from states” to violations of women’s human rights.

55 The relevant principles would include proportionality and legitimacy of aim. See discussion infra at pp. 21-29.
56 Bond, supra note 25, at 158-159 suggests that intersectionality in particular threatens to overemphasize victimization: “Because intersectionality focuses on the intersections of systems of subordination, the analysis may gravitate toward an overemphasis on victimhood. Theorists and activists using intersectionality in the international human rights context must carefully avoid this tendency by exploring the myriad ways that victims of intersectional human rights violations around the globe resist oppression.”
57 Ratna Kapur, The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics 15 HARV. HUM. RTS. J. 1, 5-6 (2002).
58 Id. at 5-7.
I attempt to avoid these problems by rejecting the common narrow focus on violence against women migrant workers and the trafficking of women. Many scholars have critiqued the seemingly exclusive focus on the “vulnerability” of women migrants – which often manifests itself through the emphasis on ending (usually sexual) violence against women migrants\(^{59}\) and trafficking in women.\(^{60}\) I do not mean to dispute the existence, pervasiveness, or perniciousness of these violations. Indeed, I have included a discussion of violence against migrant women in this article. I have chosen not to address trafficking, however, both because it has been extensively addressed elsewhere, and because I seek to contribute to a wider discussion about the rights of women who consciously choose to cross borders, and whose agency in such decisions – while constrained by economic, cultural and political forces – is not the central problem to be addressed.

Instead of focusing on violence and trafficking, I examine the full range of human rights entitlements women migrant workers should enjoy – civil and political, social and economic. Further, I examine the experience of women in many regions, and explicitly reject protectionist responses by states as contrary to human rights norms. Finally, I treat women’s “vulnerability” not as a quality that inheres in them as some analyses seem to suggest or assume. I attempt to demonstrate that it is instead the product of political, economic, and cultural forces acting along a variety of identity axes, including gender, that disempower specific sets of women in particular ways. Focusing exclusively on women’s vulnerability effectively shifts the focus away from the forces of global inequality, the gendered divisions of labor, and the forms of racism and xenophobia that work together to ensure that women migrant workers remain marginalized. Applied international intersectionality is meant instead to foreground those forces that render women vulnerable to abuse alongside the rights that can be called upon to fight that constructed vulnerability.

C. Reaching “Private” Conduct Through Human Rights Law

Women migrant workers face abuses at the hands of government officials, as well as private individuals, companies, and other “non-state actors.” This is true all along a migrant’s trajectory of movement, as well as in her chosen place of work. In fact, most of the abuses described in this article are committed by “private” actors in the sense that they are not carried out directly by government personnel, but are instead perpetrated by employers and recruitment agencies. For this reason, it is important to acknowledge the ways in which the human rights framework has evolved to respond to abuses that are carried out by agents other than the state.

\(^{59}\) See, for example, Donna Maeda, *Inter/National Migration of Labor: LatCrit Perspectives on Addressing Issues Arising With the Movement of Workers: Agencies of Filipina Migrants in Globalized Economies: Transforming International Human Rights Legal Discourse*, 12 LA RAZA L.J. 317 (2002) (noting that “the focus on vulnerability centers the ‘migrant’ as a kind of status category for human rights analysis. Rather than addressing conditions that disable people from living well as human beings and focusing on changing these conditions, this human rights model places migrants into a status category with particular harms.”) *Id.* at 326.

\(^{60}\) See Lewis, *supra* note 23, at 222 (“At this early stage in the recognition of the human rights implications of female migration, the attention of most mainstream human rights organizations remains fixed primarily on the physical and sexual abuses associated with slavery and trafficking. They document conditions involving literal enslavement or indentured servitude, such as the horrific cases reported in the United States involving foreign diplomats as employers. Are the stories of economic, social, and cultural violations that many other female migrant workers experience too ‘ordinary’ for us to see them as a matter of human rights urgency?”).
Against a general backdrop in which human rights obligations were assumed to function as a check on state actions, a number of developments have emerged in the last several decades that can be said to have dramatically altered that orientation forever. First, as scholars of economic and social rights are quick to point out, human rights law was never really designed only to halt the abuses of the state: it was also written to include affirmative duties on states to ensure that those within their jurisdiction enjoyed a set of basic subsistence rights, such as the right to food, adequate housing, education, and health. Through the development of the economic, social and cultural (ESC) rights regime, it has become clear that the state is not necessarily required to provide the goods needed to fulfill ESC rights. Private individuals and groups – including families, communities, companies, or other groupings – may provide food, water, shelter and work to people in various countries. The state, however, is recognized as obligated to ensure that (a) conditions are such that even the most marginalized and poor can access their subsistence rights in some way – whether through access to private schemes or through direct provision of goods by the state, and (b) when entrusting basic rights protections to the private sector, the state must regulate and monitor actions that could impinge on the rights of its people – through both action and inaction.

The second major development that clarified the affirmative duties of the state in the “private” sphere was the achievement, through the work of feminists in many parts of the world, of acceptance that abuses such as domestic violence, even when carried out in the most sacrosanct of spaces, constitute human rights violations. This means that the state is required to take steps to prevent such abuses, to punish them when they occur, and to provide remedies to those who have been injured. Having established this principle with respect to violence against women, it is now available for use with other forms of violation, including, for instance, discrimination that happens inside of companies, entertainment clubs, or recruitment agencies.

This broad set of positive and negative obligations for both private and public conduct has been abbreviated in the human rights field into the three-part requirement that states must respect, protect, and fulfill rights. States must respect rights by ensuring that the state and its instrumentalities do not violate rights; protect rights by preventing violations by non-state actors and investigating, punishing, and redressing violations when they do occur; and fulfill rights by creating enabling conditions for all individuals to enjoy their full rights. In sum, then, in

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64 See id. at 140-142.
66 For a discussion of this shift, see UNIFEM, NOT A MINUTE MORE: ENDING VIOLENCE AGAINST WOMEN 16-25 (2003).
68 The “respect, protect, fulfill” framework has developed over time, and is expressed in a variety of ways. For an example of the application of this framework, see CESCR, General Recommendation on the Right to water (No. 15, 2002). For a discussion and a variation, see HENRY J. STEINER AND PHILIP ALSTON, INTERNATIONAL HUMAN
relation to both civil and political rights on the one hand, and economic, social and cultural rights on the other, the state must ensure that conditions are such that all people enjoy all of their rights. Though the state actions required in relation to each set of rights – and indeed each individual right – may differ, this common framework is a helpful way of conceptualizing state obligations. It should help guide readers through the doctrinal analysis in this article: the focus is on the obligations of states, even when the abuses are occurring in private at the hands of non-state actors, since the state is ultimately responsible for setting up regulatory systems and monitoring schemes to halt such abuses.

One additional note is necessary here: human rights norms and interpretive methodologies have not yet been adequately well developed to respond sufficiently to the varying capacities of different states in the context of global economic inequality. This is a glaring gap in human rights law, since it means that states in poor Southern countries technically have similar responsibilities to fulfill individuals’ rights to adequate food and shelter, for example, as those in the North, even when Southern states’ governments may be encumbered by debt and lack of infrastructure or resources. Work is being done to rectify this deficiency, through stronger application of the rule that states are bound only to the extent of their capability (or “maximum available resources”) and by emphasizing the obligation to pursue international assistance and cooperation. 69 However, because these rules have not been clearly elaborated in a set of consistent practices over time, anomalous results are not uncommon, with norms frequently developing that seem impractical at best, and impossible at worst, when applied to poor countries. 70

IV. APPLIED INTERNATIONAL INTERSECTIONALITY: ARTICULATING ABUSES, IDENTIFYING RIGHTS

In the next section, I demonstrate the use of applied international intersectionality in relation to women migrant workers. This section will begin by considering the principles of non-discrimination and equal protection as they apply to women migrant workers. Following this introduction to core principles, the longest portion of the section will analyze the substantive treaty norms relevant to the following prevalent forms of discrimination and abuse that women migrant workers face. 71

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69 See, for example, CESCR, supra note 65, at paras. 30-36, 36 (setting out the “international obligations” of states under the ICESCR, including the duty to “facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required”).

70 For one example, see CESCR, infra note 149, in which the Committee on Economic, Social and Cultural rights expresses concern that workers in the informal sector do not have access to social security. The implication is that the government of Senegal should bring all workers in the informal sector within the ambit of social security schemes. I am grateful to Ratna Kapur for calling my attention to this issue.

71 This article includes standards applicable to both regular and irregular migrants, but it does not address trafficking. This is the result of an assessment of the existing need for analysis: a wide variety of excellent human rights-based analyses of trafficking already exist. Rather than duplicate these efforts, I concentrate here on issues of specific importance to women migrant workers.
• Exploitative Terms of Work: Pay, Hours & Contracts
• Restrictions on the Freedom of Movement
• Labor Market Discrimination Against Women – at Home and Abroad
• Dangerous and Degrading Working Conditions: Safety and Health
• Gender-Based Violence in the Workplace
• Gendered forms of Racism and Xenophobia Against Women Migrant Workers
• Restrictions on Migrant Women’s Ability to Organize for their Rights

For each set of violations, the relevant rights standards will be examined, alongside a brief consideration of some of the steps that the relevant treaty bodies have recommended to states to fulfill their obligations to respect, protect, and fulfill the rights of variously situated women migrant workers under these treaties. This analysis will be based on a careful consideration of the text of the major human rights treaties, as well as the interpretations of the treaties by their U.N. monitoring bodies.

This section is written in general terms, and includes descriptions of violations that occur in widely disparate circumstances. The common consideration of such violations may tend to decontextualize them, but it also highlights real similarities across geographical, political, and cultural spaces. These commonalities occur as a result of globalized labor and migration patterns, as well as both local and cross-national forms of gender discrimination and exploitation. For this reason, joint consideration is justified, and international human rights responses are especially important: the negative impacts of globalization cannot be corrected by any one state, but must instead be addressed by all states as they uphold their responsibilities to respect, protect and fulfill human rights.

Because of its general approach, this section does not examine questions that would be crucial for country-specific advocacy work, including the ratification status and extent of possible reservations to each of the treaties examined here. Instead, emphasis is on the web of international norms that has been woven that may be used to protect and empower women migrant workers. For that reason, the analysis in this section would only apply as a legal matter to states that have ratified the treaties under discussion without relevant reservations. As a normative matter, however, the existence of these rules, based on multilateral treaties that are in force for hundreds of states parties, evidences certain ethical principles applicable in a

72 Parreñas, supra note 23, at 247 explains:
Globalization and its corresponding macroprocesses initiate the emergence of parallel lives in different settings. Macroprocesses do not have an umbrella-like impact, but they do impel the confrontation of similar issues of migration among workers in similar economic locations. Parallels therefore do not emerge out of some ontological similarity in institutions globally. They emerge from a particular process of globalization – global restructuring and its corresponding macroprocesses, which include but are not limited to the formation of the economic bloc of postindustrial nations, the feminization of labor, the unequal development of regions, the heightening of commodification in late capitalism, and the opposite turns of nationalism.

73 The exception is the Migrant Workers Convention, which entered into force on July 1, 2003. See supra note 2 for ratification information on the MWC. The other treaties are very broadly in force: as of October 1, 2004, the ICESCR, supra note 62, had 150 states parties; the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter “ICCPR’’], had 153; the Convention on the Elimination of All forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 212 [hereinafter “CERD”], 169 and the Convention on the Elimination
persuasive manner to the whole international community, and contributes over time to the crystallization of customary international law rules. On this level, it should be remembered that different treaty norms will overlap, influencing the others via interpretive procedures, state practice, and jurisprudence. When working at the country level, legal analysis should be undertaken to determine the binding nature of the various standards discussed here in relation to the country under investigation. To do this, it will be necessary to determine which of the treaties examined here has been ratified, whether any reservations were made to the relevant provisions of those instruments, and what norms constitute customary law.

This section will conclude with a discussion of the human rights norms that can be used to argue against the imposition of overprotective measures and restrictive responses to abuses against women migrant workers. Since many governments have placed restrictions on women’s freedom of movement and ability to seek employment abroad in response to rights violations they have suffered in receiving countries, it will be important to identify rules that can be used to guide states’ choice of measures to respect, protect and fulfill women’s rights.

Core Principles: Non-Discrimination, Equality and Equal Protection – Ensuring Equality for Women Migrant Workers

Women migrant workers suffer specific forms of abuse and deserve full protection from these abuses under human rights law. While the human rights framework provides a wide range of standards and mechanisms that are relevant to this group, it is a challenge to build an analytical approach to women migrant workers’ rights that will encompass all aspects of their experiences. At this stage in the development of the human rights framework, the experiences of women migrant workers have not been thoroughly and holistically articulated by international human rights analysis. Until now, women migrant workers have sat at the crossroads of three major sets of norms: the human rights standards pertaining to women – mostly strong, protective standards; the human rights of workers – again, clearly articulated and robust; and the human rights rules concerning aliens or migrants – rules that remain in development, but which currently offer less protection than the rules relating to women and to workers. While this somewhat uncomfortable position means that women migrant workers’ rights should be very carefully articulated based on existing standards, it in no way means that they are unprotected. Indeed, as this article will demonstrate through the use of applied international intersectionality, women migrant workers have a wide range of clear rights to depend on, and states have existing obligations toward them that must be fulfilled.

In this context, this section will begin by setting out core principles underlying all human rights norms and applicable to everyone: non-discrimination, equality and equal protection of the law. Relevant provisions of the various human rights treaties embodying these principles will be examined, and their application to migrant women workers as aliens, as women, and as members of other disadvantaged groups will be considered.

The primary principles of non-discrimination, equality and equal protection of the law are essential to any human rights analysis, since they embody the general rule that human rights

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must be extended to all equally, and that avenues for redress should be made available to all on an equal footing. Over the years, these guarantees have been very strongly articulated with respect to certain groups that tend to face discrimination – including women. Unlike women, however, aliens and migrants, though they often face discrimination on the basis of their status as aliens or migrants, are not generally protected as a category. Indeed, some exceptions to the standards of equal protection and non-discrimination have been explicitly carved out in relation to these groups, allowing states to make certain distinctions between citizens and non-citizens, and between documented and undocumented aliens under international human rights law. This does not mean that states can violate the rights of aliens and migrants with impunity. Instead, it means that with respect to a small number of rights, states may limit their application to nationals or to regular, documented migrants. This subset of rights never includes the most fundamental guarantees– so-called “non-derogable rights” – and even permissible restrictions may not be imposed discriminatorily as between men and women. Further, since they are only permissible in specific circumstances, distinctions between citizens and non-citizens, and between documented and undocumented aliens should be scrutinized very closely.

The principle of equal protection requires states to ensure that individuals whose rights have been violated are able to access remedies on a basis of equality. Under this principle, women migrant workers should be able to seek remedies for rights violations in both their countries of origin and in the countries in which they work.

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) contains strong general non-discrimination and equal protection guarantees. Article 2 states that “[e]ach party to the present Convention undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the present Convention, without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This protective standard does not draw a distinction between the rights of citizens and non-citizens, and therefore requires states parties to extend the rights within the Convention to all individuals equally. Indeed, the reference to “national origin” in this article may be construed as a rule prohibiting discrimination on the basis of nationality: as the Human Rights Committee explained in its General Comment on the Position of aliens under the Covenant (No. 15, 1986), “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof.” In its 2004 General Comment on the Nature of the general legal obligation imposed on states parties to the Covenant, the Human Rights Committee underscores this rule, emphasizing that “the enjoyment of Covenant rights is not limited to citizens of states parties but must also be available to all individuals, regardless of

74 The important and obvious counter-example is the Migrant Workers’ Convention, which was created in part as a response to the gaps in existing conventions.
nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves under the territory or subject to the jurisdiction of the state Party.”

Article 3 requires states parties to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Convention. This robust standard ensures women equal civil and political rights. In its General Comment on non-discrimination (No. 18, 1989), the Human Rights Committee noted that since the Covenant does not define discrimination, the definitions of discrimination set out in CERD and CEDAW should guide the interpretation of the ICCPR such that “the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.” This “purpose or effect” standard has been recognized as essential to international efforts to combat discrimination, and must be understood according to the substantive equality model.

Article 26 holds that all people are entitled to equal protection of the law: “The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground . . . .” This article is crucial because it extends equal protection of the law to all persons subject to the state party’s jurisdiction, including women and aliens. One of the most important ways to enforce nondiscrimination standards is to ensure that all individuals—here, women migrant workers—are able to vindicate their rights equally under the law. Violations of the right to equal protection are among the most critical violations that women migrant workers face, since such infringements compound the underlying violation for which a remedy is sought. For example, everyone has the right to be free of servitude, but when non-nationals or women are denied even the ability to challenge their servitude in a court in the country where they work, they are also facing a denial of the equal protection of the law. Further, since aliens benefit from equal protection under the Covenant, all legislation in states that have ratified the convention must be applied without discrimination to aliens. This means that in states that have enacted protective legislation on wages or working conditions, for example, such protections must be applied equally to aliens, unless the state can demonstrate that the exemption of aliens aims at achieving a legitimate purpose under the Covenant.

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78 As the Human Rights Committee explained id., article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.”
79 This is the rule set out by the Human Rights Committee in its General Comment on Non-discrimination (No. 18, 1989): “the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant,” U.N. HRC, General Comment 18, supra note 79, at para. 12.
In general then, the protections of the ICCPR are guaranteed without discrimination between women and men, and between citizens and aliens.\textsuperscript{80} Against this background rule, some articles are specifically limited to citizens.\textsuperscript{81} These rights – to participate in public affairs, to vote and hold office, to have access to public services, and to enter one’s own country – are rights directly tied to the status of citizenship in a democratic state.\textsuperscript{82} The special nature of these rights make their limited applicability to citizens acceptable.

In addition to these citizenship rights, there is one other category of rights that may be limited in relation to non-citizens in specific circumstances. Article 4 holds that in the instance of a public emergency, which “threatens the life of the nation and the existence of which is officially proclaimed,” states parties may derogate from a limited set of obligations under the Covenant so long as the derogations are not implemented in a manner that discriminates on grounds of race, color, sex, language, religion or social origin. Note that unlike the general non-discrimination clause included in article 2(1), this list of prohibited classifications is narrower and does not include nationality. For this reason, states that have declared a public emergency may limit the rights of aliens, but only in relation to those rights which are not non-derogable, and even then, the limitations may not extend beyond those which are strictly required by the exigencies of the situation.\textsuperscript{83} This means that states may not use public emergencies as an excuse to limit the rights of aliens in ways that are unrelated to the emergency. Further, even when certain limitations are legitimate under the Covenant, it must be recalled that all of the non-derogable provisions and rights under the Covenant continue to protect citizens and aliens equally within a state party’s jurisdiction. For these reasons, limits on the rights of women migrant workers during states of emergency must be closely scrutinized to ensure they are strictly necessary under the prevailing circumstances, and that they do not constitute sex-based discrimination.\textsuperscript{84}

The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) includes strong non-discrimination guarantees in the field of social and cultural rights, and slightly less protective guarantees for economic rights.\textsuperscript{85} With respect to gender, the ICESCR contains a guarantee identical to that in the ICCPR: article 3 guarantees the equal right of men and women to the enjoyment of all economic, social and cultural rights. . . .” In addition, the list of protected groups in article 2 is also identical to those included in the ICCPR. Article 2 obliges states parties to “undertake to guarantee that the rights enunciated in the present Convention will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or

\textsuperscript{80} U.N. HRC, General Comment 15, supra note 75, at paras. 1 and 2.


\textsuperscript{82} Human Rights Committee, articles 25 and 12(4). See Weissbrodt, id., for discussion.

\textsuperscript{83} General Comment 5: Derogations During a State of Emergency, U.N. Human Rights Committee, 13th Sess., reprinted in Compilation of General Comments, supra note 75, at 127.

\textsuperscript{84} See General Comment 28 on the Equality of Rights Between Men and Women, U.N. Human Rights Committee, 60th Sess., reprinted in Compilation of General Comments, supra note 75, at 179 (States may not discriminate on the basis of sex when derogating).

\textsuperscript{85} For a discussion of the protective regime concerning non-citizens under the ICESCR, see Weissbrodt, supra note 83, at paras. 21-24 and 50-51.
other opinion, national or social origin, property, birth or other status.” As with the ICCPR, the reference to “national origin” in this article can be interpreted as a general rule prohibiting discrimination on the basis of nationality.

One specific exception to this rule is carved out, however, in article 2(3) of the Convention. Under this provision, developing countries may decide, “with due regard to human rights and their national economy, to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”\(^{86}\) It must be stressed that this exception is limited to developing countries, and to economic rights. Aliens continue to have the right to the full complement of social and cultural rights in all countries. Further, by calling on states to make this decision with “due regard” to human rights and the national economy, the treaty makes clear that states may not use this provision as a general exemption from the obligation to protect the economic human rights of aliens. Further, even when permissible, it will often be possible to argue, using articles 2 and 3, that restrictions on the economic rights of aliens must not be applied in such a manner as to amount to sex, race, or other forms of discrimination. This would mean that both limitations on economic rights that are facially discriminatory on the basis of sex and other protected categories, and those which violate substantive equality by impacting women disproportionately, would be impermissible.\(^{87}\)

Convention on the Elimination of All Forms of Racial Discrimination

The Convention on the Elimination of All Forms of Racial Discrimination (CERD) includes strong language requiring states parties to prohibit and eliminate racial discrimination in all its forms and to guarantee equality before the law to all without distinction as to “race, color, or national or ethnic origin.”\(^{88}\) On its face, the reference to “national origin” appears to prohibit discriminatory distinctions between citizens and non-citizens as it does in the ICCPR and the ICESCR. The CERD Convention regime is more complex than this, however. Article 1(2) states that the Convention does not prevent the state from drawing distinctions between citizens and non-citizens: “[t]his Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a state party to this Convention between citizens and non-citizens.”

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\(^{86}\) ICESCR article 2(3).

\(^{87}\) This argument would rely by analogy on principles guiding derogations and other permissible restrictions of rights under the ICCPR. First, the Human Rights Committee signaled that it would use a substantive equality approach to reviewing states’ derogations under the Convention when it stated that (a) derogations may not be made on sex-discriminatory grounds, and that (b) they may not have a gender-discriminatory impact (see U.N. Human Rights Committee, supra note 75: “[t]he equal enjoyment of human rights by women must be protected during a state of emergency (art. 4). States parties which take measures derogating from their obligations under the Covenant in time of public emergency, as provided in article 4, should provide information to the Committee with respect to the impact on the situation of women of such measures and should demonstrate that they are non-discriminatory.” Para. 7) (emphasis added). Second, the Human Rights Committee has shown a similar attention to discrimination in permissible restrictions under the Covenant (see General Comment 22, Right to Freedom of Thought, Conscience and Religion, U.N. Human Rights Committee, 48th Sess., reprinted in Compilation of General Comments, supra note 75, at 155: stating that “[i]n interpreting the scope of permissible limitation clauses, states parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. . . Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” Para. 8) (emphasis added).

\(^{88}\) CERD article 5.
In addition to this provision, article 1(3) makes clear that the treaty will not affect the rights of states parties to determine how they grant nationality, citizenship or naturalization.\(^8\) It is important to note that these provisions clarify the scope of the Convention rather than authorizing substantive restrictions on the rights of aliens. Article 1(2) is simply saying that CERD is not the standard to look to when determining the permissibility of distinctions on the basis of alien status.\(^9\) This means that states parties to CERD cannot find permission in the Convention to contravene the rights of aliens recognized in other human rights instruments, such as those included in the ICCPR and the ICESCR.\(^1\) Indeed, those rights remain, and functionally trump the silence of the CERD Convention in this area.\(^2\)

The CERD Committee has set out the test for permissible distinctions between citizens and non-citizens under the Convention: “under the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”\(^3\) In addition, the CERD Committee has interpreted the Convention to require that otherwise permissible distinctions between citizens and non-citizens may not be applied in a racially discriminatory manner – in other words, an otherwise acceptable distinction between citizens and aliens is rendered discriminatory when it applies only to certain races or national origins.\(^4\) Even more potentially far-reaching is the principle CERD set out in *Zaid Ben Ahmed Habassi v. Denmark*.\(^5\) In that case, the Committee found that when circumstances suggest that alien status may be used as a proxy for racial discrimination, “a proper investigation into the real reasons” for the distinction are required by the state party. Failure to conduct such an investigation may amount to a violation of the convention. Under that rule, states may have an obligation to investigate

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\(^8\) CERD article 1(3) reads: “Nothing in this Convention may be interpreted as affecting in any way the legal provisions of states Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.”


\(^1\) The CERD Committee explicitly recognized this in its *General Recommendation on the rights of non-citizens* (No. XI, 1993), where it stated that article 1(2) of CERD “must not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Social, Economic and Cultural Rights and the International Covenant on Civil and Political Rights.” *General Recommendation XI, Rights of Non-Citizens*, U.N. Committee on the Elimination of Racial Discrimination [hereinafter “CERD Committee”], 42nd Sess., *reprinted in Compilation of General Comments*, supra note 75, at 202.

\(^2\) The CERD Committee has underlined this fact in its 2004 *General Recommendation 30, Rights of Non-Citizens*, CERD Committee, 64th Sess., [hereinafter “CERD Committee, General Recommendation 30”], available at [http://www.ohchr.org/english/bodies/cedr/comments.htm](http://www.ohchr.org/english/bodies/cedr/comments.htm) (“Article 1, paragraph 2, must be construed so as to avoid undermining the basic prohibition of discrimination; hence, it should not be interpreted to detract in any way from the rights and freedoms recognized and enunciated in particular in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.”).

\(^3\) Id.

\(^4\) Weissbrodt, supra, note 83, at para. 17. The exact contours of this requirement have not yet been fully explored.

\(^5\) CERD Communication 10/1997 (1999) (holding that an alien who was denied a bank loan on the basis that only citizens could be granted loans was denied his right to an effective remedy when the state failed to investigate the “real reasons” for the use of alien status for loan eligibility).
distinctions on the basis of alien status – even by private actors – whenever such distinctions are suspected of being used as a proxy for impermissible discrimination.

In a more straightforward manner, the discrimination that migrants face often has little to do with their actual alien status, but is instead an overt function of racism, ethnic discrimination, and xenophobia; these forms of discrimination are clearly covered by the Convention. Although CERD is silent with respect to sex discrimination, it has been interpreted to include prohibitions on gender-specific and gender-differential forms of racial discrimination, and the CERD Committee has even called attention to the “issue of multiple discrimination faced by non-citizens,” making it a very useful tool for women migrant workers. Finally, the CERD Committee has asked states to report extensively on their laws and practices concerning non-citizens, and to disaggregate data by ethnicity and gender, signaling a heightened interest in protecting migrants – especially migrant women – from racial discrimination.

Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW or Women’s Convention) was drafted with the object and purpose of eliminating discrimination against women, so its guarantees on this subject are very strong. CEDAW begins by setting out a strong general right to equality and non-discrimination, and proceeds to include specific provisions concerning substantive areas in which steps should be taken to dismantle gender discrimination and ensure the equality of women and men. The absence of provisions on specific topics, however, does not mean that CEDAW is inapplicable to that area. Indeed, the Convention applies to “all fields,” requiring states to dismantle sex discrimination and take effective measures for the advancement of women.

Specifically, the Convention obligates states parties to prohibit discrimination against women. CEDAW’s definition of discrimination against women is expansive, and has been taken up by other treaty-monitoring bodies. Article 1 explains that “the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women of their human rights.” Article 3 amplifies and expands this definition by requiring states to “take in all fields, in particular in the social, economic and cultural fields, all appropriate measures, such as by law or other effective and binding measures, that are necessary to implement this article and to eliminate all forms of discrimination against women.”

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96 As the Special Rapporteur on Migrant Workers explains: “People whose color, physical appearance, dress, accent or religion are different from those of the majority in the host country are often subjected to physical violence and other violations of their rights, independently of their legal status. The choice of victim and the nature of the abuse do not depend on whether the persons are refugees, legal immigrants, members of national minorities or undocumented migrants.” Report of the Special Rapporteur, Ms. Gabriella Rodriguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 1999/44 (U.N. Doc. E/CN.4/2000/82, at para. 32 (6 Jan. 2000).
97 General Recommendation XXV, Gender-Related Dimensions of Racial Discrimination, CERD Committee, 56th Sess., reprinted in Compilation of General Comments, supra note 75, at 214. See also CERD Committee, General Recommendation 30, supra note 92 (states should “[p]ay greater attention to the issue of multiple discrimination faced by non-citizens, in particular concerning the children and spouses of non-citizen workers, to refrain from applying different standards of treatment to female non-citizen spouses of citizens and male non-citizen spouses of citizens, to report on any such practices and to take all necessary steps to address them”).
98 CERD Committee, General Recommendation 30, supra note 92.
99 CEDAW article 3.
100 CEDAW article 1.
including legislation to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.”

Article 4 allows the use of temporary special measures to further women’s equality; the call for the use of such measures have been interpreted as a crucial element in the Convention’s non-discrimination and equality scheme. As discussed above, the Convention’s definition of discrimination – when paired with the guarantee of equality that accompanies it – follows the substantive equality model.

This standard has important protective implications for women migrant workers. In effect, whenever a pattern can be found in which a certain law or policy has a disproportionately negative impact on women, discrimination may be present; if so, the state must take active steps to ensure women their equal rights. Further, the CEDAW Committee has found that states have a positive obligation to “address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals, but also in law, and legal and societal structures and institutions.” This obligation includes the requirement that states address multiple forms of discrimination.

Article 2 explicitly requires states parties to ensure that women have “effective protection” against discrimination, through courts and other institutions. Article 15 guarantees women equality with men before the law. CEDAW does not directly address the rights of aliens, though as noted above, its equality provisions include women aliens’ right to substantive equality.

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Migrant Workers’ Convention or MWC) includes clear non-discrimination and equal protection standards. Article 1 requires states parties to extend the rights contained in the Convention to all migrant workers and members of their families “without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.” By including both “national origin” and “nationality,” the Convention is ensuring that discrimination on the basis of alien status is covered. Article 7 repeats this standard, but amplifies it by requiring states parties “to respect and to ensure” the rights in a non-discriminatory manner.

The Convention’s equal protection provision is especially strong, since it makes clear that all migrant workers – documented and undocumented, male and female – must be treated equally before the law. Article 18 provides that migrant workers “shall have the right to equality with nationals of the state concerned before the courts and tribunals.” Article 24 affirms that “[e]very migrant worker and every member of his or her family shall have the right to recognition

101 CEDAW article 3.
103 Id.
104 Id.
105 Id.
everywhere as a person before the law.” The Convention also sets out a broad set of substantive rights, such as the right to life and freedom from torture, that must be extended to all migrant workers, regardless of their employment or residency status. The Convention does draw some distinctions based on regularity of status by extending a set of rights to those migrant workers who are “documented or in a regular situation”; these rights, outlined in part IV of the Convention, concern rights to equality in educational programs, participation in community affairs, and the freedom to choose residence in the host country.

**Applied International Intersectionality: Examining Prevalent forms of Discrimination and Exploitation**

The remainder of this section will use applied international intersectionality to examine common forms of discrimination and exploitation that women migrant workers face. As discussed above, this will require careful descriptions of the forms of abuse facing women migrant workers, followed by an excavation of existing protections. Each subsection below will therefore begin with a description of the forms of abuse under consideration, drawn from the reports of human rights organizations, U.N. documents, and the work of migrants’ rights organizations. As for the identification of existing protections, I first present a summary of the human rights standards that are relevant to these abuses – either facially or through interpretation. This analysis yields the basic protections applicable to all, in addition to those standards that could be used to support claims against discrimination based on migration status, as well as other categories relevant to women migrant workers. Next, there is a brief discussion of the steps the treaty bodies have suggested states may be required to take to halt such abuses.

To complete the intersectional interpretation, the analysis presented here would need to be supplemented with claims constructed through the transformation of migration-based claims into claims based on other categories protected by human rights law using substantive equality. That final step is necessarily left for another day, since it cannot be done in the abstract; intersectional claims require contextual analyses of the ways in which various axes of discrimination interact in specific settings.

**Exploitative Terms of Work: Pay, Hours & Contracts**

A number of forces combine to render women migrant workers vulnerable to exploitative terms of work, especially in relation to pay, hours of work, and contracts. Restrictions on the right to cross borders for work, for example, create incentives for legal and illegal agents alike to take advantage of women migrant workers. Recruitment agencies – even when working legally – often charge steep fees for placement and travel; when working irregularly or without government oversight, such agencies often charge fees that are close to impossible to repay, trapping women migrants into conditions akin to debt bondage. Others house migrant workers

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106 Treaty standards and possible state obligations have been set out in separate subsections to ensure clarity concerning the provenance of each set of obligations. While the former are clearly binding on states parties, the latter – drawn from the concluding comments/recommendations of the various treaty bodies – are usually considered to provide guidance for action rather than authoritative interpretations of treaty norms.

107 MIDDLE EAST REPORT ran a story in 1999 detailing the conditions facing Sri Lankan women hired as domestic workers in Lebanon: recruited at home, they pay significant fees to a local agent, who arranges a connection with a Lebanese agency. The Lebanese agency then contracts with the employer, who pays a fee for a 2-3 year contract,
in “collection” centers in the sending country for as long as several months before the receiving country processes the needed papers; conditions in such centers are sometimes horrendous, with women held incommunicado and given inadequate or rotten food. Finally, agents who are working in direct contravention of national laws, facilitating women’s crossing of borders illegally, may use coercion, force, or false promises, placing women in clandestine domestic settings, illegal sex work, or exploitative sweatshops – practices that amount to trafficking. The ILO reports that “[w]omen tend to be more likely than men to make use of these illegal recruitment and migration channels because of their limited access to information, lack of time to search for legal channels and lack of financial resources to pay the fees. The nature of the work and the forms of migration open to women often force them to rely on fraudulent recruiters and dubious agents.”

Regardless of their means of entry, women migrants face myriad types of exploitation, and contract problems abound. Women who actually receive a contract may not understand the language in which it is written. They may find that the contract they sign is later replaced by an inferior version stripped of worker protections, or they may be refused a copy entirely. In many places, contracts are concluded between the employer and recruitment agency alone, leaving the worker without any protection. When employees do sign contracts with employment agencies, they may be asked to sign “undertakings” in which they agree not to seek a change of employment or employer, not to engage in “immoral” behavior, not to marry a citizen or permanent resident, not to leave the premises of the employer without permission, and never to take a day off. In some countries, aliens or women who have contracts may face legal or economic barriers in accessing courts or other judicial institutions, and host country courts may

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108 See Human Rights Watch, Help Wanted: Abuses Against Female Migrant Domestic Workers in Indonesia and Malaysia (2004), at 32 [hereinafter “Help Wanted”].
109 ILO, Booklet 3, supra note 107, at 24.
110 ILO, Booklet 1, supra note 7, at 18.
111 An ILO study explains that women from Ethiopia are often asked to sign a contract upon their arrival in Middle Eastern countries in languages that they do not understand. ILO – GENPROM Working Paper No. 3: Emebet Kebede, Ethiopia: An Assessment of the International Labor Migration Situation – The Case of Female Labor Migrants, 6-7.
112 ILO, Booklet 3, supra note 107, at 22-23.
113 See Abdul Rahman et. al, supra note 25, at 9 (discussing a set of rules for foreign domestic workers distributed by a recruiting agency to new employees: included in the rules are the requirement not to take a day off during the 2 years of employment, not to seek a change in employers, never to go to sleep before other members of the family unless it is exceptionally late, and always to be humble); ILO, Booklet 4, supra note 19, at 22 (citing and quoting I. Josiah, S.F. Lee & J. Kee, “Protecting Foreign Domestic Workers in Malaysia: Laws, Policies, Implication and Intervention” (unpublished paper prepared for the Women’s Aid Organization) (2003); see also ILO, Booklet 3, supra note 109, at 22-23 (discussing a contract found in a travel agency that “recruited” workers in Ethiopia that explicitly stated that the domestic worker was not to leave her employer’s premises for the 2-3 year duration of the contract).
deem the contracts unenforceable.\textsuperscript{114} As may be expected, women in the informal, irregular, or illegal sectors are rarely given contracts.

Women migrant workers face a range of abuses connected with compensation.\textsuperscript{115} Even when paid on time and according to the terms of any contract they may have been given, women migrant workers are often paid substandard wages. Human Rights Watch reported that the migrant domestic workers it had interviewed in the United States received an average of $2.14 per hour – less than half the required minimum wage.\textsuperscript{116} Employers may deduct dubious or blatantly unfair charges, including fees for health services that are never received, or fees for rent in situations of squalor.\textsuperscript{117} Payments may be delayed, improperly calculated, or withheld arbitrarily. One common practice with respect to domestic workers is for employers to place payments into a bank account that they claim has been opened for the domestic worker, but to refuse her any access to this account until the end of her contract.\textsuperscript{118} In some places, employment agencies offer domestic employers the option of “returning” a migrant worker after a period of time – often as long as three months in some places – if their services are deemed unsatisfactory. During the trial period, the employee is rarely paid, and once they are “returned” they must begin a new probationary period, during which they will again likely not receive pay. This kind of cycle – in which the employee is working without wages – has reportedly lasted more than a year in some countries.\textsuperscript{119} Exorbitant fees for breaking contracts may be imposed. At the extreme end of the spectrum, women who are in conditions of debt bondage or slavery may not receive wages at all.

Women domestic workers often work in completely unregulated conditions: in some countries, those in the domestic sector do not count as “employees” under legal definitions, or are expressly exempted from labor codes protecting workers.\textsuperscript{120} In such circumstances, employers take advantage of the vulnerability of women migrant workers by forcing or coercing them to work long hours, often without breaks or leisure time.\textsuperscript{121} Indeed, “unscheduled availability at all

\textsuperscript{114} In the United Arab Emirates, for example, contracts are not binding unless they are concluded pursuant to a bilateral agreement with the sending country. There are currently no such bilateral agreements governing contracts for domestic workers, a fact that has not stopped recruiting agencies from furnishing workers with seemingly valid contracts. \textit{See} ILO, Booklet 3, \textit{supra} note 109, at 34. In Bahrain, contracts concluded with domestic workers are not binding under the provisions of that country’s labor code. \textit{See} al-Najjar, \textit{supra} note 25, at 21.

\textsuperscript{115} \textit{See} Booklet 4, \textit{supra} note 19, at 23 for a discussion of the range of payment-related abuses.

\textsuperscript{116} \textit{HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES} [hereinafter “\textit{HIDDEN IN THE HOME}”] 17 (2001).

\textsuperscript{117} \textit{See} ILO, Booklet 4, \textit{supra} note 19, at 25 for a discussion of accommodations for migrant domestic workers.

\textsuperscript{118} \textit{See} Kebede, \textit{supra} note 111, at 8; \textit{HUMAN RIGHTS WATCH, HELP WANTED, supra} note 108, at 41-42.

\textsuperscript{119} \textit{Id}.

\textsuperscript{120} By way of example, the following countries expressly omit domestic workers from coverage under national labor laws: Japan, Korea, Malaysia, Qatar, and Sudan. The United States also exempts domestic workers from the protective rules of the National Labor Relations Act. \textit{See} ILO, Booklet 4, \textit{supra} note 19, at 12.

\textsuperscript{121} \textit{See} Special Rapporteur on the Human Rights of Migrants, 2003 GA Report, \textit{supra} note 26, at para. 28 (noting that “Many domestic employees work long hours for a miserable salary and under truly inhumane and degrading conditions that sometimes amount to slavery”); \textit{see also} ILO, International Migration Paper #48, Ray Jureidini, \textit{Women Migrant Domestic Workers in Lebanon} 8 (2001) (noting that many domestic workers in Lebanon are “considered to be ‘on-call’ for 24 hours,” often requiring “cooking and cleaning until late at night when visitors are over, or nursing the children and assisting elderly people during the night”); \textit{HUMAN RIGHTS WATCH, HIDDEN IN THE HOME, supra} note 116, at 16-17 (domestic workers in the United States required to be on call 24 hours a day); Anderson, \textit{supra} note 26, at 106-107 (expectation of domestic workers’ “permanent availability” in European
times” is often a characteristic of domestic work for women, an expectation modeled on gendered assumptions about women’s roles in the home.122

Even when regulations do apply to them, discriminatory rules exempting domestic workers from normal hour limits, or setting long limits (as much as 12-18 hours123 in some places) may exist.124 Exceptions to overtime and holiday pay rules also frequently apply to domestic workers. Further, women working as domestics rarely have days off125— even in places where rest days are regulated, domestic workers may be exempted126 or subject to special rules allowing a single or half day of leisure instead of the standard number applicable to other workers. An ILO study conducted in the United Arab Emirates found that not one of the women working as domestics surveyed benefited from a regular day off.127 While the families who employ domestics often explain the long hours by saying that such women are “part of the family,”128 this feeling is not shared by the employees themselves.129 One researcher in the United States found that many migrant domestic workers were asked to use a separate set of utensils and told when and how much to eat.130 Similar findings were reported in Taiwan, where migrant workers are often asked to wash their clothes separately from the family.131 One domestic worker explains: “We are treated like strangers, we are not allowed to sit on the furniture. It does not matter for them if you have a profession or not, you are here, you are a maid.” Another domestic worker adds: “When they talk about us they say words like: stupid, knows nothing, or maid. We are always inferior in their place.” And finally: “I am treated as a
lower person because I am poor. They order us in a way that hurts. They don’t sympathize with us. We are vulnerable in their houses, because we are poor.”

The ILO explains that

a major incentive for exploitation of migrants and ultimately forced labor is the lack of application and enforcement of labor standards in countries of destination as well as origin. These include respect for minimum working conditions and consent to working conditions. Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labor in conditions simply intolerable and unacceptable for legal employment. Worse still is the absence of worksite monitoring, particularly in such already marginal sectors as agriculture, domestic service, sex-work, which would contribute to identifying whether workers may be in situations of forced or compulsory labor.

1. Human Rights Standards Relevant to Exploitative Terms of Work: Pay, Hours & Contracts

Through provisions on equal rights in employment, just and favorable working conditions, and equal protection of the law, the major human rights conventions offer forceful protections for women migrant workers against exploitative terms of work. CEDAW guarantees women equal rights in employment, including: the same employment opportunities as men, the free choice of profession, and the right to promotion. The Convention also extends to women the right to equal remuneration, including benefits, and equal treatment in respect of work of equal value. The ICESCR recognizes the right to fair wages – defined in the Covenant as wages that, at a minimum, provide a decent living for the worker and her family – and includes the specific right to equal pay for equal work. Article 7(d) guarantees workers rest, leisure, and reasonable limitations on working hours and periodic holidays with pay, as well as remuneration for public holidays. These rights must be extended to women and men without discrimination.

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133 Taran & Geronimi, supra note 20, at 11.
134 CEDAW Article 11(1) guarantees women the right to equal rights in employment, including: the same employment opportunities as men, the free choice of profession, and the right to promotion. Article 11(1) also provides that women have the equal right to free choice of profession, and the right to promotion and job security.
135 CEDAW Article 11(1) also provides that women have the equal right to all benefits and conditions of service equal to men. The same article also guarantees women equal remuneration, including benefits, and equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work. Article 11(1) protects women’s right to social security and the right to paid leave, on a basis of equality with men.
136 ICESCR Article 7(a) recognizes the right to the enjoyment of just and favourable conditions of work, including remuneration which provides all workers, at a minimum, with: fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families.
137 ICESCR Article 2 calls on states to ensure that the rights included in the Convention are exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ICESCR Article 3 requires states to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights in the Convention.
prohibits discrimination on the basis of race, color, or national or ethnic origin in work, free choice of employment, and just and favorable working conditions.\textsuperscript{138} These provisions have been interpreted to mean that states have an obligation to “t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects”.\textsuperscript{139} Under the ICCPR, all individuals – including women and men, aliens and citizens – are guaranteed equality before the law,\textsuperscript{140} and aliens and women may not be treated differently in court based on their alien status or gender.\textsuperscript{141} This guarantee of equality is amplified in the Migrant Workers’ Convention, which clearly requires states to ensure that migrant workers benefit from the same terms of work as nationals, including remuneration, hours of work, overtime pay, weekly rest, and holidays with pay.\textsuperscript{142} The Convention also provides that migrant workers must have equal access to the authorities to vindicate their contract rights,\textsuperscript{143} and may claim their wages and other entitlements owed to them even if they have been expelled from the state of employment.\textsuperscript{144} The ICCPR\textsuperscript{145} and the MWC\textsuperscript{146} include protections against debt bondage or slavery-like practices.

\textsuperscript{138} CERD Article 5(e)(i) guarantees the rights to non-discrimination on the basis of race, color, or national or ethnic origin in work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.

\textsuperscript{139} CERD, supra note 92.

\textsuperscript{140} ICCPR Article 26 provides that all persons are equal before the law, and are entitled without any discrimination to equal protection of the law. The law should prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sex, race, color, national or social origin, or other status.

\textsuperscript{141} ICCPR Article 14 provides that all people shall be equal before the courts and tribunals. In its General Comment on the position of aliens under the Covenant (No. 15, 1986), the Human Rights Committee emphasized that this guarantee of equality before the courts and tribunals applies to aliens, who must not be treated differently from citizens on the basis of their status. Concerning gender equality, the Human Rights Committee made clear in its General Comment on the equality of rights between men and women (No. 28, 2000), that women must have equal – and autonomous – access to justice under article 14.

\textsuperscript{142} MWC Article 25 provides that migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the state of employment in respect of remuneration and other conditions of work, including overtime, hours of work, weekly rest, holidays with pay, safety, health, termination of the employment relationship and any other conditions of work covered under domestic law. Article 25 also guarantees equal treatment with nationals concerning other terms of employment including minimum age of employment, restrictions on home work and any other matters that are considered a term of employment under domestic law. The same article also requires states Parties to take all appropriate measures to ensure that migrant workers are not deprived of any rights concerning remuneration and other conditions of work on the basis of irregularities in their work or residence status. Article 25 also provides that employers may not be relieved from obligations toward their workers on the basis of irregularities.

\textsuperscript{143} MWC Article 54(2) provides that if a migrant worker claims that the terms of his or her work contract have been violated by his or her employer, he or she shall have the right to address his or her case to the competent authorities of the state of employment on the basis of equality with nationals of that state.

\textsuperscript{144} MWC Article 22 guarantees migrant workers the right to claim wages and other entitlements even if they have been expelled from the state of employment.

\textsuperscript{145} ICCPR Article 8 provides that no one shall be held in slavery, and that no one shall be held in servitude or required to perform forced or compulsory labor.

\textsuperscript{146} MWC Article 11 provides that no migrant worker or member of his or her family shall be held in slavery or servitude, and that no migrant worker or member of his or her family shall be required to perform forced or compulsory labor.
CERD has been interpreted to include protection for non-citizen domestic workers from debt bondage.  

2. Measures to Respect, Protect and Fulfill

States in which women migrant workers find employment may be required to adopt a wide variety of measures to ensure that women’s rights to fair terms of work are fully respected, protected, and fulfilled. Based on the relevant treaty provisions and the guidance given by the treaty bodies, it is now clear that states may be required to adopt a range of measures to fulfill their obligations, including the following examples. States should consider undertaking a comprehensive study on the employment situation of women migrants; such a study could include an examination of the impact of discrimination on the basis of sex, race or ethnicity, and alien status, and focus on issues such as the use of contracts and their terms, the enforceability of contracts, pay rates, working hours, the deduction of fees, and the use of training periods to withhold payment. States that exempt domestic or non-national workers from labor protections should take steps to extend labor protections – including working hours and minimum wage standards – to these groups. Although some fair and non-discriminatory amendments might be needed to account for specific differences in workplaces, regulatory schemes concerning working conditions and terms of employment should be made applicable to workers in domestic

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147 CERD, supra note 92 (states should “[t]ake effective measures to prevent and redress the serious problems commonly faced by non-citizen workers, in particular by non-citizen domestic workers, including debt bondage, passport retention, illegal confinement, rape and physical assault”).

148 See, for example, Concluding Observations: Germany, Committee on the Elimination of Discrimination Against Women [hereinafter “CEDAW Committee”], 22nd Sess., U.N. Doc. A/55/38, paras. 287-333 (2000) (“Noting the Government’s intention to commission a study on the living situation and social integration of foreign women and girls, the Committee requests the Government to undertake a comprehensive assessment of the situation of foreign women, including their access to education and training, work and work-related benefits, health care and social protection, and to provide such information in its next report.” Para. 318).

149 See, for example, Concluding Observations: Senegal, U.N. Committee on Economic, Social, and Cultural Rights [hereinafter “CESCR”], U.N. Doc. E/C.12/1/Add. 62 (2001) (“The Committee is concerned that, while half of Senegalese workers are employed in the informal sector, most of them still lack access to basic social services, including social security and health insurance, and work long hours in unsafe conditions. The Committee is concerned that the state party is not taking appropriate measures to protect the rights of domestic workers, mostly women and girls, especially with regard to their lack of access to basic social services, their unfavorable working conditions and their wages, which are far below the minimum wage.” Paras. 20-21); Concluding Observations: Jordan, CESCR, U.N. Doc. E/C.12/1/Add. 46 (2000) (“The Committee is concerned that non-Jordanian workers are exempted from minimum wage provisions, are denied participation in trade union activities and are excluded from the social security system. The Committee is concerned that the 1996 Labor Code does not provide any protection for persons working in family-owned and agricultural enterprises, and domestic labor. It is precisely with respect to work in these areas that protection is most needed because it often involves hazardous working conditions, and largely female and child workers.” Paras. 19-20); Concluding Observations: Morocco, CESCR, U.N. Doc. E/C.12/1994/5 (1994). (“The Committee is also concerned that labor laws and regulations are largely ignored or disregarded in the informal and traditional sectors of the economy and that the absence or limited presence of labor inspectors in these sectors has impeded the effective implementation of regulations relating to just and favorable conditions of work, including health and safety of the workplace.” Para. 14). See also Concluding Observations: Israel, CERD Committee, 52nd Sess., U.N. Doc. CERD/C/304/Add. 45 (1998) (“The Committee encourages the state party to adopt new labor legislation in order to secure the protection against ethnic discrimination of the rights of Palestinians working in Israel on a daily basis; the rights of migrant workers, including undocumented workers, is also a matter of concern.” Para. 17).
service. In places where regulations already apply to non-national and domestic workers, states should ensure that enforcement measures are effective, that monitoring takes place regularly, and that fines are imposed or licenses revoked wherever necessary. Finally, states must take proactive steps to ensure that women migrant workers are not trapped in debt bondage, and to remedy the situation when it does arise. States should consider extending assistance to women who have been the victims of debt bondage, including resources for rehabilitation and reintegration.

Locked in the Home: Restrictions on the Freedom of Movement

Women migrants who work in the domestic sector are made especially vulnerable to violations of their freedom of movement. Those who employ domestic workers often confiscate the worker’s travel documents (a practice that is legally condoned in many places), often making it impossible for the worker to leave the country – even to return home – without permission. In

150 See, for example, Concluding Comments: India, CEDAW Committee, 22nd Sess., U.N. Doc. A/55/38 (2000)(“The Committee requests the Government to enforce laws on bonded labor and provide women with self-employment opportunities and minimum wages in home-based production and the non-formal sector.” Para. 83); Concluding Comments: Chile, CEDAW Committee, 21st Sess., U.N. Doc. A/54/38 (1999)(“The Committee congratulates the Government of Chile on the adoption of a number of legislative reforms, including . . . reforms to improve the conditions of access to employment and training, working hours and social benefits for female workers, including domestic workers.” Para. 215).

151 See, for example, Concluding Observations: Panama, CESCER, U.N. Doc. E/C.12/1/Add. 64 (2001)(“The Committee is concerned about the lack of a sufficient number of labor inspectors and the reported widespread use of "blank" contracts and temporary work contracts, which avoid the protection and benefits that the law requires for persons employed under longer-term contracts.” Para. 15); Concluding Observations: Peru, CESCER, U.N. Doc. E/C. 12/1/Add. 14 (1997), (“The Committee recommends that the state party make the necessary efforts to ensure compliance with the legislation on minimum wage, safety and health in the workplace, equal pay for equal work for men and women and the legal recognition of young people from 16 to 25 years of age as workers. To that end, the Committee stresses that sufficient resources should be allocated to the labor inspection services to enable them to perform their task properly.” Para. 32); Concluding Observations: United Kingdom of Great Britain and Northern Ireland, CESCER, U.N. Doc. E/C. 12/1994/19 (1994)(“The Committee expresses its concern about the legal and social position of foreign employees known as domestic helpers in Hong Kong. It considers that these workers’ economic, social and cultural rights are seriously impaired by the so-called two-week rule which provides that a worker may neither seek employment nor stay more than 2 weeks in Hong Kong after the expiration of original employment; by the fact that maximum working hours are not set; and by the discriminatory practice of not being allowed to bring their families to Hong Kong, while professional migrant workers from developed countries are allowed to do so.” Para. 29).

152 See, for example, Concluding Observations: Kuwait, CERD Committee, 43rd Sess., U.N. Doc. A/48/18, paras. 359-381 (1993) (“In addition, it was alleged that many domestic staff of Asian origin, mainly women, were subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault. Members requested information on measures taken by the Government to improve and remedy that situation.”).

153 See, for example, Concluding Observations: Mali, CESCER, U.N. Doc. E/C. 12/1994/17 (1994) (“With regard to Article 6 of the Covenant, the Committee notes with concern that, despite the prohibition of forced labor in the new constitution, debt bondage still exists in the salt mining communities north of Timbuktu. It has to be stated, however, that the number of people treated in this way has decreased and that the Government has assisted in the rehabilitation of former victims.” Para. 8).

154 See ILO, Booklet 4, supra note 19, at 25-27 (reporting that passports are often confiscated by employers of migrant workers in Europe, the Middle East, and East and Southeast Asia); see also Special Rapporteur on the Human Rights of Migrants, 2003 GA Report, supra note 26, at paras. 28-31 (expressing concern about the seizure of passports from migrant domestic workers); and HUMAN RIGHTS WATCH, HIDDEN IN THE HOME, supra note 116, at 13 (reporting the confiscation of travel documents by employers of foreign domestic workers in the United States).
almost half of the cases investigated by Human Rights Watch in the United States, foreign domestic workers had been deprived of their passports by their employers.\textsuperscript{155} Many domestic workers live within the home, or on the same property as, the employing family; often, the family forbids the worker from leaving the premises alone – and sometimes the worker will not be allowed to leave at all.\textsuperscript{156} For example, the ILO found that a travel agency in one country masquerading as an overseas employment firm asked women domestic workers to sign employment contracts stating explicitly that they were not permitted to leave the employer’s premises.\textsuperscript{157} Some employers compound the isolation this kind of seclusion causes by forbidding any contact with the outside world – even through telephone or mail.\textsuperscript{158} Human Rights Watch reported that a number foreign domestic workers interviewed by the organization in the United States had their phone calls monitored by employers listening in on their conversations.\textsuperscript{159} Seclusion is often extreme in the case of undocumented domestic workers. Such women may be “hidden” in the homes of their employers to avoid detection by the authorities.\textsuperscript{160} If detected, these hidden workers often suffer summary expulsion without regard to any outstanding wages or other benefits. In some places, including Malaysia, being present as an undocumented migrant worker is criminalized, a fact that translates into increased vulnerability to abuses by employers, since women will be reluctant to run away from abusive employers for fear they will only face imprisonment by the authorities.\textsuperscript{161}

Many women working as domestic helpers are locked in the home by their employers whenever they are left alone – sometimes for extended periods.\textsuperscript{162} In addition to the routine problems this causes, many women in such circumstances report being terrified that a fire or some other emergency would occur and they would be unable to escape.\textsuperscript{163} In some places, including Bahrain, it is illegal for a domestic employee to “run away” from the employer’s home; in such cases, the police search for the “runaway,” publish her name and photograph in the newspaper, and deport her summarily if she is located.\textsuperscript{164} In Taiwan, Malaysia and Singapore, employers of migrant domestic workers are charged a fee upon employment to ensure they do not “run away”;\textsuperscript{165} the ILO reports that such fees have the effect of encouraging restrictions on

\textsuperscript{155} \textsc{Human Rights Watch, Hidden in the Home, supra note 116, at 3.}
\textsuperscript{156} For example, see ILO, Booklet 4, supra note 19 at 26. \textit{See also} Jureidini, supra note 121, at 10-11 (Lebanon), and \textsc{Human Rights Watch, Hidden in the Home, supra note 118, at 13-15 (United States).}
\textsuperscript{157} \textit{See} Kebede, \textit{supra} note 111, at 6-7.
\textsuperscript{158} \textit{See} Jureidini \textit{supra} note 121, at 10-11 (discussing prohibitions on the use of the telephone and mail by domestic workers in Lebanon).
\textsuperscript{159} \textsc{Human Rights Watch, Hidden in the Home, supra note 116, at 18.}
\textsuperscript{161} \textsc{Human Rights Watch, Help Wanted, supra note 108, at 12, 40-42.}
\textsuperscript{162} \textit{See} ILO, Booklet 4, \textit{supra note} 19, at 26 and 29 (noting that foreign domestic workers are often locked in their employers’ homes in Lebanon, and citing a report by a UK-based organization that found 54% of its domestic worker clients had been subjected to this practice).
\textsuperscript{163} \textit{See} Kebede, \textit{supra} note 111, at 9.
\textsuperscript{164} \textit{See} al-Najjar, \textit{supra} note 25, at 10-11.
\textsuperscript{165} \textit{See} ILO, Booklet 4, \textit{supra note} 19, at 26 (Singapore and Malaysia), and Lan, \textit{supra note} 131, at 5.
employees’ freedom of movement by employers reluctant to pay a new fee should the current domestic worker “run away.”  

The social exclusion created by the cloistering of migrant women in domestic service can take a heavy toll: many women do not have the opportunity to form friendships or create community ties. The resulting solitude exacerbates women’s constructed vulnerability to abuse, and deprives them of possible support when violations occur. It also can lead to depression and other psychological difficulties. Women who are deprived of contact with their families may suffer especially severely, to say nothing of the impact on the workers’ family members, especially children.

One domestic worker told ILO researchers that she became ill during her employment as a domestic helper and could no longer work. Her contract stated that she was required to pay US $3000 if she left her place of employment before the term of her employment had expired. Since she did not have the full fee, the woman offered $300 – the sum total of her savings. When this was rejected as too little, the woman fabricated a mental illness to escape. Her employer’s male relatives, as well as the local police, beat the woman before letting her return home.

In addition to fees charged by some agencies and employers when women migrants break their contracts, governments sometimes impose exit fees for time spent in the country illegally. In such instances, women are charged for each day they spent out of status. This means that women who have escaped harsh and abusive employment conditions – and thereby have fallen out of legal status because they are no longer lawfully employed – are literally fined for the abuse of their employers.

1. Human Rights Standards Relevant to Restrictions on the Freedom of Movement

Under the major human rights treaties, the right to freedom of movement can be broken down into three main components: the right of an individual to move within a state when she is there legally, the right to leave any state, and the right to return to her own state. International human rights law does not guarantee rights more generally concerning free movement across state borders. The ICCPR makes clear that right to freedom of movement within a state may be limited only under specified circumstances related to national security, public order, public

\[^{166}\text{See ILO, Booklet 4, supra note 19, at 26.}\]
\[^{167}\text{Id. at 7.}\]
\[^{168}\text{Id. at 7.}\]
\[^{169}\text{Id. at 11.}\]
\[^{170}\text{ICCPR Article 12 guarantees to everyone lawfully within the territory of a state the right to liberty of movement and freedom to choose a residence within that territory, and provides that everyone has the right to leave any country, including his or her own.}\]
\[^{171}\text{ICCPR article 12(2). See also MWC Article 8(1) guarantees the right of migrant workers and members of their families to leave any state, including their state of origin. This right shall not be subject to any restrictions except those that are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the Convention.}\]
\[^{172}\text{ICCPR Article 12 prohibits the arbitrary deprivation of the right of every person to enter his or her own country. See also article 8(2) of the MWC (providing that migrant workers and members of their families shall have the right at any time to enter and remain in their state of origin).}\]
health or morals, or the rights and freedoms of others. While the general rule is to allow restrictions only in certain specified circumstances, some restrictions on the freedom of movement may permissibly be imposed, under the ICCPR, on individuals who are not lawfully authorized to be on the territory of a state. Individuals with regular status have the same right to freedom of movement as citizens and choice of residence, a right echoed under the MWC. When subject to expulsion, however, migrants have the right to present their reasons for being present without permission. The right to leave a country, and to return to one’s home country – and to remain at home, however, may not be restricted arbitrarily.

The right to freedom of movement must be guaranteed to women and men equally: in its General Comment on the Freedom of Movement (No. 27, 1999), the Human Rights Committee underlined the importance of this right for women, noting that it is “incompatible” with the right of a woman to move freely to subject that free movement to “the decision of another person, including a relative.” Similarly, the Human Rights Committee has emphasized that restrictions on women’s ability to travel or to acquire identity and travel documents, including passports – including requirements concerning the approval of third parties like husbands – violate women’s rights to freedom of movement under the ICCPR. Of crucial importance to women migrant workers is the Human Rights Committee’s clear concern with the activities of private citizens in restricting women’s freedom of movement: “the state party must ensure that the rights guaranteed in article 12 are protected not only from public but also from private interference. In the case of women, this obligation to protect is particularly pertinent.” Indeed, if they do not exercise due diligence to end restrictions imposed by private employers –

173 Article 12 makes clear that freedom of movement may only be restricted in a limited set of circumstances: to protect national security, public order, public health or morals, or the rights and freedoms of others.


175 Article 39 provides that migrant workers who are documented and in regular status have the right to liberty of movement in the territory of the state of employment and freedom to choose their residence there.

176 Article 13 provides that aliens lawfully within the territory of a state party may be expelled from that territory only in pursuance of a decision reached in accordance with law. Aliens also have the right to submit the reasons against their expulsion and to have their cases reviewed by, and be represented before, a competent authority, except where compelling reasons of national security otherwise require.

177 See U.N. Human Rights Committee, supra note 75, at 177 (“The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one’s own country.”).

178 ICCPR Article 12(4).

179 U.N. Human Rights Committee, supra note 75, at 177.

180 Id.

181 Id.

182 The due diligence standard has been accepted by many human rights bodies as the appropriate measure of the adequacy of state efforts aimed at halting violations at the hands of non-state actors. For a discussion of this standard, see Report of the Special Rapporteur on Violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44 (29 February 2000), at paras. 51-53 (noting that “In addition to being articulated in international instruments themselves, the due diligence standard... has been widely accepted as the measure by which state responsibility for violations of human rights by non-state actors is assessed. Due diligence requires more than the mere enactment of formal legal prohibitions. The states’ measures must effectively prevent such actions. Failing effective prevention, a prompt and thorough investigation, resulting in prosecution of the culpable parties and compensation for the victim, must be undertaken. In order to comply with the due diligence standard, the state must act in good faith.”). The due diligence standard has also been explicitly
especially severe restrictions like locking in the home, which could amount to arbitrary detention in some circumstances\textsuperscript{183} – states could be responsible for violations of women’s human rights under the ICCPR.

Under CEDAW, women are guaranteed the right to equal exercise of the freedom of movement, which means that any restrictions based on sex – or which result in disproportionate disadvantages for women – amount to sex discrimination and must be dismantled.\textsuperscript{184} In its General Recommendation on Equality in marriage and family relations (No. 21, 1994), the CEDAW Committee stressed that “[d]omicile, like nationality, should be capable of change at will by an adult woman regardless of her marital status. Any restrictions on a woman’s right to choose a domicile on the same basis as a man may limit her access to the courts in the country in which she lives or prevent her from entering and leaving a country freely and in her own right.” The Committee then stated clearly that “[m]igrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.”

Under CERD no restrictions to freedom of movement may be placed on individuals on the basis of race, color, ethnicity, or national origin.\textsuperscript{185} The CERD Committee has specifically interpreted the convention to require states to take steps to ensure that the passports of migrant domestic workers are not confiscated, and to protect them against illegal confinement.\textsuperscript{186} The Migrant Workers Convention requires states to criminalize the confiscation and destruction of identity documents, such as passports, and residence or work papers.\textsuperscript{187}

2. \textit{Measures to Respect, Protect and Fulfill}

In order to implement these obligations, states may be required to take many steps to protect the rights of women migrants to freedom of movement. Based on the relevant treaty provisions and the guidance provided by the treaty bodies, it is now clear that states may be required to adopt a range of measures to fulfill their obligations, including the following examples. States should ensure that all employers, agencies, and migrant workers themselves, are aware that it is

\textsuperscript{183} The Human Rights Committee has indicated that confinement within the home may be cognizable as arbitrary detention under article 9 of the ICCPR in some circumstances. See U.N. Human Rights Committee, \textit{supra} note 75, at 181 (“With regard to article 9, states parties should provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house.” Para. 14) (internal citation omitted).
\textsuperscript{184} CEDAW Article 15 requires states to accord to men and women the same rights with regard to the law relating to the movement of persons.
\textsuperscript{185} CERD Article 5(c) guarantees the right of everyone, without distinction as to race, color, or national or ethnic origin, freedom of movement and residence. Article 5(c) also recognizes the right of everyone, without distinction as to race, color, or national or ethnic origin, the right to leave any country, including one’s own, and to return to one’s country.
\textsuperscript{186} CERD, \textit{supra} note 92.
\textsuperscript{187} MWC Article 21 provides that it shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family.
completely forbidden for identity documents and work or residence papers to be confiscated or destroyed, and failure to obey should be investigated and punished. This is especially important in relation to women migrants working in domestic settings. Sending and host states should review domestic legislation and practice to ensure that women’s right to freedom of movement is not subject to the approval of third persons, such as husbands, fathers, or other male relatives. Women should be allowed to freely obtain their own individual identity, work, and residence papers. Arbitrary restrictions on the ability of migrant workers legally in the country of employment to freedom of movement within that country should be removed. Restrictions on the right of all migrant workers to leave a country and arbitrary limits on the

188 CERD has interpreted article 5(e)(i) to include this obligation. See, for example, Concluding Observations: Lebanon, CERD Committee, 52nd Sess., U.N. Doc. CERD/C/304/Add.49 (1998) (“In relation to article 5(e)(i) of the Convention, the situation of migrant workers is of concern, especially in relation to access to work and equitable conditions of employment. In this regard, reports of confiscations of passports of foreign workers by their Lebanese employees are a matter which should be looked into by the responsible authorities of the state party.”) Para. 15), and Kuwait, supra note 152. (“In addition, it was alleged that many domestic staff of Asian origin, mainly women, were subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault. Members requested information on measures taken by the Government to improve and remedy that situation.”). The obligation is also explicitly stated in Article 21 of the MWC, which provides that it shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. Under general human rights law, the state has the responsibility to protect this right – i.e. to ensure that third parties do not interfere with it. Under the due diligence standard, violations by third parties must be effectively investigated and punished.

189 See, for example, Concluding Observations: Saudi Arabia, CERD Committee, 62nd Sess., U.N. Doc. CERD/C/62/CO/8 (2003) (“The Committee has also noted with satisfaction that measures are taken to put an end to the practice of employers who retain the passports of their foreign employees, in particular of domestic workers.”) Para. 6).

190 U.N. Human Rights Committee, supra note 75, at 181. (“states parties should provide information on any legal provision or any practices which restrict women’s right to freedom of movement, for example, the exercise of marital powers over the wife or parental powers over adult daughters; legal or de facto requirements which prevent women from traveling, such as the requirement of consent of a third party to the issuance of a passport or other type of travel documents to an adult woman. States parties should also report on measures taken to eliminate such laws and practices and to protect women against them, including reference to available domestic remedies.”) See also, Concluding Observations: Sudan, U.N. Human Rights Committee, 61st Sess., U.N. Doc. CCPR/C/79/Add.85 (1997) (“The Committee is concerned that . . . immigration officers may arbitrarily require women to show . . . a male relative consents to their leaving the Sudan.”) Para. 14).

191 Id.

192 See, for example, Concluding Observations: Dominican Republic, U.N. Human Rights Committee, U.N. Doc. CCPR/CO/71/DOM (2001) (“The Committee expresses its . . . concern over the living and working conditions of Haitian workers and the tolerated practices that restrict their freedom of movement. The state party should give priority to addressing the issue of the working and living conditions of Haitian workers, and ensure that those workers can take advantage of the rights and safeguards laid down in articles 8, 17 and 22 of the Covenant.”) Para. 17); Concluding Observations: Armenia, U.N. Human Rights Committee, 64th Sess., U.N. Doc. CCPR/C/79/Add.100 (1998) (“The Committee expresses its grave concern about the incompatibility of several provisions of the Constitution with the Covenant: for example, article 22 of the Constitution, which guarantees freedom of movement only to Armenian citizens, contravenes article 12 of the Covenant.”) Para. 7); and Concluding Observations: Lithuania, U.N. Human Rights Committee, 61st Sess., U.N. Doc. CCPR/C/79/Add.87 (1997) (“The Committee expresses concern that the right of foreign nationals to freedom of movement may be restricted on grounds not compatible with the Covenant. . . . Provisions which restrict freedom of movement in a manner incompatible with article 12 of the Covenant should be repealed.”) Para. 15).

193 See, for example, Concluding Observations: Georgia, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.75 (1997) (“The Committee recommends that the authorities put an end, once and for all, to the restrictions on freedom of movement within the country and on the right to leave the country.”) Para. 29); and
ability to enter the home country and remain there, should be repealed or amended. Host country governments should take steps to end restrictions imposed by private employers – especially severe restrictions like locking in the home.

**Labor Market Discrimination Against Women – at Home and Abroad**

Gender-based discrimination in the labor market at home is one of the factors that leads women to cross borders in search of work. When pervasive, such discrimination can result in scarce opportunities, shrunken salaries, and limited horizons for women. Seeking a better fortune abroad becomes an attractive option. Gender discrimination in the labor market takes many forms, both direct and indirect. Three specific phenomena – the wage gap between men and women, labor market segregation by gender, and the glass ceiling – have been of particular concern to women workers in both sending and receiving countries. Unfortunately, women migrants usually find that discrimination is also present in the host country. Indeed, sometimes it is worse, with women migrants tracked into very specific sectors while men are recruited for others. Many women find their options limited to work in the domestic sector, for example, where they act as housekeepers, servants, personal assistants, tailors, cooks, and childcare attendants.

**The Gender Wage Gap**

In countries around the world, women have a documented disadvantage in earned income relative to men. The ILO reports that women earn 20-30% less than men worldwide. The causes for this difference are varied, but they are linked to labor market segregation, in which women and men tend to predominate in distinct fields, and the phenomenon of the glass ceiling, in which women are clustered in the lower rungs of the employment ladder. Wage-based discrimination is a major factor as well. Wage-based discrimination occurs when work of equal and comparable value is treated differently in terms of remuneration. For example, work involving repeated lifting of heavy loads may be poorly paid when it entails women lifting household equipment or children in the domestic setting, and well paid when it concerns men lifting machine parts in the industrial sector.

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*Concluding Observations: Gabon*, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.71 (1996) (“With regard to the rights of non-Gabonese citizens and refugees living in Gabon, the Committee is concerned about legal impediments to their freedom of movement within the country as well as by the requirement of an exit visa for foreign workers, which run counter to the provisions in article 12 of the Covenant.” Para. 16).

194 ICCPR Article 12(4). See *also* U.N. Human Rights Committee, *supra* note 75, at 177 (“The right of a person to enter his or her own country recognizes the special relationship of a person to that country. The right has various facets. It implies the right to remain in one’s own country.”).

195 See discussion of due diligence, *supra* note 182.

196 “Men migrate for a variety of jobs ranging from low to high skilled jobs. But female labour migration is strongly characterized by the concentration in a very limited number of female-dominated occupations, which are associated with traditional gender roles, such as domestic workers and ‘entertainment’ workers.” ILO, Booklet 1, *supra* note 7, at 9.


198 See ANKER, GENDER AND JOBS, *supra* note 7, at 30-35.

199 See *id.*
Women migrant workers often find that their wages are lower than both those of men who have crossed borders for work, and of native-born women in their country of work.\textsuperscript{200} In addition to this gender wage gap, in some countries, wages are more closely linked to the employee’s national or ethnic origin than to their skills.\textsuperscript{201} Indeed, in many countries, wage rates for women domestic workers of certain nationalities and/or races were significantly higher than those of others.\textsuperscript{202}

**Labor Market Segregation**

Another way in which indirect, institutionalized discrimination in employment manifests itself is in labor market segregation. Segregation occurs when women and men are grouped in different occupations or in different sectors of the economy.\textsuperscript{203} When examined closely, the pattern of these groupings can often be linked to stereotyped ideas about men and women’s roles, strengths, and weaknesses. For example, in many countries, women predominate in the fields of childcare, education, health care, and personal and household services, while men predominate in construction, utilities, transport and communications.\textsuperscript{204} Another important pattern that has been documented is that pay in the fields in which women predominate tends to be lower than the fields in which men predominate, contributing to the gender wage gap.\textsuperscript{205} The impact of privatization on these trends is not completely clear, but initial research indicates that many of the sectors in which women predominate have been state-controlled fields, meaning that the picture may well worsen for women as those areas are privatized.\textsuperscript{206}

The causes of labor market segregation are many and varied. Stereotypes play a significant role, influencing the choices individuals make, including an employer’s preference among qualified candidates or a woman’s choice among fields of study in preparation for an occupation.\textsuperscript{207}

Women migrant workers tend to be concentrated in the service sector, and are clustered in women-specific jobs – both skilled and unskilled. Women migrants can be found in skilled positions such as nurses, teachers and secretaries, and unskilled jobs such as domestic workers, entertainers and hotel employees. In some countries, the majority of women are employed as domestic workers (“housemaids,” “servants,” or “nannies”).\textsuperscript{208} Women’s work within the domestic sphere is heavily based on gendered expectations: perceived to be especially fit for

\begin{itemize}
\item \textsuperscript{200} See ILO, Booklet 1, supra note 7, at 29.
\item \textsuperscript{201} See al-Najar, supra note 23, at 19-20; Amy Sim & Vivienne Wee, Labour Migration by Filipina Domestic Workers to Hong Kong: Conditions, Process and Implications, paper presented at the “International Workshop on Contemporary Perspectives on Asian Transnational Domestic Workers” (on file with author), at 7-10 (documenting the significant wage differentials among domestic workers from the Philippines, Indonesia, and Thailand).
\item \textsuperscript{202} Id.
\item \textsuperscript{203} See ANKER, GENDER AND JOBS, supra note 7.
\item \textsuperscript{204} See id. at 250-285 (reviewing seventeen typical “male” and “female” occupations).
\item \textsuperscript{205} See id. at 7-8.
\item \textsuperscript{206} See Anne Orford, Contesting Globalization: A Feminist Perspective on the Future of Human Rights, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS (Burns H. Weston & Stephen P. Marks, eds., 1999) 157, 157-8 (noting that women “have been described as the ‘shock absorbers’ of so-called shock therapy and structural adjustment programs imposed by the International Monetary Fund (IMF) and World Bank, often the first to face the loss of employment when the public sector fires workers or when the workforce is casualized.”) (citation omitted).
\item \textsuperscript{207} See ANKER, GENDER AND JOBS, supra note 7, at 22-28.
\item \textsuperscript{208} See id.
\end{itemize}
work with children, housecleaning, and other domestic chores, women migrants are tracked into this sector even when they have professional training or qualifications. For example, 23% of domestic workers in one study conducted by the ILO had university degrees.\textsuperscript{209}

The Glass Ceiling

In addition to gender-based labor market segregation and the gender wage gap, the glass ceiling is holding women back from achieving equality with men in the labor market. The “glass ceiling” is a way of describing the phenomenon – evidenced all over the world – of an invisible barrier that keeps women from occupying the highest-level positions in the labor market. In countries at varying levels of development, evidence has shown that women are underrepresented at all levels of management, with the most dramatic gender disparities occurring at the very highest levels. This kind of discrimination is directly linked to the gender wage gap, since workers at lower levels bring in less money than managers and business leaders.

For women migrant workers, climbing to higher levels of responsibility is often impossible. Research shows that the heaviest concentration of women migrant workers is usually found at the lower end of the job hierarchy in both skilled and unskilled sectors. For women working in the domestic sphere, there is almost never any possibility for advancement. While occasionally women domestic workers will be asked to train new colleagues, this work is not rewarded with increased pay or recognized as management in professional terms. Women in domestic service rarely have the opportunity to broaden their skills or obtain new qualifications.

1. Human Rights Standards Relevant to Labor Market Discrimination Against Women

The key human rights treaties provide significant protection for women migrant workers against discrimination in the labor market. CEDAW provides the strongest guarantees against gender-based discrimination, requiring states parties to ensure that women have the same rights as men in the field of employment, and specifying that women have the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value.\textsuperscript{210} In General Recommendation on Equal remuneration for work of equal value (No. 13, 1989), the CEDAW Committee noted that despite the adoption and use of the principle of equal remuneration for work of equal value, “more remains to be done to ensure the application of that principle in practice.”\textsuperscript{211} In the same General Recommendation, the CEDAW Committee recommended that states parties “consider the study, development and adoption of job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of those jobs of a different nature, in which women presently predominate, with those jobs in which men presently

\textsuperscript{209} al-Najjar, supra note 25, at 23.
\textsuperscript{210} CEDAW Article 11 requires states parties to ensure that women have the right to the same employment opportunities, including specifically the right to equal remuneration and benefits, and to equal treatment in respect of work of equal value. Article 11’s guarantee of equal opportunities in employment includes a provision that requires states parties to ensure women have the equal right to promotion and the right to receive vocational training and recurrent training. Article 11 also provides that states must ensure women have the right to the same employment opportunities as men, including the application of the same criteria for selection in matters of employment.
\textsuperscript{211} General Recommendation 13, Equal Remuneration for Work of Equal Value, CEDAW Committee, 8th Sess., reprinted in Compilation of General Comments, supra note 75, at 237.
predominate, and they should include the results achieved in their reports” to the Committee. 212

Finally, the Committee recommended that states parties should actively assist in the implementation of equal value schemes, including by encouraging the incorporation of the principle into labor agreements. 213

Through its articles on equality in employment and customs and practices based on stereotypes, CEDAW addresses the problem of labor market segregation by aiming at its root causes: stereotypes and customs that funnel women into certain occupations. 214

The Convention also requires states to ensure women have the same rights as men in the field of education; under this provision, sending states must ensure that women are not excluded from certain educational pathways, and host states must ensure that the same conditions for career and vocational guidance apply to women and men. 215

The CEDAW committee has amplified the Convention’s provisions in this regard in its General Recommendation on equal remuneration for work of equal value by stating that gender-based segregation in the labor market must be overcome. 216

The ICESCR includes provisions proscribing discrimination on the basis of gender 217 as well as substantive rights to just and favorable working conditions for all. 218

The latter includes an explicit requirement that women must be “guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families.” 219

The Convention’s provisions are open to interpretation concerning discrimination on the basis of alien status: as stated above, although article 2(3) would appear to allow developing countries to discriminate against aliens concerning the economic rights at issue, the CESC has in practice treated this kind of discrimination as prohibited under the Covenant, suggesting that the application of different rates of pay to migrant workers as compared to citizens was discriminatory. 220

Taken together then, these provisions translate into guarantees

212 Id.
213 Id.
214 CEDAW Article 5 requires states parties to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotypes roles for men and women.
215 CEDAW Article 10 requires states parties to ensure women have the right to the same opportunities for access to programs of continuing education, including adult and functional literacy programs, particularly those aimed at reducing any gap in education existing between men and women.
216 CEDAW Committee, supra note 75, at 237.
217 ICESCR Article 2 calls on states to ensure that the rights included in the Convention are exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 3 requires states to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights in the Convention.
218 ICESCR Article 7(a) recognizes the right to the enjoyment of just and favorable conditions of work, including remuneration which provides all workers, at a minimum, with: fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; and a decent living for themselves and their families. Article 7(c) sets out the right of equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.
219 Id.
220 See, for example, Concluding Observations: Libya, CESC, U.N. Doc. E/C.12/1/Add.15 (1997) (“The Committee expresses its concern at reports that foreign workers who have come to work in the state party in connection with the Great-Man-Made River project are living and working in appalling conditions. According to a report of the Committee of Experts on the Application of Conventions and Recommendations of the International Labor Organization (ILO), foreign employees in the state party who are accused of infringing disciplinary rules may
for fair wages sufficient to support a decent living without distinction on the basis of gender or alien status. A similar non-discrimination result could be reached under the ICCPR in states that have enacted minimum wage or equal value laws. Since the Human Rights Committee has interpreted the treaty’s non-discrimination regime to include alien status, these protective laws must be applied equally to citizens and non-citizens, unless the state can demonstrate that the exemption of aliens aims at achieving a legitimate purpose under the Covenant. The failure to apply such laws to migrants would amount to a denial of equal protection of the law under article 26.

CERD prohibits discrimination in employment, conditions of work, and remuneration on the basis of race, color, or national or ethnic origin. These protections apply equally to men and women. The Migrant Workers Convention guarantees migrant workers – male and female alike – treatment not less favorable than that which applies to nationals in respect of remuneration. Article 25 of the MWC also makes clear that employers cannot be relieved of their obligation to pay migrant workers fairly on the basis of a migrant’s irregular status. Article 1 of the MWC guarantees that the protections in the Convention are applicable without distinction of any kind as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic, or social origin, nationality, age, economic position, property, marital status, birth or other status.

2. Measures to Respect, Protect, and Fulfill

There are a variety of measures states may need to take to dismantle and counteract labor-market discrimination against women migrant workers. Based on the relevant treaty provisions and the guidance from the treaty bodies, it is now clear that states may be required to adopt a range of measures to...

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221 U.N. Human Rights Committee, supra note 75, at para. 2.
222 This is the rule set out by the Human Rights Committee in its General Comment on Non-discrimination: article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities. . . Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory.” U.N. Human Rights Committee, supra note 75. But: “the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” Id. at para. 12.
223 CERD Article 5(e)(i) guarantees the rights to non-discrimination on the basis of race, color, or national or ethnic origin in work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration.
224 This is the rule set out by the Human Rights Committee in its General Comment on Non-discrimination: article 26 “prohibits discrimination in law or in fact in any field regulated and protected by public authorities. . . Thus, when legislation is adopted by a state party, it must comply with the requirement of article 26 that its content should not be discriminatory.” U.N. Human Rights Committee, see discussion supra note 75, at 149. But: “the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant” Id. at para. 12.
225 MWC Article 25 guarantees migrant workers treatment not less favorable than that which applies to nationals of the state of employment in respect of remuneration. This standard is applicable to all contracts – including those concluded within the private sector.
measures to fulfill their obligations concerning labor market discrimination, including the following examples. States parties may need to adopt the principle of equal remuneration for work of equal value, and ensure the principle is translated into action, in particular by studying, developing, and adopting job evaluation systems based on gender-neutral criteria that would facilitate the comparison of the value of jobs in which men predominate to those in which women predominate. Since women migrants predominate in very particular fields in many countries – especially in areas such as domestic labor – such studies could lead to improvements for them. As a general rule, states should ensure that the same pay rates are applied to foreign workers as to citizens. States may also need to adopt special measures aimed at directly combating gender-based labor market segregation; measures may be required on the part of

226 ICESCR article 7(a)(i). CEDAW article 11(1)(d).
227 CEDAW Committee, supra note 75, at 237-238. See also, for example, Concluding Observations: Kazakhstan, CEDAW Committee, 24th Sess., U.N. Doc. A/56/38, paras. 68-113 (2001) (The Committee “further recommends wage increases in female-dominated sectors in order to decrease the wage differentials between those and male-dominated sectors.” Para. 102); Concluding Observations: Greece, CEDAW Committee, 20th Sess., U.N. Doc. A/54/38, paras. 172-212 (1999) (“Noting that there are positive trends in the employment situation of women, the Committee remains concerned about the situation of women in the formal and informal labor market, including the high percentage of unemployed women and the continuing pay gap between women and men. It is also concerned that many of the new jobs occupied by women might provide only low pay and limited career prospects. The Committee is concerned that the employment prospects for women in rural areas, for women who are migrating from the agricultural sector into other employment areas and for immigrant women remain precarious, especially for those with low skills or who are functionally illiterate.” Para. 203); Concluding Observations: Slovakia, CEDAW Committee, 19th Sess., U.N. Doc. A/53/38/Rev.1, paras. 59-99 (1998) (“The segregation of women and men into different employment sectors is not a valid justification for unequal pay between women and men. The Committee is concerned that job descriptions that link ‘physically demanding’ elements to male strength and to higher pay for men may be based on a one-sided understanding of those elements. These descriptions may underestimate other physically demanding elements found in women’s work, thereby discriminating against women in terms of pay.” Para. 87). See also Concluding Observations: Slovakia, CESCR, 29th Sess., U.N. Doc. E/C.12/1/Add.81 (2002) (“The Committee is concerned that there remains a large disparity between the wages of men and women, and that, according to the Slovak Statistical Office, women’s wages in general are 25 per cent lower than those of men. . . The Committee urges the state party to effectively implement measures recently adopted to ensure equal pay for work of equal value, as provided for in the Covenant, and to reduce the wage gap between men and women.” Paras. 13, 26); Concluding Observations: Colombia, CESCR, 27th Sess., U.N. Doc. E/C.12/1/Add.74 (2001) (“The Committee is also concerned that there is still a large disparity between the wages of men and women, particularly in the commercial sector, and that according to the Presidential Advisory Office on Women’s Equity, women’s wages in general are 25 per cent lower than men’s. . . [The Committee] urges the state party to adopt a policy of equal pay for work of equal value as provided for in the Covenant and to reduce the wage gap between men and women.” Paras. 16, 37); Concluding Observations: Iceland, CESCR, 20th Sess., U.N. Doc. E/C.12/1/Add.32 (1999) (“The Committee welcomes the state party’s efforts to further the goal of the implementation of gender equality and fuller participation of women in public affairs. It welcomes the Act on the Equal Status of Women and Men, which paved the way for special equal-status programs such as the Action Programme, 1998-2001, which attempts to eliminate traditional obstacles to equality. The Committee welcomes the state party’s acknowledgement that formal or legal equality is not sufficient if it does not result in real equality between both sexes in practice. It notes, in particular, that an important objective of the Government of Iceland is to work against wage disparities based on gender.” Para. 4); and Concluding Observations: Republic of Korea, CESCR, U.N. Doc. E/C.12/1995/3 (1995) (“Particular concern is expressed as to the wage differential between men and women and to other discriminatory practices in the workplace including an apparently high rate of sexual discrimination in recruitment. The Committee expresses its concern with regard to the non-enforcement by the Government of its own policies and legislation in these matters.” Para. 11).
228 ICESCR by interpretation (see discussion, supra). See also MWC Article 25.
229 See, for example, CEDAW concluding comments concerning: Slovenia 1997 (“The Committee was concerned about the clustering of female students in certain disciplines, at both schools and universities, that did not provide optimum employment opportunities.” The Committee recommended “revised labor legislation” containing quality
both sending and receiving states to facilitate women’s entry into growth sectors of the economy instead of traditionally female-dominated sectors. Finally, states should watch carefully for the ways in which race and gender may interact to keep women migrant workers’ wages low, and take corrective measures.231

**Dangerous and Degrading Working Conditions: Safety and Health**

Many refer to the kind of work migrant laborers typically perform as the “three-D jobs”: dirty, degrading and dangerous.232 Included in this category are those jobs at the lowest ends of the pay scale that are often deemed undesirable by the local labor force. Such work is usually offered through temporary or short-term agreements, and may be in the informal or illegal sectors. The ILO has found that there is a significant link between working in the informal economy, being female, and being poor.233 Indeed, women in the informal sector are often found in poorly-paid positions within the commercial sex sector, low-wage garment and “sweatshop”

and non-discrimination provisions “and strong sanctions for non-compliance.” It also “recommended temporary special measures with concrete numerical goals and timetables in order to overcome employment segregation.” Paras. 103, 115); Turkey 1997 (“The Committee urged the Government of Turkey to take adequate measures to provide skills training, retraining and credit facilities or other support services that would provide employment opportunities or self-employment for urban migrant workers, to correct occupational segregation through concrete measures and to provide the necessary protection to working women to ensure their safety and healthy conditions of work.” Para. 202).

See, for example, Concluding Observations: Slovenia, CEDAW Committee, U.N. Doc. A/52/38/Rev.1, paras.81-122 (1997) (“The Committee was concerned about the clustering of female students in certain disciplines, at both schools and universities, that did not provide optimum employment opportunities.” The Committee recommended “revised labor legislation” containing quality and non-discrimination provisions “and strong sanctions for non-compliance.” It also “recommended temporary special measures with concrete numerical goals and timetables in order to overcome employment segregation.” (103, 115).

See, for example, Concluding Observations: Republic of Korea, CERD Committee, 54th Sess., U.N. Doc. CERD/C/304/Add.65 (1999) (“While acknowledging the fact that the state party has recently taken measures to improve the status of foreign "industrial trainees" and other foreigners working in the country, the Committee suggests that the Government of the Republic of Korea take further measures against discrimination in the labor conditions of foreign workers. The Committee also recommends that measures be taken to improve the situation of all migrant workers, particularly those with irregular status.” Para.16), and Lebanon 1998 (“In relation to article 5 (e) (i) of the Convention, the situation of migrant workers is of concern, especially in relation to access to work and equitable conditions of employment.” Para. 15).

Taran & Geronimi, supra note 9. See also ILO, Booklet 1, supra note 7, at 19 (stating that “women are concentrated in the ‘3D jobs’ – the dirty, degrading and demeaning jobs” and quoting another writer who explains that “if migrants are concentrated in SALEP-jobs (Shunned by All Nationals Except the Very Poorest), migrant women are concentrated in the most vulnerable of these jobs”). Id. at 19 (quoting and citing W. R. Bohning, Conceptualizing and Simulating the Impact of the Asian Crisis on Filipinos’ Employment Opportunities Abroad, 7 ASIAN & PACIFIC MIGRATION J. 339 (1998)). Parreñas, supra note 23, at 174, found that employers sometimes intentionally alter household tasks to underline the difference between a domestic worker and their employer: “To enhance their own status, employers often assign tasks that they would not want to undertake to their domestics. In Italy, domestic workers are expected to scrub the floor on their knees. When performing the same task themselves, employers, the domestic workers noticed, enforce a different standard: they do not scrub but instead mop the floor. The distinction of appropriate household labor for domestic workers and employers enforces race and class hierarchies between women as tasks unacceptable for employers are rendered acceptable for domestic workers, most of whom are women of color.” (citation omitted).

enterprise, or domestic work. The worst positions in these sectors are often filled by irregular migrants, who are especially vulnerable to exploitation and to safety and health hazards, since they are frequently marginalized and have little recourse to protection by the authorities. Furthermore, work in these sectors is often unregulated, leaving even those brave enough to seek official assistance without clear legal rights.

Women who work in domestic service are often exposed to health and safety threats, including exposure to strong cleaning agents without adequate information about risks and precautions (and in some cases with employer-imposed restrictions on taking precautions like wearing gloves), and dangers within the home, including sexual harassment and violence (addressed in a separate section, below). Despite these risks, in many countries, workplace health and safety regulations for workers are expressly not applied to domestic workers: in the United States and Croatia, for example, domestic workers are explicitly excluded from such protections. If injured on the job, migrant workers are frequently denied medical treatment and risk losing their positions. Benefits extended to non-migrant workers are often not available to women migrants – especially those working in domestic service – either because domestic workers are not considered “employees” under national labor law, or because laws explicitly exempt nonnationals from protections and benefits. Indeed, women migrant workers engaged in domestic service are often exempted from health insurance, workers compensation, pension, social security, and unemployment programs, where these exist.

1. Human Rights Standards Relevant to Dangerous and Degrading Working Conditions

The Convention on the Elimination of All Forms of Discrimination Against Women guarantees women the equal right to protection of health and safety in working conditions, including the safeguarding of the function of reproduction. Similarly, the International Convention on the

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234 See ILO, Booklet 4, supra note 19, at 28-29; see also Kebede, supra note 111, at 9, and HUMAN RIGHTS WATCH, HIDDEN IN THE HOME supra note 116, at 15 (United States).
235 In the United States, domestic workers are explicitly excluded from regulations implementing the Occupational Safety and Health Act. See HUMAN RIGHTS WATCH, HIDDEN IN THE HOME, supra note 118, at 30; and Young, supra note 24, at 27-29. Similarly, in Croatia, the Safety and Health Protection at the Workplace Act (1996) specifies that “the provisions of this Act do not apply to domestic servants.” See ILO, Booklet 4, supra note 19, at 12.
236 See ILO, Booklet 4, supra note 19, at 28-29.
237 In the United States, for example, domestic workers are excluded from most state-level workers compensation acts. See Young, supra note 24, at 27-28.
238 Exclusion may come because of a woman’s undocumented status, as in Japan, where all undocumented migrant workers are excluded from the national health service. See ILO, Booklet 4, supra note 19, at 28. In other places, migrant workers may qualify for service, but at higher costs: the ILO gives the example of Malaysia, where migrants pay about twice the rate of nationals for medical treatment in public hospitals. Id.
239 CEDAW Article 12 provides that states must ensure women equal access to health care services, including those related to family planning. In its General Recommendation on Women and Health, the CEDAW Committee called on states to give special attention to the needs of migrant women, who may suffer ill-effects on their health status due to vulnerabilities and discrimination. General Recommendation 24, Women and Health, CEDAW Committee, 20th Sess., reprinted in Compilation of General Comments, supra note 77, at 271.
240 CEDAW Article 11 guarantees women the equal right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. Article 11 also requires states to provide special protection to women during pregnancy in types of work proved to be harmful to them. Article 11 protects women’s right to social security and the right to paid leave, on a basis of equality with men.
Elimination of All Forms of Racial Discrimination ensures equality in working conditions and public health and medical care.\footnote{CERD Article 5(e)(i) guarantees the rights to non-discrimination on the basis of race, color, or national or ethnic origin in work, to free choice of employment, to just and favorable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favorable remuneration. Article 5(e)(iv) guarantees equality before the law without distinction as to race, color, or national or ethnic origin, with respect to the right to public health, medical care, social security and social services. See also CERD, supra note 92 (states must “[t]ake measures to eliminate discrimination against non-citizens in relation to working conditions and work requirements, including employment rules and practices with discriminatory purposes or effects”).} These provisions have been interpreted to mean that states should remove obstacles preventing non-citizens from obtaining health care, including preventive, curative and palliative health services.\footnote{CERD, supra note 92.} Through its provisions on the right to the highest attainable standard of health, the International Covenant on Economic, Social and Cultural Rights has been interpreted to require that hazards in the workplace be minimized\footnote{ICESCR Article 12 provides that states must take steps necessary to improve all aspects of environmental and industrial hygiene, and to prevent, treat, and control occupational diseases. In its General Comment on the Right to the highest attainable standard of health, the Committee on Economic, Social and Cultural Rights specified that these steps must be aimed at minimizing the causes of health hazards inherent in the working environment. CESCR, The Right to the Highest Attainable Standard of Health, General Recommendation No. 14, 2000 CESCR, 22nd Sess., reprinted in Compilation of General Comments, supra note 77, at 85.} and that health facilities must be made available for all\footnote{ICECSR Article 12 requires states to create the conditions necessary to assure to all medical service and medical attention in the event of sickness. Article 12 recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.} – including women and immigrants, regardless of status\footnote{In interpreting article 12, the CESCR has underscored the requirement that health facilities must be accessible to everyone without discrimination. In its General Comment on the Right to the Highest Attainable Standard of Health, the CESCR stressed that states are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a state policy; and abstaining from imposing discriminatory practices relating to women’s health status and needs. CESCR, supra note 70, at 85. In the same General Comment, the Committee explained that to eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women’s right to health throughout their life span. Id. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women’s health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women’s right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotional and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.} – without discrimination. The International Convention on the Protection of the Rights of All Migrant Workers and their Families requires states to extend the same health and safety standards to migrant workers as they apply to their nationals; protections concerning conditions of work may not be denied on the basis of irregular status.\footnote{MWC Article 25 provides that Migrant workers shall enjoy treatment not less favorable than that which applies to nationals of the state of employment in respect of remuneration and other conditions of work, including safety and health provisions. The same article also requires states parties to take all appropriate measures to ensure that migrant workers are not deprived of any rights concerning conditions of work on the basis of irregularities in their work or residence status. Article 70 requires states parties to take measures not less favorable than those applied to nationals to ensure that working and living conditions of migrant workers and members of their families in a regular situation are in keeping with the standards of fitness, safety, health and principles of human dignity.} The Convention also explicitly guarantees to all migrant workers and members of their families the right to receive public health and medical care.

\begin{itemize}
\item CESCR, 22nd Sess., reprinted in Compilation of General Comments, supra note 77, at 85.
\item Id.
\end{itemize}
any medical care that is urgently required on a basis of equality with nationals, and bars refusal of such care on the basis of irregular status. In sum, then, the provisions of the major human rights treaties protect the rights of women migrant workers to adequate, non-discriminatory health and safety protections. To meet the burden of non-discrimination and equality, these protections must be equal to those available to men and to nationals, and should also be tailored to respond to any unique or especially burdensome health and safety vulnerabilities women migrant workers may encounter on the job.

2. Measures to Respect, Protect and Fulfill

The creation and application of adequate health and safety protections may require a broad array of proactive steps on the part of the host state. Based on the relevant treaty provisions and the guidance provided by the treaty bodies, it is now clear that states may be required to adopt a range of measures to fulfill their obligations, including the following examples. States may need to assess the specific health and safety requirements and vulnerabilities of women migrant workers in the workplace, and to devise a national plan to respond to the findings. States will usually be required to adopt regulations, conduct inspections, and devise other measures aimed at minimizing risks and hazards for workers, and to ensure that those protections are applicable to all workers – including migrants, and including those in the informal sector. In relation to migrant women, these measures should include all the protections afforded to men and to nationals, as well as measures tailored to the workplace hazards migrant women encounter most frequently. Health services should be made available to non-citizen workers.

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247 MWC Article 28 guarantees migrant workers and members of their families the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the state concerned. Such emergency medical care may not be refused them by reason of any irregularity with regard to stay or employment.

248 See, for example, Concluding Observations: Greece, CEDAW Committee, supra note 233 (“The Committee urges the Government to develop a general policy to address the particular needs of immigrant and migrant women with regard to their protection, health, employment and educational needs.” Para. 210).

249 ICESCR Article 12, and CESCR, supra note 70, at 85 (specifying that states must take steps aimed at minimizing the causes of health hazards inherent in the working environment).

250 Id.; see also discussion, supra.

251 See, for example, discussion of Senegal at note 149; Concluding Observations: Republic of Korea, CESCR, U.N. Doc. E/C.12/1/Add.59 (2001) (“The Committee regrets that the specific conditions of work to which the so-called "irregular workers" are subject have not been clarified during the dialogue. Information from independent sources indicate that "irregular" workers are distinguished from "regular" workers, although they often perform the same tasks, in that irregular workers receive lower wages, pension benefits, unemployment and health benefits and have less job security. It also notes that the proportion of irregular workers in the general labor force has grown to half, the great majority of them women.” Para. 17); Concluding Observations: El Salvador, CESCR, U.N. Doc. E/C.12/1/Add.4 (1996) (“The Committee recommends that the state party make the necessary efforts to implement the Salvadoran legislation on minimum wages, safe and healthy working conditions, equal pay for equal work by men and women and arbitrary dismissals. To this end, the Committee stresses that sufficient resources must be allocated to labor inspection services to enable them to carry out the tasks entrusted to them.” Para. 31); and Concluding Observations: Morocco, CESCR, U.N. Doc. E/C.12/1994/5 (1994) (“The Committee is also concerned that labor laws and regulations are largely ignored or disregarded in the informal and traditional sectors of the economy and that the absence or limited presence of labor inspectors in these sectors has impeded the effective implementation of regulations relating to just and favorable conditions of work, including health and safety of the workplace.” Para. 14).

252 See, for example, Concluding Observations: China, CEDAW Committee, 20th Sess., U.N. Doc. A/54/38, paras.251-336 (1999) (“The Committee notes that while prostitution itself is not unlawful, provisions to
designed to protect women’s reproductive health must be carefully crafted; overly protective measures may not be allowed to bar women’s access to employment opportunities and may amount to discrimination. 254 Protections must therefore be firmly anchored in scientific knowledge and up-to-date practices. 255 To fulfill their obligation to protect these rights with respect to women migrant workers, regulatory agencies and their inspection staffs should be adequately funded, trained, and tasked concerning the situation of women migrant workers.

**Gender-Based Violence in the Workplace**

Many women migrant workers are subjected to gender-based violence during the different phases of migration: at home, when being recruited for migrant work, while in transit, and once in the host country – at work. Domestic workers, who live in close proximity to – often inside the homes of – their employers, are often rendered vulnerable to such abuses through these living and working conditions. One woman working as a domestic worker in the United Arab Emirates described her experience this way: after answering a knock on her door, she was accosted and brutally raped by her employer. The experience was “horrible,” she said, adding “I will not forget it all my life. I still hear him knocking on my door. I still have nightmares.” 256 Two women in another study had received stab wounds and cuts from broken glass as a result of a struggle during attempted rapes by their domestic employers. 257 Human Rights Watch found that almost half of all Indonesian domestic workers in Malaysia had experienced abuse, whether physical (including sexual assault) or psychological. 258 One woman interviewed by Human Rights Watch reported being raped by her employer once a day for three months. 259

Women domestic workers are also rendered vulnerable to gender-based violence, including sexual abuse, through their close proximity to – and often a carefully constructed dependence on

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254 CEDAW article 12(3).
255 Id.
257 See Kebede, supra note 111, at 10.
258 HUMAN RIGHTS WATCH, HELP WANTED, supra note 108, at 45-50.
259 Id. at 48.
Employers frequently foster this dependence and isolation, confiscating travel, work, or residence papers, forbidding workers to leave the premises without escort or only for specific reasons, and severely limiting contact with the external world. In such circumstances, violence often goes unreported, and women rarely find assistance. For these women, violence may come at the hands of the employer, their relatives (especially teenage sons), or family guests and associates, as well as male employees in the same household. In one ILO study, half of all foreign domestic workers interviewed reported that they were victims of verbal or physical (including sexual) abuse. The Sri Lanka Bureau of Foreign Employment has reported that 227 of 793 migrant workers who were victims of workplace harassment during one year had suffered “severe sexual harassment.” Women have reported being the object of a whole range of assaults – from verbal abuse to slapping, beating, rape and other forms of torture. These assaults are sometimes used as “punishment” for work considered slow or sloppy, or for behavior regarded as inappropriate or insubordinate. Psychological abuse is also used against women migrant workers: threats of deportation, withholding of wages, and denigrating, abusive, sexist and racist commentary have all been reported.

Many women working in domestic service report being punished, and even fired, for having “affairs” with their male employers or their sons, when the employer’s wife found out about the sexual harassment or abuse visited upon the worker. In some cases, women who have sought assistance or protection from their female employers after being abused have found themselves turned out for “seducing” their male employer. Similarly, women who sought assistance from the police have found themselves abused by officers, or forced to pay bribes for basic help.

1. *Human Rights Standards Relevant to Gender-Based Violence in the Workplace*

CEDAW provides clear protection against gender-based violence, including sexual assault and harassment: the treaty’s definition of discrimination has been interpreted to include these abuses. CEDAW Recommendation on Violence against women (No. 19, 1992) makes clear that gender-based violence fits within the definition of discrimination against women under CEDAW, and specifies that gender-based violence is violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict

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261 See ILO, Booklet 4, supra note 19, at 25-28.
262 Cited by ILO in Booklet 4, supra note 19, at 27.
263 The ILO reports that the organization KALAYAAN, based in the U.K. and serving migrant domestic workers, found that 84% of their clients had suffered psychological abuse, 38% had been beaten, and 10% had been sexually abused. See ILO, Booklet 4, supra note 19, at 29.
264 A survey conducted by the South Asian Migrant Centre and Coalition for Migrants’ Rights found that 26% of a random sample of foreign domestic workers in Hong Kong have been the victims of physical or verbal abuse, while 4.5% have suffered sexual abuse, including rape. See ILO, Booklet 4, supra note 19, at 32. HUMAN RIGHTS WATCH, *HIDDEN IN THE HOME*, supra note 116 at 18-19, found that many foreign domestic workers in the United States have been subjected to psychological abuse, including verbal abuse, denial of proper clothing, controlling of food consumption, and requiring that workers launder their clothing with dirty rags.
physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. The General Recommendation also states clearly that sexual harassment in the workplace is a form of violence against women. The Committee explains that such conduct can be humiliating and may constitute a health and safety problem, and expresses special concern for the situation of domestic workers, whose working conditions should be monitored by states parties, in part to prevent sexual abuse.

The CESCR has also interpreted the ICESCR’s provisions against sex discrimination as including a prohibition on gender-based violence. The committees monitoring compliance with both of these treaties, as well as the committee monitoring the ICCPR, have recognized the devastating impact of gender-based violence and harassment on women in the workplace and called on states to end these abuses, in part through criminalization. CERD guarantees the right to security of person and protection against bodily harm; this norm applies equally for men and women. The Migrant Workers Convention requires states to protect migrant workers and their families from attacks on their physical security and safety.

2. Measures to Respect, Protect and Fulfill

Efforts to end gender-based violence aimed at women migrant workers will often require a strategic approach involving a broad set of actors. Based on the relevant treaty provisions,

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267 General Recommendation 19 finds that sexual harassment amounts to discrimination when the woman has reasonable grounds to believe that her objection to the harassment would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment. Id. at para. 18.

268 ICESCR Article 2 calls on states to ensure that the rights included in the Convention are exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. ICESCR Article 3 requires states to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights in the Convention.

269 See, for example, Concluding Observations: Georgia, CESC, 29th Sess., U.N. Doc. E/C.12/1/Add.83 (2002) (“The Committee recommends that the state party implement its national plans of action for the advancement of women and for combating domestic violence, and that it adopt adequate legislation and policies to address and to ensure access to effective remedies concerning domestic violence, rape and sexual harassment. The Committee encourages the state party to develop programs aimed at raising awareness of, and educating law enforcement officials, the judiciary and the general public on, these problems.” Para. 36); Concluding Observations: Croatia, CESC, 27th Sess., U.N. Doc. E/C.12/1/Add.73 (2001) (“The Committee recommends that the state party take measures to make sexual harassment in the workplace a prosecutable offence.” Para. 25); Concluding Observations: Republic of Korea, CESC, supra note 267 (“[T]he Committee notes with deep concern the continued unequal status of women. Persisting problems include . . . discrimination against women and sexual harassment in the workplace: and a large gap in the average salaries paid to women and to men.” Para. 16); and Concluding Observations: Georgia, CESC, U.N. Doc. E/C.12/1/Add.42 (2000) (“The Committee notes with concern that the laws addressing violence against women and sexual harassment in the workplace are inadequate and insufficient.” Para. 5).

270 See, for example, id. and Concluding Observations: Guatemala, U.N. Human Rights Committee, 56th Sess., U.N. Doc. CCPR/C/79/Add.63 (1996) (“The Committee also urges that violence (especially within the home) and acts of discrimination against women (such as sexual harassment in the workplace) be established as punishable crimes.” Para. 33).

271 CERD Article 5(b) guarantees the right to security of person and protection by the state against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

272 MWC Article 16(2) guarantees the right of migrant workers and members of their families to effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.
general comments/recommendations issued by the treaty bodies, and their concluding observations and comments, it is now clear that states may be required to adopt a range of measures to fulfill their obligations to counter gender-based violence against women migrant workers, including the following examples. Laws and programs may need to be established to prevent violence against women at the hands of employers, their friends and relatives.\textsuperscript{273} Such programs should include monitoring and penalties for abusive employers, as well as services for women who survive gender-based violence.\textsuperscript{274} These services should be available to all women – including domestic workers and migrants.\textsuperscript{275} Education or “know your rights” campaigns might be required to ensure migrant women know that they can obtain legal redress.\textsuperscript{276} Police, the judiciary, and health providers must respond effectively to gender-based violence against women migrant workers, and may require training in this area.\textsuperscript{277} Host governments may also

\begin{footnotesize}
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\item \textsuperscript{273} In its \textit{General Recommendation on Violence Against Women, No. 19, 2000}, the CEDAW Committee made clear that states can be held responsible for acts of violence against women carried out by private individuals if they do not act with due diligence: “It is emphasized, however, that discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2(e), 2(f) and 5). For example, under article 2(e) the Convention calls on states parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, states may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.” (para. 9).
\item \textsuperscript{274} \textit{See, for example, Concluding Observations: Trinidad and Tobago, CEDAW Committee, 26th Sess., U.N. Doc. A/57/38 (Part I), paras.119-166 (2002) (“The Committee is also concerned about the lack of specific legislation prohibiting sexual harassment in the workplace and providing a remedy for victims of sexual harassment.” Para. 151); Human Rights Committee concluding observations concerning Guatemala 1996 (“The Committee also urges that violence (especially within the home) and acts of discrimination against women (such as sexual harassment in the workplace) be established as punishable crimes.” Para. 33); and Concluding Observations: Georgia, CESC, supra note 282 (“The Committee notes with concern that the laws addressing violence against women and sexual harassment in the workplace are inadequate and insufficient.” Para. 15); Concluding Observations: Cameroon, CESC, U.N. Doc. E/C.12/I/Add.40 (1999) (“The Committee is concerned that the Government has not yet introduced legislation to prohibit sexual harassment in the workplace which, according to information received by the Committee, is a widespread practice in Cameroon.”)}
\item \textsuperscript{275} CEDAW Committee, supra note 70 (expressing special concern for the situation of domestic workers and affirming that their working conditions should be monitored by states parties, in part to prevent sexual abuse). \textit{See also, Concluding Observations: China, CEDAW Committee, supra note 268} (“The Committee commends efforts to develop a standard labor contract for migrant workers with provision for minimum wages, but it is concerned that these workers can be exposed to abuse and custodial violence. The Committee recommends that the Government monitor and take action to protect women migrant workers from abuse and violence, as well as to prevent such violence.” Paras. 327-28); Concluding Observations: Kuwait, CERD Committee, supra note 153 (In addition, it was alleged that many domestic staff of Asian origin, mainly women, were subjected to debt bondage, other illegal employment practices, passport deprivation, illegal confinement, rape and physical assault. Members requested information on measures taken by the Government to improve and remedy that situation.”).
\item \textsuperscript{276} \textit{See, for example, Concluding Observations: Germany, CEDAW Committee, supra note 149} (“The Committee . . . urges the Government to strengthen its efforts for the social integration of foreign women through educational and employment services, and through awareness-raising of the population. It also recommends that steps be taken to combat domestic violence and violence within the family and to increase foreign women’s awareness about the availability of legal remedies and means of social protection.” Para. 318).
\item \textsuperscript{277} \textit{See, for example, Concluding Observations: Cuba, CEDAW Committee, 23rd Sess., U.N. Doc. A/55/38, paras.244-277 (2000) (“The Committee calls upon the Government to assess, in a comprehensive manner, the possible incidence of violence against women, including domestic violence and sexual harassment in the workplace, as well as, in case of incidents, the root causes of such violence. It invites the Government to increase public awareness of the need to take measures to prevent such violence, to consider launching a zero-tolerance campaign on violence against women, as well as to increase the awareness of public officials and the judiciary about the seriousness of such violence.” Para. 264); Concluding Observations: China, CEDAW Committee, supra note...
need to conduct public awareness campaigns concerning the right of migrant women to be free from violence, and the obligations on employers to ensure their safety in the workplace.\textsuperscript{278} Reducing the vulnerability of women migrant workers through improved labor protections and monitoring of employers will also help give women options for redress when they face abuse.

\textit{Gendered Forms of Racism and Xenophobia Against Women Migrant Workers}

In addition to gender-based discrimination, women migrants – like their male counterparts – often face pervasive racial, ethnic, and religious discrimination.\textsuperscript{279} The types of discrimination faced by migrant workers cover the whole spectrum: from subtle forms of shunning and social exclusion, overt racist and xenophobic attitudes expressed in public (including by officials\textsuperscript{280}) and in the media,\textsuperscript{281} to employment\textsuperscript{282} and housing discrimination and racist and xenophobic violence.\textsuperscript{283} The ILO reports that most migrant workers face discrimination and xenophobia aimed at foreigners in host countries.\textsuperscript{284} Indeed, a study conducted by the ILO found widespread (up to 37\% in some places) xenophobic discrimination against documented workers in employment settings.\textsuperscript{285} Based on anecdotal evidence, discrimination against irregular workers is often even more intense. Further, some efforts to strictly enforce immigration laws by states concerned with their security have reportedly contributed to intolerance against immigrants in general.\textsuperscript{286} These forms of discrimination are gendered as well, with specific forms of racial or ethnic discrimination aimed specifically at women, including gender-based violence and harassment.

\textsuperscript{268} Concluding Observations: Kuwait, CERD Committee, \textit{supra} note 153; and Concluding Observations: Georgia, CESC\textit{R}, \textit{supra} note 282 ("The Committee recommends that the state party implement its national plans of action for the advancement of women and for combating domestic violence, and that it adopt adequate legislation and policies to address and to ensure access to effective remedies concerning domestic violence, rape and sexual harassment. The Committee encourages the state party to develop programs aimed at raising awareness of, and educating law enforcement officials, the judiciary and the general public on, these problems." Para. 36).

\textsuperscript{278} ILO, \textit{supra} note 2.

\textsuperscript{279} See ILO, Booklet 1, \textit{supra} note 7, at 44-47 for a discussion of the impact of racism and xenophobia on women migrant workers.

\textsuperscript{280} The \textit{Asian Migrant Yearbook 2000} reported that police in Dubai, United Arab Emirates stated that migrant domestic workers had committed 60\% of the family related crimes. \textit{Cited in ILO, Booklet 4, supra} note 19, at 17.

\textsuperscript{281} The Malaysia-based Women’s Aid Organization studied media reports, opinion polls and letters written to media outlets between 1997 and 1998 and found that one of the predominant views expressed was that “the foreign worker’s culture is inferior to Malaysian culture and her influence will corrupt the family.” Women’s Aid Organization, “Attitudes Held by Some Malaysians on Foreign Domestic Workers” (2001), available at http://www.wao.org.my/research/tdw.htm#tdw.

\textsuperscript{282} The Asian Migrant Centre and Coalition for Migrant Rights found a significant relationship between unequal treatment of foreign domestic workers to the race and gender of the worker. \textit{See} Asian Migrant Centre and Coalition for Migrant Rights, \textit{Baseline Research on Racial and Gender Discrimination Towards Foreign Domestic Helpers in Hong Kong} (2001), available online at www.asian-migrants.org.


\textsuperscript{284} ILO, \textit{supra} note 2. \textit{See also} ILO Booklet 4, \textit{supra} note 19, at 2-3.

\textsuperscript{285} \textit{Id}.

\textsuperscript{286} COMMISSION ON HUMAN SECURITY, “People on the Move,” \textit{in} HUMAN SECURITY NOW (2003), at 42-43.
In some countries, the very concept of foreign domestic worker carries with it a racialized,
gendered stigma, since women of certain nationalities overwhelmingly predominate in domestic
services – work that is frequently perceived by the host community as servile and degrading.  
When translated into labor practices, ethnic, racial, and status-based discrimination usually
results in low wages and poor working conditions for women from unpopular groups.  Indeed,
as noted earlier, in some countries, wages for women migrant workers are more closely linked to
the employee’s national or ethnic origin than to their skills.  Indeed, in many countries, there is
a strong preference – often reflected in wages – for women domestic workers of certain
nationalities and/or races.  These wage differentials were based on stereotypes about the
“honesty,” “morality” and “intelligence” of different groups as compared to the “wantonness”
and “stupidity” of others.

These gendered and racialized forms of discrimination create barriers in access to services and
redress when abuses occur.  Police, labor officials, and health care officials may be reluctant to
assist “foreigners,” and in some places certain services are routinely denied to migrant workers,
gregardless of their status in the host country.  In some places, migrant workers are singled out for
abuse by state officials, including police or border agents.  In places where services do exist for

287  See Jureidini, supra note 121, at 2 (noting the “racial and discriminatory stigma attached to domestic
employment” in Lebanon); D’Alconzo, La Roca & Marioni, supra note 260, at 12 (noting that “in Italian, ‘Filipino’
is a synonym for ‘housekeeper’”).  See also Hondagneu-Sotelo, supra note 23, at 13-19 (discussing the ways in
which the racialized nature of the occupation of “domestic worker” has shifted within the United States over time,
always retaining a close association with racialized communities, even as those communities changed over time).
288  See Parreñas, supra note 23, at 176.
289  al-Najjar, supra note 25, at 19-20.
290  See id; Sabban, supra note 127, at 24 (noting that “The wages of the foreign female domestic worker vary
according to their ethnic background and are not based on their education or previous skills.  A college-educated
foreign female domestic worker from the Philippines is paid the same wage as a high school graduate or a middle
school-educated Filipina, but would earn much more than a foreign female domestic worker from India, regardless
of the latter’s skills.  When they were first introduced to the United Arab Emirates market in the 1990s, Indonesian
foreign female domestic workers were the highest paid. . . Nowadays, Indonesians are paid less than Filipinas.”  The
“decline” in the “worth” of Indonesian domestic workers was attributed to higher demand and greater supply, the
shift in Indonesian policy to send poorer women abroad, and the perception that Indonesian women were “loose
sexually” in comparison with Filipina women.).  See also Anderson, supra note 24, at 108-109 (noting the existence
of preferences for certain races and nationalities by Europeans when choosing foreign domestic workers that “often
reflect racial hierarchies that rank women by precise shades of skin color”).
291  See Abdul Rahman et al., supra note 25, at 6, 8 (explaining the nationality-stratified wage structure for domestic
workers in Singapore and setting out the prevailing stereotypes of domestic workers from the Philippines, Indonesia,
and Sri Lanka); Abigail B. Bakan & Daiva K. Stasiulis, Making the Match: Domestic Placement Agencies and the
Racialization of Women’s Household Work, 20 SIGNS303 (1995); id.; Lan, supra note 133, at 6 (noting that “An
increasing number of employers [in Taiwan], often on the advice of manpower agencies, are replacing ‘smart yet
unruly’ Filipina workers with ‘stupid yet obedient’ Indonesians”); Jureidini, supra note 121, at 4-5 (stating that
Filipina domestic workers receive significantly higher monthly wages than those from Sri Lanka or African
countries “because they are considered to be better educated, are literate in English, and have higher social prestige
as domestic servants”); see also Women’s Aid Organization Malaysia, “WAO’s Advocacy Work on Foreign
Domestic Worker Abuse.”  http://www.wao.org.my/news/20011005fdw.htm  See also Young, supra note 23, at 58-59
(pointing out that stereotypes concerning the “abilities” of individuals of certain ethnic, racial, or national groups
in relation to domestic work shift over time, retaining their content but being applied to various groups as patterns of
racism and migration shift).  Hope Lewis points out that “Sending countries may be economically or politically
dependent on the commodification of identity.  Remittances from migrant workers are likely to be one of the most
important sources of private transfers to the national economy.  Gender stereotyping may figure into the perceived
migrants, more subtle forms of discrimination, such as cultural insensitivity, lack of regard for language, or assumptions about religious differences, can complicate attempts to provide assistance. Migrant women working in domestic service may find that they do not qualify for the kinds of protections against racial or ethnic discrimination that other workers receive. In the United States, for example, domestic workers are almost never covered by Title VII of the Civil Rights Act of 1964, which applies only to employers with 15 or more employees.

1. Human Rights Standards Relevant to Gendered Forms of Racism and Xenophobia Against Women Migrant Workers

The major human rights treaties weave a protective web for women migrant workers against gendered forms of racial or xenophobic discrimination. While CEDAW does not explicitly refer to race or national origin, the Committee has made clear that states have obligations under the Convention to proactively prevent and redress acts of racism and xenophobia aimed at women. CERD makes clear that the state obligation to end racial and xenophobic discrimination and equality should be understood according to the substantive equality model. This means that an individual’s rights are violated not only when, for example, laws formally treat one racial group, national origin, or gender differently from other groups, but also when any law, policy, or action has the practical effect of disadvantaging them. While article 1(2) states that the Convention does not apply to distinctions, exclusions, restrictions or preferences between citizens and non-citizens, the Committee made clear in its General Recommendation on the rights of non-citizens (No. XI, 1993), that this provision must not be interpreted to detract in any way from the rights and freedoms of aliens recognized and enunciated in other instruments, especially the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. In addition, the Convention’s prohibitions against discrimination will apply to aliens whenever

292 In its contribution to the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, the CEDAW Committee noted that the Convention obliges states parties to work towards the realization of the human rights of women in all fields throughout their life cycle, which are an inalienable, integral and indivisible part of universal human rights. This commitment also requires active intervention to prevent all forms of discrimination against women, including preventing such discrimination in the context of racism, racial discrimination, xenophobia and related intolerance. The Committee also observed that that the reports submitted to the Committee by states parties demonstrate that women all over the world continue to suffer multiple discrimination because of their sex and other factors of social exclusion. This multiple discrimination is often suffered by women migrant workers, women asylum seekers and women of diverse race, ethnicity, caste and national origin. CEDAW, Contribution of CEDAW to the preparatory process and World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, CEDAW/C/2001/I/CRP.3Add.9, at para. 4.

293 CERD Article 1 defines the term "racial discrimination" to mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Under article 2, states condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races. Included among the steps required of states under article 2 is the obligation to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization. States are further required under article 2 to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

294 CERD Committee, supra note 97.
migrants face abuse on the basis of their race, color, descent, or national or ethnic origin. Since very few instances of xenophobic discrimination are truly based on alien status, and are usually based on perceived differences in race, color, or nationality, CERD offers powerful standards for migrants. Finally, the CERD Committee has also emphasized that “[c]ertain forms of racial discrimination may be directed towards women specifically because of their gender, such as . . . abuse of women workers in the informal sector or domestic workers employed abroad by their employers.”

Article 20(2) of the ICCPR requires states to prohibit by law any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. In its General Comment on the Prohibition of propaganda for war and inciting national, racial or religious hatred (No. 11, 1983), the Human Rights Committee emphasized that in view of the nature of article 20, states parties are obliged to adopt the necessary legislative measures prohibiting the actions referred to in article 20. When present in significant numbers, groups of migrant workers have the same rights as other minorities under the International Covenant on Civil and Political Rights, including the right – in community with other members of their group – to enjoy their own culture, to profess and practice their own religion, and to use their own language. These rights must be respected, protected, and fulfilled for women and men equally. The Migrant Workers’ Convention guarantees the right of migrant workers to liberty and security of person, and to respect for their cultural identity.

2. Measures to Respect, Protect, and Fulfill

The measures states will need to take to fulfill their obligations under the various conventions will vary according to the nature and severity of the forms of racial and xenophobic discrimination present. Based on the relevant treaty provisions, general comments or recommendations issued by the treaty bodies, and their concluding observations and comments, it is now clear that states may be required to adopt a range of measures, including the following examples. States should take active steps to eliminate discrimination against migrant women by

295 Id. at para. 2.
296 General Comment 23, Rights of Minorities to Enjoy, Profess, and Practise Their Own Culture, U.N. Human Rights Committee, 50th Sess., [hereinafter “HRC, General Comment 23”], reprinted in Compilation of General Comments, supra note 77, at 159. Article 27 provides that in states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language. In its General Comment on the Rights of minorities, the Human Rights Committee noted that Article 27 confers rights on persons belonging to minorities which "exist" in a state party. Id. Given the nature and scope of the rights envisaged under that article, it is not relevant to determine the degree of permanence that the term "exist" connotes. Those rights simply are that individuals belonging to those minorities should not be denied the right, in community with members of their group, to enjoy their own culture, to practice their religion and speak their language. Just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a state party constituting such minorities are entitled not to be denied the exercise of those rights. As any other individual in the territory of the state party, they would, also for this purpose, have the general rights, for example, to freedom of association, of assembly, and of expression.
297 MWC Article 16 provides that migrant workers and members of their families have the right to liberty and security of person, and that they are entitled to effective protection by the state against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions. Article 31 requires states to ensure respect for the cultural identity of migrant workers and members of their families and to refrain from preventing them from maintaining their cultural links with their state of origin.
state or non-state actors, including collecting disaggregated data, conducting studies concerning the circumstances of such discrimination, and taking active steps to promote the principle of non-discrimination in relation to non-citizens. Allocations of abuse by state agents must be promptly investigated and, if substantiated, adequately punished. Public awareness campaigns and attention to the intersection of race- and gender-based

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298 See, for example, Concluding Observations: Sweden, CEDAW Committee, 25th Sess., U.N. Doc. A/56/38, paras. 319-360 (2001) (“The Committee urges the Government to take effective measures to eliminate discrimination against immigrant, refugee and minority women and to strengthen its efforts to combat xenophobia and racism in Sweden. It also encourages the Government to be more proactive in its measures to prevent discrimination against immigrant, refugee and minority women, both within their communities and in society at large, to combat violence against them and to increase their awareness of the availability of social services and legal remedies.” Para. 357); Concluding Observations: Saudi Arabia, CERD Committee, supra note 189 (“The Committee is concerned about allegations of substantial prejudice against migrant workers, in particular those coming from Asia and Africa. The Committee invites the state party to report on the situation, in particular, of women domestic workers and draws the attention of the state party to its General Recommendation on Gender-related dimensions of racial discrimination.” CERD Committee, supra note 90, at para. 17); and Concluding Observations: Portugal, CERD Committee, 58th Sess., U.N. Doc. CERD/C/304/Add.117 (2001) (“The Committee notes with concern that, in some industrial and services sectors where illegal migrant workers are engaged, they are discriminated against. It recommends that the state party take measures to put an end to this discrimination.” Para. 10); Concluding Observations: Denmark, CERD Committee, 48th Sess., U.N. Doc. CERD/C/304/Add.2 (1996) (“It is noted with concern that only three convictions have been registered in the past six years against members of neo-Nazi groups although new instructions have been issued to prosecutors. The recent granting of licenses to such groups to operate a radio station and a telephone number to which people allegedly can call to hear a recorded message about why migrants and refugees should be deported is also noted with special concern.” Para. 1). See also Concluding Observations: Italy, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.37 (1994) (“The Committee notes the emergence in certain parts of the population of Italy of a trend towards racism and intolerance against foreigners, particularly asylum-seekers and migrant workers, and the resurgence of certain elements militating in favor of political movements reminiscent of a past when human rights were seriously violated.” Para. 2), and Concluding Observations: Norway, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.27 (1993) (“The Committee notes the emergence in certain parts of the population of Norway of a trend towards intolerance against foreigners, particularly asylum-seekers and migrant workers.” Para. 4).

299 See, for example, Concluding Observations: Qatar, CERD Committee, 60th Sess., U.N. Doc. CERD/C/60/CO/11 (2002) (“The Committee has taken careful note of the assurances by the state party delegation that the law guarantees all workers equal status. It wishes, however, to obtain further information on the practical implementation of this principle, particularly given the high proportion of migrant workers in Qatar. The Committee requests the state party to include in its next periodic report statistics disaggregated by migrants’ national origin, which would provide a better understanding of the economic and social standing of non-nationals of Qatar in relation to their national and ethnic origins.” Para. 21), and Concluding Observations: Saudi Arabia, CERD Committee, supra note 189 (“The Committee requests the state party to include in its next periodic report statistics, disaggregated by migrants’ national origin, which would provide a better understanding of the economic and social standing of non-citizens in Saudi Arabia.” Para. 20).

300 CERD Committee, General Recommendation 30, supra note 92 (states should “[t]ake steps to address xenophobic attitudes and behaviour towards non-citizens, in particular hate speech and racial violence, and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens”).

301 See, for example, Concluding Observations: Switzerland, U.N. Human Rights Committee, U.N. Doc. CCPR/C/79/Add.70 (1996) (“The Committee is concerned at the numerous allegations of ill-treatment in the course of arrests or police custody, particularly in respect of foreign nationals or Swiss citizens of foreign origin and, in conjunction with them, reports on the authorities’ failure to follow up complaints of ill-treatment by the police and the disproportionate nature, if not absence, of penalties.” Para. 13).

302 Concluding Observations: Ecuador, CERD Committee, 62nd Sess., U.N. Doc. CERD/C/62/CO/2 (2003) (“The Committee is concerned at the reports on discrimination and hostility suffered by migrants, and calls on the state party to intensify its efforts in designing and implementing educational campaigns in order to combat racial discrimination within all sectors of society.” Para. 20).
discrimination may be needed. States may also need to implement programs aimed at ensuring that women have access to legal redress for any violence or discrimination they may face. States should educate migrant women about their rights, and about any services that may be available to them. The state has an obligation to protect the rights of women migrants against acts of violence and discrimination carried out by individuals and groups; such acts should be effectively investigated and prosecuted where appropriate. The state also has an obligation to ensure access by non-citizens to legal remedies for racist violence. Finally, the state must take action to end stereotyping or profiling of non-citizens on the basis of race, color, descent, or ethnicity.

**Restrictions on Migrant Women’s Ability to Organize for their Rights**

In many countries, migrant women workers face barriers and restrictions on their ability to organize for their rights. In some countries, the restrictions are enshrined in the law and based on migrants’ alien status: non-nationals may not be entitled to lawfully organize or join unions or other organizations. In other places, domestic workers may be specifically barred from workplace protections concerning organizing or from union membership, sometimes because they are not legally considered full employees under applicable labor law.

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303. See, *Concluding Observations: Poland*, CESC R, 29th Sess., U.N. Doc. E/C.12/1/Add.82 (2002) (“The Committee notes with regret that it did not receive a satisfactory answer from the state party as to whether migrant workers and members of their families have the right to appeal in courts. The Committee is concerned that the rights enshrined in the Covenant are insufficiently protected for a large number of migrant workers residing in Poland.” Para. 15).

304. See, for example, *Concluding Observations: Germany*, CEDAW Committee, supra note 149 (“The Committee calls on the Government to improve the collection of data and statistics disaggregated by sex and race/ethnicity of victims of violence motivated by xenophobia and racism, to put in place adequate protection mechanisms and to ensure that foreign women victims of such attacks are made aware of their rights and have access to effective remedies. It also urges the Government to strengthen its efforts for the social integration of foreign women through educational and employment services, and through awareness-raising of the population. It also recommends that steps be taken to combat domestic violence and violence within the family and to increase foreign women’s awareness about the availability of legal remedies and means of social protection.” Para. 318).

305. See, for example, *Concluding Observations: Russian Federation*, CERD Committee, 62nd Sess., CERD/C/62/CO/7 (2003) (“The Committee is concerned about the incidence of violence racist attacks against ethnic minority by, *inter alia*, skinheads and neo-Nazis. In this regard, the Committee recommends the state party to strengthen its efforts to prevent racist violence and to protect members of ethnic minorities and foreigners, including refugees and asylum-seekers. Also the Committee requests that the state party provides a list of the cases that have been investigated and brought before the courts in its next periodic report.” Para. 27).


307. *Id.*.

308. The ILO reports that “[o]nly two countries in Asia (Hong Kong and Japan) have legally registered independent migrant trade unions.” ILO, Booklet 4, supra note 19, at 16.

309. In the United States, domestic work is explicitly excluded from the National Labor Relations Act, which protects rights to organize and engage in collective bargaining. See Young, supra note 23, at 27-29.

310. In Malaysia, migrant workers in general have the ability to join trade unions (but not hold leadership positions), domestic workers are expressly denied this right, as well as the right to join social clubs. To ensure this restriction is understood by all, migrant domestic workers are required by employment agencies to sign statements affirming that they will not take part in any social clubs while in Malaysia. See ILO, Booklet 4, supra note 19, at 16.

places where these restrictions are not in force, undocumented women are often unable to openly organize for fear of reprisal and deportation. Some barriers are even less formal – women domestic workers, for example, are often continually present at their place of work, and may face seemingly insurmountable barriers to organizing efforts in the form of their inability to meet with other workers or problems with the language of the host country. Employers of domestic workers often place limits on the workers’ access to the larger community, and may monitor communications and activities.

Even when they are able to participate in unions or other organizations, women’s voices may be lost within larger, often male-dominated unions. While men and women share labor concerns, women also often have distinct concerns as gendered workers. This is especially true with regard to women who are engaged in domestic service. Similarly, women of various nationalities, religions, or ethnicities may not feel they are adequately represented by unions dominated by different groups. This is especially true in places where racism and xenophobia against some groups is worse than it is against others. In response to these problems, some unions have begun outreach efforts specifically aimed at assisting the whole range of migrant women engaged in domestic work. The goals of such efforts are to regularize domestic laborers’ status as workers and to obtaining better working conditions. Women’s organizations have also set up programs to assist women migrant workers in some countries. They frequently offer counseling, shelter for abused workers, and assistance with civil and criminal proceedings against abusive employers. Finally, migrants have created their own organizations in some countries, with domestic workers organizing as migrants and as domestic workers in different settings. These NGOs provide needed support and resources for women asserting their rights. These efforts are nascent, however – and in many places, nonexistent.

1. Human Rights Standards Relevant to Restrictions on Migrant Women’s Ability to Organize for their Rights

The main human rights treaties protect the ability of women migrant workers to organize for their rights through provisions on the rights to freedom of association, equal participation in public life, freedom to form and join trade unions and other organizations, minority rights, and freedom from discrimination on the basis of sex, race, color, national or ethnic origin, ethnicity or religion. The Women’s Convention requires states to take measures to ensure women have


See Lan, supra note 131, at 13-14 (discussing migrants’ rights organizations in Taiwan); Michele Ruth Gamburd, “Lentils There, Lentils Here!” Sri Lankan Domestic Labor in the Middle East, paper presented at the “International Workshop on Contemporary Perspectives on Asian Transnational Domestic Workers” (on file with author), at 14-15 (describing newly formed migrant workers’ organizations in Sri Lanka); Rita Asfar, Issues Related to Transnational Migration of Female Domestic Workers from Bangladesh, paper presented at the “International Workshop on Contemporary Perspectives on Asian Transnational Domestic Workers” (on file with author); and Sim & Wee, supra note 201, at 30-33 (describing the vibrant NGO scene for migrant workers in Hong Kong). In the United States, Domestic Workers United of New York has succeeded in passing city-wide legislation protecting domestic workers, and the organization is now pushing for a state-wide Bill of Rights for Domestic Workers. DWU is a coalition of domestic worker and women’s groups that have formed within various immigrant communities in the city. See http://www.domesticworkersunited.org/.
the equal right to participate in NGOs and associations in the public sphere. The ICESCR guarantees that everyone has the right to form and join trade unions, and the monitoring Committee has underscored the importance of not restricting this right using justifications concerning globalization. The ICCPR guarantees everyone the right to freedom of association with others, including the right to form and join trade unions for the protection of their interests; this right can only be restricted as prescribed by law and necessary in a democracy in the interests of national security or public safety, public order, or the protection of the rights and freedoms of others. The Human Rights Committee has explicitly reminded states that “aliens receive the benefit of the right of peaceful assembly and of freedom of association,” and that “[t]here shall be no discrimination between aliens and citizens in the application of these rights.” The Human Rights Committee has called on states to recognize that migrant workers present in their territory have minority rights under the ICCPR when they form such a group, including the right to enjoy their own culture, practice their own religion, and use their own language. CERD requires states to ensure that the rights to freedom of association and to form and join trade unions are extended to all without racial or ethnic discrimination. These provisions have been interpreted to require states to respect the right of all migrant workers – documented or undocumented – to freedom of assembly and association. The Migrant Workers Convention recognizes the right of all migrant workers – no matter what their status – to participate in, join, and seek support from unions and the right of regular migrant workers to form their own trade unions. All of these rights apply equally to men and women.

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314 CEDAW Article 7 requires states to take all appropriate measures to eliminate discrimination against women in the political and public life of the country. Article 7 also guarantees women the equal right to participate in non-governmental organizations and associations concerned with the public and political life of the country.
315 ICESCR Article 8 guarantees the right of everyone to form trade unions and join the trade union of his or her choice, subject only to the rules of the organization concerned, for the promotion and protection of his or her economic and social interests. This right may not be restricted except as prescribed by law and as necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.
316 In a comment on globalization, the CESCR expressed concern that the right to form and join trade unions may be threatened by restrictions upon freedom of association, restrictions claimed to be "necessary" in a global economy, or by the effective exclusion of possibilities for collective bargaining, or by the closing off of the right to strike for various occupational and other groups. CESCR, “Globalization and Economic, Social and Cultural Rights,” May 1998.
317 ICCPR Article 22.
318 U.N. HRC General Comment 15, supra note 75, at para. 7.
319 ICCPR Article 27 states that in states where ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied their right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.
320 U.N. HRC, General Comment 23, supra note 296.
321 CERD Article 5(d) guarantees the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law in enjoyment of the right to freedom of peaceful assembly and association. Article 5(e) guarantees the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law in enjoyment of the right to form and join trade unions.
322 CERD Committee, General Recommendation 30, supra note 92 (states should “[r]ecognize that, while States parties may refuse to offer jobs to non-citizens without a work permit, all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated”).
323 MWC Article 26(1)(a) protects the right of right of migrant workers and members of their families to take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view
2. Measures to Respect, Protect and Fulfill

This broad range of norms relevant to women’s organizing efforts may require states to take numerous proactive measures. Based on the relevant treaty provisions and the guidance given by the treaty bodies, it is now clear that states may be required to take a range of actions to fulfill their obligations, including the following examples. States should review their laws and regulations to ensure that women migrant workers have the right to participate in and join trade unions and related organizations without restrictions based on non-citizen status, race, or gender. The participation of women migrant workers should not be restricted, and women migrant workers should have the right to hold official and leadership positions within unions. States should take measures to protect these rights by

to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned. Article 26(1)(b) recognizes the right of migrant workers and members of their families to join freely any trade union and any such association, subject only to the rules of the organization concerned. Article 26(1)(c) further recognizes the right of migrant workers and members of their families to seek the aid and assistance of any trade union and of any such associations. Article 26(1)(2) specifies that no restrictions may be placed on the exercise of these rights except in a very narrow set of circumstances.

MWC Article 40 provides that migrant workers who are documented and members of their families have the right to form associations and trade unions in the state of employment for the promotion and protection of their economic, social, cultural and other interests. This right may not be restricted, except in a very narrow set of circumstances.

ICCP ARticles 22 and 2 (as interpreted in HRC, General Comment No. 15, supra note 7073). See, for example, Concluding Observations: Jordan, CESC R, supra note 149 (“The Committee is concerned that non-Jordanian workers are exempted from minimum wage provisions, are denied participation in trade union activities and are excluded from the social security system.” Para. 19). See also Concluding Observations: Venezuela, CERD Committee, 49th Sess., U.N. Doc. CERD/C/304/Add.17 (1996) (The Committee “further recommends that particular attention be given to the effective implementation of article 5 (e) and that relevant information be provided in the next periodic report on the measures taken in this regard, particularly as far as the indigenous population and migrant workers are concerned.” Para. 15), and Concluding Observations: Kuwait; CERD Committee, supra note 153 (“Members of the Committee requested further information on the situation of foreign workers in the post-occupation period, and it was asked whether they enjoyed trade union rights.”). See also Concluding Observations: Estonia, U.N. Human Rights Committee, 55th Sess., U.N. Doc. CCPR/C/79/Add.59 (1995) (“The Committee expresses concern at limitations to the exercise of freedom of association for long-term permanent residents in Estonia, particularly in the political sphere.” Para. 22).

CERD Art. 5(e)(ii), ICESCR Arts. 8(1)(a) and 2(2).

Id. See, for example, Concluding Observations: Croatia, CERD Committee, 53rd Sess., U.N. Doc. CERD/C/304/Add.55 (1999) (“The Committee recommends that the state party take concrete measures in order to guarantee freedom of association without distinction as to ethnic origin and that mass media, in all their forms, including electronic form, are open to all ethnic groups without distinction.” Para. 20).

CEDAW Articles 3 and 7, CERD Article 5(e)(ii), ICESCR Articles 8(1)(a), 2(2) and 3.

See, for example, Concluding Observations: Senegal, U.N. Human Rights Committee, 61st Sess., U.N. Doc. CCPR/C/79/Add.82 (1997) (“The Committee is concerned over the lack of full enjoyment of freedom of association, in particular the fact that foreign workers are barred from holding official positions in trade unions, and that trade unions may be dissolved by the executive. Therefore: The Committee recommends that the state party take all necessary measures to permit foreign workers to hold official positions in trade unions, and provide guarantees and legal redress to trade unions, in accordance with article 22 of the Covenant, against dissolution by administrative measures.” Para. 16); and Concluding Observations: Senegal, CESC R, supra note 149 (“It is a matter of concern that foreign workers are still not permitted to hold trade union offices, in spite of the Committee’s recommendation to that effect in 1994.” Para. 22), and Concluding Observations: El Salvador, CESC R, supra note 267 (“The Committee considers that the legal restrictions on trade-union freedom and the right to strike are far too extensive. In the view of the Committee, the prohibition on aliens occupying positions of responsibility within a trade union is contrary to the Covenant. The Committee is concerned at the numerous reports it has received of
ensuring that unions do not discriminate against women or migrants. Finally, states should ensure that migrant worker communities that constitute minority groups are given space to enjoy their rights to enjoy their culture, practice their religion, and speak their language as a community.  

**Empowering Women Workers, Not Protecting Vulnerable Victims: Human Rights and the Choice of Measures to Respect, Protect and Fulfill**

In addition to the abuses outlined in the sections above, women migrant workers have also suffered from discrimination and exploitation at the hands of their home governments. In some countries in which large numbers of women migrants have reported abuse and exploitation in connection with their labor migration, states have adopted measures that – instead of empowering women migrants – restrict their movement, penalize their choice to migrate, or impose onerous prerequisites on their ability to leave. For example, the government of Bangladesh in 1982 barred women from migrating to take positions as domestic workers unless they were accompanied by their husbands. This ban was later repealed when the government was persuaded that its actions had backfired by creating a market for sham marriages and trafficking. A new ban on unskilled women’s migration was imposed in 1998 in response to renewed concerns about trafficking; this ban has been selectively lifted in specific circumstances: several recruiting agencies have been recently allowed to send women to Saudi Arabia as domestic workers. Strict conditions have been imposed, however: to obtain permission to work in Saudi Arabia, women must be at least 35 years old and must be married and accompanied by their husbands – conditions that are not matched by obligations on the part of the employer (to employ the accompanying husbands, for example). The government of the Philippines also imposed a brief ban on women’s ability to migrate into positions as domestic workers; the ban has been lifted on a country-by-country basis: women are now free to migrate to states that have entered into bilateral agreements with the government of the Philippines concerning minimum working conditions and remedial mechanisms. In 2003, the government of Indonesia announced that it would impose a temporary ban on women migrant workers to protect them from abuse. The government reasoned that abuses were resulting from poor communication between migrant domestic workers and their employers; the government planned to respond in part through skills training. At the time of writing, legislation implementing a violations with virtually total impunity in enterprises located in duty-free zones of the rights contained in articles 7 and 8 of the Covenant.” Para. 19).

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333 *Id.* at 8-11.
334 Fitzpatrick & Kelly, *supra* note 331, at 72-73.
336 *Id.*
ban had not been passed; Human Rights Watch reports that the leading bill under debate would ban migration by those under 21, unless they were married.\textsuperscript{337}

Receiving countries have also imposed certain restrictions in the name of protection: Malaysia has banned the employment of domestic workers by unmarried individuals, apparently in an effort to curb sexual harassment and assault.\textsuperscript{338} Singapore imposes burdensome taxes on household workers, reportedly with the intent of limiting the employment of domestic workers to the wealthy classes, seen as less likely to abuse their domestics.\textsuperscript{339}

All of these efforts, undertaken in the name of protecting women from abuse, are actually perverse, frequently increasing risks to participants’ physical integrity and economic welfare. Measures to regulate distinctly female migration streams, including those intended to protect female migrants from gender-specific threats to their physical, psychological and economic security, may assume forms that deprive these migrants of the liberating potentiality of the migration experience. Devising a role for legal norms and institutions to balance safety and freedom for female migrants remains an enormously difficult challenge.\textsuperscript{340}

Although they have not always been called upon in this context,\textsuperscript{341} human rights norms can help guide those taking up this challenge. Through the core standards of non-discrimination and equality, human rights can function as a check on states’ use of overprotective measures.

First, any measures that are facially applicable only to women (such as restrictions on the right of women to migrate freely without concomitant restrictions on men) must be tested against non-discrimination standards defining gender discrimination under international human rights norms. While states may attempt to argue that such restrictions amount to temporary special measures of the kind allowed under CEDAW, such an argument can be defeated by the terms of the treaty alone. Article 4 provides that:

Adoption by states Parties of temporary special measures aimed accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail, as a consequence, the maintenance of unequal or separate standards. . . \textsuperscript{342}

Measures that seek to “protect” women as distinct from men are not “aimed at accelerating de facto equality between men and women.” Instead, they attempt to end abuse by modifying

\textsuperscript{337} Human Rights Watch, Help Wanted, supra note 108, at 56.
\textsuperscript{338} Fitzpatrick & Kelly, supra note 331, at 79.
\textsuperscript{339} Id. at 78-79.
\textsuperscript{340} Id. at 47-48.
\textsuperscript{341} In fact, sometimes human rights advocates have accepted these restrictive measures without questioning their negative consequences for women migrants. See 2003 GA Report, supra note 26, at para. 29 (“welcoming” policies “allowing the recruitment only of skilled workers to prevent employment in the sex industry or in humiliating or degrading jobs”).
\textsuperscript{342} CEDAW, Article 4(1). See also CEDAW, General Recommendation 25, supra note 102.
women’s scope of action, movement, and choice, instead of taking aim at those directly responsible for the abuse.

Second, measures that have a disproportionate impact on women’s ability to exercise their human rights need to be carefully scrutinized using substantive anti-discrimination standards. Measures such as those adopted by Malaysia and Singapore, which do not specify the gender of the domestic workers they are regulating, still have a disproportionate impact on women’s ability to work freely since women make up the vast majority of domestic workers in those countries. Such regulations are therefore contrary to recognized human rights law. Even the response of the Philippines, which some believe has led to limited improvements for regular migrants in countries where bilateral agreements exist, was discriminatory in its application. Clearly conditions like those in place in Bangladesh violate women’s right to equality, and set husbands up as private protectors in lieu of labor and human rights rules.

Human rights norms make clear that states must focus their attention on ending abuses and empowering women migrants to claim and enforce their human rights rather than imposing paternalistic bans that serve to exacerbate the discrimination that such workers already experience in the course of their migration and work.

IV. CONCLUSION: CLARIFYING RIGHTS AND ARTICULATING EMERGING CLAIMS

As growing numbers of women migrate for work, there is an increasing focus on the abuses they face in sending and receiving countries. Much of the effort to combat these violations focuses on urging states to ratify the Migrant Workers Convention or on clarifying that Convention’s guarantees. As the analysis provided in this article demonstrates, this singular focus is misplaced. Indeed, if advocates are not attentive to the ways in which migrants’ rights are protected by all of the major U.N. human rights treaties, the focus on the MWC could be counterproductive. As a practical matter, it is highly unlikely that the MWC will be ratified in the near future by a broad range of states that are host to a large number of migrant workers. Of the 27 states that had ratified the Convention at the time of writing, none are primarily receiving states. Further, a singular focus on the MWC would undercut the fact that a strong body of binding norms already exists and should be implemented without delay, and reduces advocates’ ability to respond to the intersectional forms of discrimination challenging women migrants.

Arguments that migrants do not have rights, or that the human rights framework is inadequate to the task of protecting those crossing borders should be countered with clear analyses and

343 See, for example, Taran, supra note 1.
344 For a discussion of the obstacles to widespread ratification, see Shirley Hune and Jan Niessen, Ratifying the U.N. Migrant Workers Convention: Current Difficulties and Prospects, 12 NETHS Q. HUM. RTS. 12 (1994), and Taran, supra note 1, at 94-96 (outlining obstacles but also expressing limited optimism).
345 Supra note 2.
346 On International Migrants Day, December 18, 2003, UN Secretary-General Kofi Annan chose to focus on the need for states to ratify the MWC instead of pointing out the myriad ways in which states are currently violating their existing obligations:

More must be done to ensure the respect of the human rights of migrant workers and their families — be they regular or irregular, documented or undocumented. That is why I call on States to become parties to
insistence on enforcing and monitoring norms. Of course, the MWC should not be ignored. Ratification efforts should continue alongside these other tasks. Moreover, the newly-formed Committee on the Protection of the Rights of All Migrant Workers and their Families, charged with monitoring compliance with the MWC, should be viewed as a location for more than just enforcement of the treaty. Advocates should look to the Committee for explications of rights protections that can be used as interpretive guides for similar obligations under other human rights treaties. Statutes and policies adopted by ratifying countries and identified as promising by the Committee in its monitoring role can be promoted as best practices. And organizing efforts led by NGOs in states that have ratified can model productive engagement with states receptive to improving their treatment of migrant workers on both the sending and receiving end.

More importantly, however, migrants’ rights advocates should consider constructing claims using applied international intersectionality by transforming migration-based claims into claims more widely enforceable as discrimination on the basis of sex, race, ethnicity, and religion. Advocates should also remain attentive to emerging claims. The processes through which the nascent claims of individuals and groups are articulated into rights discourse are complicated, but it is clear that these processes are vital to ensuring that norms evolve in response to the felt claims of those most directly affected by discrimination and exploitation. The job of the human rights lawyer involves walking the tricky line between seeking normative clarity and remaining flexible enough to respond to emerging claims. This is especially true for those using intersectionality.

Feminist social scientists have developed methodologies aimed at excavating women’s claims that have not yet been acknowledged as human rights through the formal mechanisms of the state or international human rights machinery. One of these methodologies involves close attention to women’s own “sense of entitlement” concerning their lives, bodies, and futures. Developed by the International Reproductive Rights Research Action Group (IRRRAG), the concept of women’s “sense of entitlement” and its accompanying ethnographically-driven anthropological methodology has been used to identify the things that women consider to be morally theirs, but which have not yet hardened into legal norms:

In order to capture our respondents’ own perception of their needs and just claims... beyond what may exist juridically, we adopted the concept of “sense of entitlement”... Sense of entitlement goes beyond the concept of “needs” insofar as it entails a conviction of the moral rightness of one’s claim, without perhaps the formal public or legal acknowledgment that “rights” imply. It thus denotes the space in between a felt sense of need and an articulation of right.

the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which entered into force this July. The Convention establishes for its ratifying countries the obligation to respect the core human rights and fundamental freedoms of migrant workers in their State of immigration. It is a vital part of efforts to combat exploitation of migrant workers and members of their families.


To identify what lies in this space in between, IRRRAG designed an ethnographic research methodology that encouraged women to articulate their own sense of entitlement at the local level, focusing especially on claims made in relation to partners, family, and caregivers, rather than the State. Indeed, IRRRAG was not terribly interested in claims made against the State, since such claims already implied a certain advanced form of claiming, while IRRRAG was most concerned with embryonic rights claims as felt and expressed by women on the micro level.

Using the spirit of this concept if not the accompanying anthropological methodology, legal scholars could usefully examine claims by women migrant workers that are based on the same “sense of entitlement” IRRRAG discusses, but which have progressed beyond their earliest stage and are now being forwarded as rights by women migrants and their advocates. These are claims that have not yet become rights in a formal sense, but which should be attended to by human rights advocates as they make claims on the State and the international community. Identifying these claims requires an iterative methodology in which existing guarantees for women migrants are carefully and consistently invoked while newly articulated rights are progressively brought forward.

Research could be conducted, for example, with migrants’ and women’s rights NGOs, or with groups of women migrant workers more directly, to identify the core entitlements that have not yet become part of established human rights law. Moving such claims to the center of advocacy efforts would honor the agency of the women migrant workers whose experiences have been so far described and analyzed only through existing legal norms.

The importance of this kind of balancing act is exemplified in the historical debates over violence against women. As mentioned above, several decades ago, advocates struggled to establish the human rights pedigree of norms against domestic violence. This work required a close examination of the seemingly fundamental distinction in human rights law between state action and the acts of private individuals, and the analogically opposed realms of the “public”

348 One important effort that should be closely followed is the organizing work being done by Global Rights, which moderates an affinity group of domestic migrant workers’ advocates, and is currently compiling an international “Declaration” on the rights of migrant domestic workers. This effort was inspired in part by the creation of the “Migrant Domestic Workers Charter of Rights” by a network of advocates in the European Union. See Respect Network, “Migrant Domestic Workers Charter of Rights,” available at http://www.solidar.org/Document.asp?DocID=162&tod=63616.

349 Feminist human rights scholars worked for decades to redefine women’s rights as human rights. Indeed, until the 1993 World Conference on Human Rights in Vienna, the straightforward claim that “women’s rights are human rights” remained controversial. See Elisabeth Friedman, Women’s Human Rights: The Emergence of a Movement, in WOMEN’S RIGHTS, HUMAN RIGHTS INTERNATIONAL FEMINIST PERSPECTIVES 18 (JULIA PETERS & ANDREA WOLPER, eds., 1995), and Bond, supra note 33, at 77-92; for an example of an earlier work setting out the arguments, see Charlotte Bunch, Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights, 12 HUM. RTS. Q. 486 (1990). In the past ten years, much work has been done to “mainstream” women’s rights into all forms of human rights work – from local organizing efforts to treaty-making and international institution-building. See Bond, supra note 33, at 138-142. See also UNDP, Gender Mainstreaming Tools, available at http://www.undp.org/gender/tools.htm. One of the methodological imperatives that has emerged from these feminist efforts is the requirement that existing human rights norms not be taken as the permanent embodiment of what human rights are.

and “private” more generally. Through intensive advocacy and careful legal work, women’s rights advocates established definitively that states have the duty to prevent violence against women in all realms, and to take remedial actions when such violence occurs. Similarly gendered struggles remain to be had concerning the rights of women migrant workers, many of whom work in those same “private” spheres of family and home, and whose status as workers seems to trouble neat categories of productive and reproductive labor.

Arguments have already been joined concerning how to establish standards, design monitoring programs, and set up enforcement mechanisms for work done in the “private sphere.” Many of these arguments have gendered connotations similar to those heard during the violence debates of the 1990s. Work to uncover women migrant workers’ own sense of their rights are important, and should be coupled with a gendered examination of how those entitlements can best be articulated using the human rights framework.

Further, claims lying outside the realm of what seems possible at any given time – such as current arguments for a right to cross borders freely – may need to be strategically incorporated as political demands rather than rights claims. This kind of strategy will be especially important when dealing with women’s entitlements concerning transnational processes that have yet to be adequately addressed by human rights law. In this way, political claims about forces that lie beyond the control of any one state (such as globalization), or within the purview of international financial institutions rather than states per se (such as conditions for loans and aid, including privatization and structural adjustment programs) or which states continue to hold as their prerogative (such as immigration controls), may become cognizable within the larger human rights discourse if not (yet) the human rights legal framework.

351 The feminist interrogation of the public/private divide in human rights law has of course extended beyond the issue of domestic violence. For broader discussions, see Celina Romany, State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law, in Cook, supra note 350, at 85, and Donna Sullivan, The Public/Private Distinction in International Human Rights Law, in Peters & Wolper, supra note 351, at 126.

352 For a discussion of this shift, see UNIFEM, NOT A MINUTE MORE: ENDING VIOLENCE AGAINST WOMEN 16-25 (2003).

353 As Donna Maeda explains: “human rights” do not reside solely within the international legal framework developed under the United Nations. The idea of human rights is powerful for those attempting to assert claims to change conditions in their lives and to work for justice on a global level. In addition, critical human rights workers are able to use U.N. fora to organize and transform approaches to human rights. Multiple discourses or regimes of human rights co-exist, compete, coincide, and overlap. Acknowledgment of these multiple discourses in contexts of globalization moves from simply adding formerly excluded voices to a more critically transformative approach to severe power differentials. . .

Maeda, supra note 59, at 334-5.

354 Hope Lewis calls for a human rights analysis of similar forces: Global migration stories should also be about the transnational human rights impact of international policies and arrangements over which the North has significant control and responsibility. Assigning the sole responsibility for human rights violations to the governments of the Third World masks the responsibilities of the North with regard to the human rights of migrants. Structural adjustment policies, Third World debt, and inequitable terms of trade, for example, have a great deal to do with human rights conditions in the South. We must use the lens of human rights to examine more fully the factors that contribute to the need to migrate.

Lewis, supra note 23, at 227.
Human rights law was created primarily to address abuses and forms of exploitation that were presumed to take place within the public sphere by state agents against individuals of the same nationality. These standards were based on certain gendered assumptions that prevailed at the time, and were written to address discrete forms of discrimination. Over time, the norms and rules constructed to address such abuses have been expanded to include violations aimed at non-nationals, exploitation of individuals in “private” places by non-state actors, and forms of abuse that combine multiple forms of discrimination. Because of these transformations, many of the violations suffered by women migrant workers may be addressed by existing human rights law using applied international intersectonality. What lies outside these protections, however, are types of exploitation bound up with forces of globalization, transnational gender dynamics, and patterns of racism, ethnic discrimination and economic subordination that exceed the borders of any one state, and which involve institutions that are as yet not directly bound by human rights law. These forces remain to be adequately addressed by the human rights framework; examining the experiences of women domestic workers – the new “servants of globalization” – may be a good place to start. The entitlements that these women articulate as they cross borders may allow us to identify the human rights concepts and institutions that need to be reconfigured as we struggle to humanize globalization.