Article

Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers

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This Article considers the impact of the Migrant Workers Convention on the human rights of women migrants. While the adoption of a convention targeting abuses against migrant workers is a significant development in international human rights law, the author cautions that its specialized nature might be perceived as a limitation on the obligations that states owe to women migrants. The author warns against traditional, single-variable, compartmentalization of human rights treaties that would make the Migrant Workers Convention the only applicable human rights tool to women migrants, and, instead, advocates an intersectional approach. Using intersectionality, the author shows that many of the major human rights treaties can be invoked on behalf of the empowerment of migrant workers. 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, and consider the ways in which the rights of women migrants are already included in the panoply of standards set out in those instruments.

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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. 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, and that few are likely to do so in the near future, this victory is a limited one, even for human rights advocates accustomed to celebrating small achievements. 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 energy more wisely placed elsewhere, but also because it would allow states to minimize the obligations they owe to women migrants under existing human rights law regardless of their decision to sign, ratify, or ignore this new treaty.

The temptation to counter-productive compartmentalization is by no

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1. International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Dec. 18, 1990, 30 I.L.M. 1517 (entered into force July 1, 2003) [hereinafter MWC]. The Migrant Workers’ Convention was developed over a ten-year period, and was adopted by the U.N. General Assembly in 1990. The treaty, which is unusually long and detailed in comparison to the other major human rights conventions, was developed through a painstaking process of consensus-building among both receiving and sending States. See Shirley Hune, Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 25 INT’L MIGRATION REV. 800, 807-15 (1991). The result is a treaty that includes a wide range of protections that also contain significant limitations clauses, which give ratifying States the ability to narrow the coverage of the treaty’s norms. For example, while article 41 guarantees the right of documented migrants to vote in their countries of origin, the second clause of the article provides that this right shall be facilitated and exercised “in accordance with [each country’s] legislation.” MWC, 30 I.L.M. 1517, 1534. While some host States have stronger protections for documented workers than those included in the treaty, many of those same States’ laws may fall below the standards set out for undocumented workers. This simultaneously under- and over-protective nature means that many receiving countries are reluctant to sign the treaty. See Nicola Piper & Robyn Iredale, Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (2003) (setting out wide range of obstacles to ratification to be identified through empirical research), available at http://www.unesco.org/most/apmm_unconv.htm; Patrick A. Taran, Status and Prospects for the UN Convention on Migrants’ Rights, 2 EUR. J. MIGRATION & L. 85, 92-3 (2000) (discussing major obstacles to widespread ratification).


3. See Piper & Iredale, supra note 1; Taran, supra note 1.
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, 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, the MWC appears to be the only relevant standard for
those who are migrant workers, since the treaty explicitly responds to the
status “migrant.” Viewed through the framework of intersectionality, on
the other hand, all of the other major treaties have significant contributions
to make to the empowerment of migrant workers.

In this Article I will argue that applying the methodology of
intersectionality to human rights treaty law allows us to identify and
articulate a set of robust standards relating to women migrant workers that
can be applied to states – now – by shifting the focus from the single
variable of “migration status” to the multiple variables relevant to women
who migrate for work – including gender, race or ethnicity, and
occupation. Other scholars have demonstrated the ways in which the
failure to use an intersectional approach leads to misapprehensions about
individuals’ varied experiences of discrimination and subordination. 4
Shifting the focus, I will argue here – more affirmatively – that
intersectionality can also be applied to existing rights standards to produce
a wide variety of empowering norms that advocates can use right away. 5

Since there are no real enforcement mechanisms for human rights
internationally, much depends on whether – and how – advocates take up
the discourse of rights. 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

5. It should be acknowledged immediately that intersectionality will not solve the most
glaring and pressing predicament facing human rights practitioners: the problem of how to
close the gap between theory and practice, between the ability to elaborate protective norms
and the inability to halt egregious rights violations. Indeed, the legal analysis contained in
this Article will reveal just how large that gap is. Such a revelation, though potentially
disappointing, should not be viewed as a weakness of the approach I advance here. 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 treaty law. The intersectional analysis of treaty law offered in this Article
carefully delineates a range of international obligations relating to women migrant workers.
By clarifying these norms, I believe this analysis will contribute toward closing the gap it also
reveals.
“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 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 standards 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 intersectionality, it is clear that treaty law prohibits governments from reducing policy decisions concerning the treatment of migrant workers to instrumental calculations about the economic impact of upholding entitlements. 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.

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 intersectionality, consider the issue of women’s vulnerability, and comment on the way in which human rights law can be used to reach private, non-state conduct. In Section IV, I apply intersectionality 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 in which human rights law can be invoked 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.\(^6\) The analysis draws on


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.\(^7\)

\(^7\) Id. at 11 (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).
the five most relevant major human rights conventions: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); the International Covenant on Social, Economic and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Migrant Workers Convention (MWC). Since this Article focuses on treaty law, it does not include an analysis of the wide range of documents on migration produced by U.N. bodies in recent years, such as the reports produced by the U.N. Special Rapporteur on the Rights of Migrants and the Secretary-General, resolutions of the U.N. General Assembly and the Commission on Human Rights, documents relating to the International Commission on Migration, or the outcome documents from the various world conferences of recent years, though they were consulted as background. Further, important work being done at the regional level – including the recent advisory opinion of the Inter-American Court of Human Rights affirming the rights of all migrant workers – is not examined in this Article.

7. Because this Article focuses on women, the rights of children are not examined here.
8. 1249 U.N.T.S. 13 (Dec. 18, 1979) [hereinafter CEDAW].
12. MWC, supra note 1. 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 on Specific Groups and Individuals: Migrant Workers, U.N. GAOR, 58th Sess., Agenda Item 14(a), U.N. Doc. E/CN.4/2002/94 (2002) (discussing 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 is integrated where relevant.
In the concluding section, I emphasize the need both to insist on enforcement of existing protections, and to remain attentive to emerging claims. Such emerging claims may require scholars and advocates to push the current boundaries of human rights frameworks to accommodate claims made by workers who are crossing borders at increasingly rapid rates.

This Article is intended to contribute to the efforts of advocates to use existing protections 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. It is also aimed at advancing scholarly consideration of human rights by demonstrating that careful doctrinal work can help close the gap between rules and reality by providing the normative clarity that is a prerequisite to effective rights enforcement.

II. FEMINIZED LABOR MIGRATION IN THE CONTEXT OF GLOBALIZATION

The world is witnessing an increasing feminization of migration, resulting 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.

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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. 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 services of migrant [women] domestic workers, migrant [women] domestic workers simultaneously purchase the even lower wage services of poorer women left behind in the 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.

Rhacel Salazar Parrenas, Servants of Globalization: Women, Migration and Domestic Work 62 (2001). See also Hope Lewis, Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas, 5 J. Gender Race & Just. 197, 219 (2001) (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.”); Jan Aart Scholte, Globalization: A Critical Introduction 251-53, 252 (2000) (discussing the global dynamics that have created more opportunities for women in wage labor markets while failing to take away family burdens, leading to, inter alia, “[e]xpanded global markets in domestic servants. . .”); 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.”).

In Western Asia, where oil booms have brought about major social and economic changes, the employment of foreign women domestic workers has become a status symbol. See Sabika Al-Najjar, Women Migrant Domestic Workers in Bahrain 6 (ILO, International Migration Paper # 47, 2001). Bridget Anderson suggests that prestige is also a significant factor for Europeans in hiring migrant domestic workers. See Bridget Anderson, Just Another Job? The Commodification of Domestic Labor, in Global Woman: Nannies, Maids and Sex Workers in the New Economy 104, 106 (Barbara Ehrenreich and Arlie Russell Hochschild eds., 2002) [hereinafter Global Woman]. 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. See, e.g., Noorashikin Abdul Rahman, Brenda S.A. Yeoh & Shirlena Huang, “Dignity Over Due”: Transnational Domestic Workers in Singapore, 2-3 (unpublished manuscript, on file with author) (explaining that the introduction by the government of Singapore of the Foreign Maid Scheme in 1978 was an effort to encourage continued participation of women in the formal economic sphere).


24. Taran & Geronimi, supra note 19, at 10.

25. The ILO identifies four types of irregular migrant workers: (1) “those who enter the country legally but whose stay or employment contravenes the law,” (2) “those whose stay and entry are lawful but who do not have the right to work and are engaged in illegal or illicit employment,” (3) “those who enter the country illegally and who seek to change their status after arrival to find legitimate employment,” and (4) “those who enter the country illegally, whose stay is unlawful, and whose employment is illegal.” Booklet 2, supra note 23, at 18.
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 to 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. For women in many parts of the world, these trends spell increased vulnerability to exploitation and abuse, while simultaneously presenting opportunities for empowerment.

III. APPROACHES TO USING HUMAN RIGHTS LAW TO EMPOWER WOMEN MIGRANT WORKERS

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 intersectionality, human rights law can effectively be used by advocates to respond to the myriad aspects of women migrant workers’ experience as multiply situated individuals. Further, human rights law can support carefully crafted responses to discrimination and exploitation that do not reinscribe women as victims in need of protection. 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.

Briefly, intersectionality is an approach to combating discrimination in which the various forms of subordination that people face are taken into consideration as they act together. Instead of conceiving of a Filipina

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26. Taran & Geronimi, supra note 19, at 10.
27. Id. at 5.
28. 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. For an overview of subaltern studies, see A SUBALTERN STUDIES READER, 1986-1995 (Ranajit Guha, ed., 1997); for postcolonial studies, see ROBERT J.C. YOUNG, POSTCOLONIALISM: AN HISTORICAL INTRODUCTION (2001). As others have eloquently demonstrated, intersectionality shares with this much larger family of critiques the commitment to reconceptualizing the
domestic worker, for example, as separately or consecutively disadvantaged by gender and racial discrimination in the United States, intersectionality calls attention to the ways in which race and gender interact – or intersect – to create specific forms of discrimination and oppression. A Filipina migrant woman’s experience of racism in the U.S. will be different than the racism experienced by a Filipino 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.29

The version of intersectionality most familiar to North American legal audiences was formulated in the 1990s by critical race feminists.30 This American strand of intersectionality has since blended with other forms of intersectional analysis and has been used and re-crafted by scholars,31 advocates,32 and jurists33 both in North America and abroad. The concept of model of the “self” as unitary and unchanging. See Johanna E. Bond, International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations, 52 EMORY L. J. 71, 101-37 (2003).

29. See ONTARIO HUMAN RIGHTS COMMISSION, AN INTERSECTIONAL APPROACH TO DISCRIMINATION: ADDRESSING MULTIPLE GROUNDS IN HUMAN RIGHTS CLAIMS, 2 (2001) (noting that “a contextualized approach places less emphasis on characteristics of the individual and more on society’s response to the person”).


33. For a discussion of the use of intersectionality by Canadian courts, see ONTARIO HUMAN RIGHTS COMMISSION, AN INTERSECTIONAL APPROACH TO DISCRIMINATION: ADDRESSING MULTIPLE GROUNDS IN HUMAN RIGHTS CLAIMS (2001).
multiple forms of discrimination – if not intersectionality – has even entered the language of U.N. documents.\textsuperscript{34} Although the use of this language is important, intersectionality, as a mode of analysis in which all of the axes of discrimination are systematically considered as they work together, has not been truly integrated into the work of the human rights bodies of the United Nations.

In recent years, a number of scholars have applied intersectionality analysis to international human rights norms and processes.\textsuperscript{35} In an important 1997 article, Lisa Crooms uses intersectionality to elucidate U.S. obligations under the CERD Convention, and concludes that, if applied holistically and robustly, 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 discourses.”\textsuperscript{36} 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

\textsuperscript{34} One of the most important instances is 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.” Report of the World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, World Conference against Racism, Racial Discrimination, Xenophobia, and Related Intolerance, at 10, U.N. Doc. A/Conf. 189/12 (2001). See also General Recommendation No. XXV, The Gender-related Dimensions of Racial Discrimination, Committee on the Elimination of Racial Discrimination [Hereinafter CERD Committee], 56th Sess., at 216, U.N. Doc. No. HRJ/GEN/1/Rev.6 (2003) (noting that “[t]here 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…”).

\textsuperscript{35} 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); Hope Lewis, Global Intersections: Critical Race Feminist Human Rights and Inter/National Black Women, 50 Mt. 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); 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, 735 (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”).

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 merely theorizes intersectionality to human rights problems.

Taking up this challenge, I use intersectionality in this Article to analyze the situation of women migrant workers. I intend to perform the kind of analysis requested by Crenshaw and Bond: 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 intend to push beyond this applied form of intersectionality with its focus on identifying forms of discrimination and suggesting institutional reform. Shifting the emphasis from only articulating forms of discrimination to also identifying protections, I will use intersectionality to uncover those human rights norms that already exist, and which could be called upon to fight the subordinating practices made so clear through intersectional descriptions of violations.

Women migrant workers face abuses not only at the hands of government officials, but also private individuals, companies, and other

37. Id. at 15-18.
38. Id. at 15-16.
39. Bond, supra note 28, at 152-60 (theoretical shifts) and 161-84 (institutional reforms).
40. Id. at 75-76.
41. This approach also allows me to avoid some of the pitfalls inherent in rooting an analysis of human rights violations in women's lived experience. 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. 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). I attempt to avoid these problems by rejecting the common narrow focus on violence against women migrant workers and the trafficking of women, instead focusing on the full range of human rights entitlements that 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.
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 responds to abuses that are carried out by agents other than the state.

Under human rights law, the state has a broad set of positive and negative obligations concerning both private and public conduct. These obligations have 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. 42 In sum, then, in relation to both civil and political rights and economic, social, and cultural rights, 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. 43

IV. INTERNATIONAL INTERSECTIONALITY: ARTICULATING ABUSES, IDENTIFYING RIGHTS

This section will begin by considering the principles of non-discrimination and equal protection as they apply to women migrant

42. 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 General Recommendation XV, Committee on Economic, Social, & Cultural Rights, 42nd Sess., *reprinted in General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. High Commissioner for Human Rights, at 207, U.N. Doc. HRI/GEN/1/Rev.7 (2004) [hereinafter *Compilation of General Comments*].

43. One additional note is necessary here: human rights norms and interpretive methodologies have not yet been adequately 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. 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.
workers. Following this introduction to core principles, the longest portion of the section will analyze the substantive treaty norms relevant to prevalent forms of discrimination and abuse that women migrant workers face.\textsuperscript{44} For each set of violations, the relevant rights standards will be examined, alongside a brief consideration of some of the steps states may be required to take 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 major human rights treaties and their interlocking norms, 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.\textsuperscript{45} 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.

Since this section is written in general terms, it 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. At a general level, this section examines the web of international norms that has been woven concerning 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,\textsuperscript{46} evidences certain ethical principles.

\textsuperscript{44} 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 exists. Rather than duplicate these efforts, I concentrate here on issues of specific importance to women migrant workers.

\textsuperscript{45} As Rhacel Salazar Parreñas explains:

\begin{quote}
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.
\end{quote}

\textit{Parrenas, supra} note 22, at 247.

\textsuperscript{46} The exception is the Migrant Workers Convention, which entered into force on July 1,
applicable in a persuasive manner to the entire international community and contributes over time to the crystallization of customary international law rules.  

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.

A. 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 stood 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 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.

The primary principles of non-discrimination, equality and equal

2003. For ratification information on the MWC see supra note 2. The other treaties are very broadly in force: as of November 2, 2003, the ICESCR, supra note 9, had 148 States Parties; the ICCPR, supra note 10, had 151; the CERD, supra note 11, had 169; and the CEDAW, supra note 8, had 174.

47. 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.
protection of the law are essential to any human rights analysis, since they embody the general rule that human rights 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 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 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.

1. 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. Under Article 2, each State Party “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. In its 2004 General

48. 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.

49. As the Human Rights Committee has explained: “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.” General
Comment on the Nature of 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 nationality or statelessness … who may find themselves in the territory or subject to the jurisdiction of the State Party.”

Article 3 ensures equal civil and political rights to women and men. 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 so that the term discrimination is “understood to imply any distinction, exclusion, restriction or preference … 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. Article 26 holds that all people are entitled to equal protection of the law. 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 to aliens without discrimination. This means that in states that have enacted protective


52. “The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground….”

53. As the Human Rights Committee explained, 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
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. This will be especially important in cases in which a state has ratified the ICCPR but not the ICESCR or other treaties guaranteeing substantive economic and social rights.

In general then, the protections of the ICCPR are guaranteed without discrimination between women and men, and between citizens and aliens. Against this background rule, some articles are specifically limited to citizens. 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. The special nature of these rights makes 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 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 this list of prohibited classifications is narrower than the general non-discrimination clause included in Article 2(1), 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. 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 conditions.

54. See General Comment 18, supra note 51, ¶ 13 (“[T]he 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.”).

55. See id. ¶¶ 1-2.


57. ICCPR, supra note 10, arts. 25 and 12(4), at 179 and 176.

circumstances, and that they do not constitute sex-based discrimination.\textsuperscript{59}

2. 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{60} 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 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, “with due regard to human rights and their national economy[,] may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.”\textsuperscript{61} It must be stressed that this exception is limited to developing countries, and to economic rights. Aliens continue to enjoy 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 as well as 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 may be possible to argue, using Article 3, that restrictions on the economic rights of aliens must not be applied in such a manner as to amount to sex discrimination. This would mean that both limitations on economic rights that are facially discriminatory on the basis of sex, and those which violate substantive equality by impacting women disproportionately, would be impermissible.\textsuperscript{62}


\textsuperscript{60} For a discussion of the protective regime concerning non-citizens under the ICESCR, see Progress Report of the Special Rapporteur submitted in accordance with Sub-Commission Decision 2000/103 and 2001/108, as well as Commission Decision 2002/107, supra note 56, ¶¶ 21-4 and 50-1.

\textsuperscript{61} ICESCR, art. 2(3), supra note 9, at 5.

\textsuperscript{62} This argument would analogize to 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 General Comment 15, supra note 49, ¶ 7 (“States Parties which take measures derogating from...
3. 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.” 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.”

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. 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 when determining the permissibility of distinctions on the basis of alien status. 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.

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.” (emphasis added). Second, the Human Rights Committee has paid similar attention to discrimination through permissible restrictions under the Covenant. See General Comment 22, Right to Freedom of Thought, Conscience and Religion, U.N. GAOR Hum. Rts. Comm., 48th Sess., ¶ 8 (1993), reprinted in Compilation of General Comments, supra note 42, at 155 (“[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 . . . Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.”) (emphasis added).

63. CERD, art. 5, supra note 11, at 220.

64. “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.” Id.


66. 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
Indeed, those rights remain, and they functionally trump the silence of the CERD Convention in this area.

In addition, the CERD Committee has interpreted the Convention to prohibit the application in a racially discriminatory manner of otherwise permissible distinctions between citizens and non-citizens. Even more potentially far-reaching is the principle the CERD Committee set out in Zaid Ben Ahmed Habassi v. Denmark.

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 is 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 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. Finally, 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, making it a very useful tool for women migrant workers.


The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW or Women’s Convention) was drafted with the


67. Preliminary Report of the Special Rapporteur on the Promotion and Protection of Human Rights, submitted in accordance with Sub-Commission Decision 2000/103, supra note 65, ¶ 17. The exact contours of this requirement have not yet been fully explored.

68. Denmark Communication No. 101997, CERD Committee, 54th Sess., ¶ 93, U.N. Doc. CERD/C/54/D/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).

69. 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.


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 those areas.
Indeed, the Convention applies to “all fields,” requiring states to dismantle
sex discrimination and take effective measures for the advancement of
women.\footnote{CEDAW, art. 3, supra note 8, at 16.}

Specifically, the Convention obligates States Parties to prohibit
discrimination against women.\footnote{Id. art. 1, at 16.} 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 ... all appropriate measures, 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.”\footnote{Id.
art. 3, at 16.} This
definition of discrimination – when paired with the guarantee of equality
that accompanies it – should be understood according to the substantive
equality model. This means that women’s rights are violated not only
when, for example, laws formally treat them differently from men, but also
when any law, policy, or action has the practical effect of disadvantaging
them. 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 migrant
women, discrimination is present and the state must take active steps to
ensure women their equal rights.

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. By way of example, these standards would require a
state in which a disproportionate number of women migrant workers were
subjected to violence within their employer’s home – for instance, in states
where violence against women domestic workers is widespread – to take
steps to ensure effective protection from such abuse.

71. CEDAW, art. 3, supra note 8, at 16.
72. Id. art. 1, at 16.
73. Id. art. 3, at 16.
5. 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, including the prohibition of discrimination on the basis of alien status. States Parties are required “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 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.

V. APPLIED INTERNATIONAL INTERSECTIONALITY: EXAMINING PREVALENT FORMS OF DISCRIMINATION AND EXPLOITATION

This section will examine common forms of discrimination and exploitation that women migrant workers face. Each subsection will begin with a description of the forms of abuse under consideration, and then move on to identify human rights standards relevant to those violations, alongside a consideration of steps states may be required to take to halt such abuses.

74. 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.” MWC, supra note 1, at 1523.
75. Id. at 1532.
A. Exploitative Terms of Work: Pay, Hours & Contracts

1. The Problem

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 nearly impossible to repay, trapping women migrants into conditions akin to debt bondage.76 Others house migrant workers 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.77 Finally, agents who are working in direct contravention of national laws by facilitating women’s crossing of borders illegally, may use coercion, force, or false promises, the placement of women in clandestine domestic settings, illegal sex work, or exploitative sweatshops—practices that amount to trafficking. The ILO reports that women are more vulnerable to illegal recruitment and more likely to rely on illegal migration channels due to “their limited access to information, lack of time to search for legal channels … lack of financial resources to pay the fees [and] [t]he nature of the work and the forms of migration open to women …”78

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.79 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

76. 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, often without the knowledge of the worker. Reed Haddad, A Modern-Day ‘Slave Trade’: Sri Lankan Workers in Lebanon, 211 MIDDLE EAST REPORT 39 (1999). See also BOOKLET 1, supra note 6, at 18-9 (discussing exorbitant fees, deceptive contracts, and other practices used by migration agents); ILO, PREVENTING DISCRIMINATION, EXPLOITATION AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE – BOOKLET 3: RECRUITMENT AND THE JOURNEY FOR EMPLOYMENT ABROAD (2003) [hereinafter BOOKLET 3] at 20-21 (exploring debt bondage).

77. BOOKLET 3, supra note 76, at 24.

78. BOOKLET 1, supra note 6, at 18.

79. 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. EMEBET KEBEDE, ETHIOPIA: AN ASSESSMENT OF THE INTERNATIONAL LABOR MIGRATION SITUATION – THE CASE OF FEMALE LABOR MIGRANTS 6-7 (ILO – GENPROM WORKING PAPER No. 3).
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 to accessing courts or other judicial institutions, and host country courts may deem the contracts unenforceable. 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. 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. 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. 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. 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.

80. BOOKLET 3, supra note 76, at 23.
81. See Abdul Rahman et al., supra note 22, at 9 (discussing a set of rules for foreign domestic workers distributed by a recruiting agency to new employees, which included the requirements 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); see also BOOKLET 3, supra note 76, at 22-3 (discussing a contract found in a travel agency that “recruited” workers in Ethiopia and explicitly stated that the domestic worker was not to leave her employer’s premises for the 2-3 year duration of the contract).
82. 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. See BOOKLET 3, supra note 76, at 34. In Bahrain, contracts concluded with domestic workers are not binding under the provisions of that country’s labor code. See AL-NAJJAR, supra note 22, at 21.
84. HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 17 (2001).
85. See BOOKLET 4, supra note 83, at 25 (discussing accommodations for migrant domestic workers).
86. See KEBEDE, supra note 79, at 8.
– if their services are deemed unsatisfactory. During the trial period, the employee is rarely paid, and once she or “returned” they must begin a new probationary period, during which she 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. 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. 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. Indeed, “unscheduled availability at all times” is often a characteristic of domestic work for women, an expectation modeled on gendered assumptions about women’s roles in the home.

Even when regulations do apply to them, discriminatory rules exempting domestic workers from normal hour limits, or setting long limits (as much as 12-16 hours in some places) may exist. Exceptions to overtime and holiday pay rules also frequently apply to domestic workers. Further, women working as domestics rarely have days off -- even in places where rest days are regulated, domestic workers may be exempted or subject to special rules allowing a single or half day of leisure instead of

87. Id.
88. 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. BOOKLET 4, supra note 83, at 12.
89. See Report of the Special Rapporteur of the Commission on Human Rights on the Human Rights of Migrants, U.N. GAOR, 58th sess., ¶28, U.N. Doc. A/58/275 (2003) (noting that “Many domestic employees work long hours for a miserable salary and under truly inhumane and degrading conditions that sometimes amount to slavery”); see also RAY JUREIDINI, WOMEN MIGRANT DOMESTIC WORKERS IN LEBANON 8, ILO, International Migration Paper No. 48, (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”); HUMAN RIGHTS WATCH, supra note 84, at 17 (noting that domestic workers in the United States required to be on call 24 hours a day); Anderson, supra note 22, at 107 (discussing expectation of domestic workers’ “permanent availability” in European households).
90. ANA ISABEL GARCÍA, ET AL., COSTA RICA: FEMALE LABOR MIGRANTS AND TRAFFICKING IN WOMEN AND CHILDREN 18 (ILO-GENPROM Working Paper No. 2). See also PARREÑAS, supra note 22, at 164 (finding that Filipina live-in workers in Los Angeles and Rome have complained of the “absence of set parameters between their work and rest hours”).
91. The Labor Code of Costa Rica specifically allows employers of domestic workers to require 12-hour days, with the possibility of 4-hour additions when necessary. The Employment Act of Grenada provides for a 60-hour week for domestic workers, while restricting to 40 hours the workweek of agricultural, construction, and industrial workers. See BOOKLET 4, supra note 83, at 12.
92. The ILO reports that not one of a number of women interviewed about working as domestic workers in the United Arab Emirates reported receiving a day off. Id. at 26. Similar stories emerged from Malaysia. Id.
the standard number applicable to other workers. While the families who employ domestics often explain the long hours by saying that such women are “part of the family,” this feeling is not shared by the employees themselves. 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. Similar findings were reported in Taiwan, where migrant workers are often asked to wash their clothes separately from the family. 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.

93. For a discussion of the “part of the family” phenomenon and the ways in which migrant domestic workers have attempted to subvert the familial discourse to their benefit, see Parreñas, supra note 22, at 179-195. See also Al-Najjar, supra note 22, at 10-11.

94. Parreñas, supra note 22, at 165 (“[Filipina domestic workers] regularly found themselves subject to food rationing, prevented from sitting on the couch, provided with a separate set of utensils, and told when to get food from the refrigerator and when to retreat to their bedrooms. These attempts by employers to regulate their bodies are described by domestic workers as part of the larger effort by employers to own them.”).

95. Id.


98. Taran & Geronimi, supra note 19, at 11.
2. UN Human Rights Treaties 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. CERD 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. Under the ICCPR, all individuals – including women and men, aliens and citizens – are guaranteed equality before the law, and aliens and women may not be

99. CEDAW Article 11(1) guarantees women the “right to equal rights in employment, including the right to the same employment opportunities” as men and the application of the same criteria for selection in matters of employment.” Article 11(1) also provides that women have the equal right to free choice of profession, and the right to promotion and job security. CEDAW, supra note 8, at 18.
100. 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 to 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. Id.
101. 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; a decent living for themselves and their families.” ICESCR, supra note 9, at 6.
102. 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. ICESCR, supra note 9, at 5.
103. CERD Article 5(o)(i) guarantees the enjoyment of the following rights, without distinction as to 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.” CERD, supra note 11, at 222.
104. ICCPR Article 26 provides that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”

...
treated differently in court based on their alien status or gender. 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. The Convention also provides that migrant workers must have equal access to the authorities to vindicate their contract rights, and may claim their wages and other entitlements owed to them even if they have been expelled from the state of employment. The ICCPR and the MWC include protections against debt bondage or slavery-like practices.

3. 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

discrimination on any ground,” including sex, race, color, national or social origin, or other status. ICCPR, supra note 10, at 179.

105. ICCPR Article 14 provides that all people shall be equal before the courts and tribunals. Id. at 176. 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. General Comment 15, supra note 49, ¶ 7. Concerning gender equality, the Human Rights Committee made clear in its General Comment on the equality of rights between men and women, that women must have equal – and autonomous – access to justice under Article 14. General Comment 28, supra note 59, ¶ 18.

106. 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 which . . . 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. MWC, supra note 1, at 1532.

107. 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. MWC, supra note 1, at 1531.

108. 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. MWC, supra note 1, at 1540.

109. 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. ICCPR, supra note 10, at 175.

110. 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.” MWC, supra note 1, at 1526.
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 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

111. See, e.g., Report of the Committee on the Elimination of Woman: Concluding Comments by the Committee: Germany, U.N. Committee on the Elimination of Discrimination against Women [hereinafter CEDAW Committee], 22nd Sess., ¶ 318, U.N. Doc. A/55/38 (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.

112. See, e.g., Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations: Senegal, U.N. Committee on Economic, Social & Cultural Rights [hereinafter CESCR], ¶¶ 20-21, 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.


114. See, e.g., Consideration of Reports by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations: Panama, CESCR, 30th Sess., ¶ 15, U.N. Doc. E/C.12/1/Add. 64 (2001) (“The Committee is concerned about the lack of a sufficient number of labour 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”).

115. See, e.g., Report of the Committee on the Elimination of Racial Discrimination: Concluding Observations: Kuwait, CERD Comm., 43rd Sess., ¶ 362, U.N. Doc. A/48/18 (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
should consider extending assistance to women who have been the victims of debt bondage, including resources for rehabilitation and reintegration.  

B. Locked in the Home: Restrictions on the Freedom of Movement

1. The Problem

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 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. 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. 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. Some employers compound the isolation this kind of seclusion causes by forbidding any contact with the outside world – even through telephone or mail. Human Rights Watch reported that a number of foreign domestic workers interviewed by the organization in the United States had their phone calls monitored by employers listening in on the conversation. Seclusion is often extreme in the case of

and physical assault. Members requested information on measures taken by the Government to improve and remedy that situation.


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.

117. See BOOKLET 4, supra note 83, at 26 (reporting that passports are often confiscated by employers of migrant workers in Europe, the Middle East, and East and Southeast Asia); see also Report of the Special Rapporteur, submitted pursuant to General Assembly Resolution 57/218, ¶ 28-31, U.N. Doc. A/58-275 (2003) (expressing concern about the seizure of passports from migrant domestic workers).

118. HUMAN RIGHTS WATCH, supra note 84, at 13.

119. The ILO reports that this is often the case for foreign domestic workers in the Middle East. See BOOKLET 4, supra note 83, at 26. See also JUREIDINI, supra note 89, at 10-11 (Lebanon); HUMAN RIGHTS WATCH, supra note 85, at 13-15 (United States).

120. See KEBEDE, supra note 79, at 6-7.

121. See JUREIDINI, supra note 89, at 10-11 (discussing prohibitions on the use of the telephone and mail by domestic workers in Lebanon).

122. HUMAN RIGHTS WATCH, supra note 84, at 18.
undocumented domestic workers. Such women may hide in the homes of their employers to avoid detection by the authorities.\textsuperscript{123} If detected, these hidden workers often suffer summary expulsion without regard to any outstanding wages or other benefits.

Many women working as domestic helpers are locked in the home by their employers whenever they are left alone – sometimes for extended periods.\textsuperscript{124} 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{125} 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{126} In Taiwan, Malaysia and Singapore, employers of migrant domestic workers are charged a fee upon employment to ensure they do not “run away”;\textsuperscript{127} the ILO reports that such fees have the effect of encouraging restrictions on employees’ freedom of movement by employers reluctant to pay a new fee should the current domestic worker “run away.”\textsuperscript{128}

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 can also 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.\textsuperscript{129} 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.\textsuperscript{130}

In addition to fees charged by some agencies and employers when

\textsuperscript{123} See ALMACIARA D’ANGELO & MAYRA PASOS MARCIACQ, NICARAGUA: PROTECTING FEMALE LABOUR MIGRANTS FROM EXPLOITATIVE WORKING CONDITIONS AND TRAFFICKING 16 (ILO – GENPROM Working Paper No. 6).

\textsuperscript{124} See BOOKLET 4, supra note 83, 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{125} See KEBEDE, supra note 79, at 9.

\textsuperscript{126} See AL-NAJJAR, supra note 22, at 10-11.

\textsuperscript{127} See BOOKLET 4, supra note 83, at 26 (Singapore and Malaysia); Lan, supra note 96, at 5.

\textsuperscript{128} BOOKLET 4, supra note 83, at 26.

\textsuperscript{129} Id. at 7.

\textsuperscript{130} Id.
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.

2. UN Human Rights Treaties 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 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.

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131. Id. at 11.
132. ICCPR Article 12 guarantees to “everyone lawfully within the territory of a State . . . the right to liberty of movement and freedom to choose his residence” within that territory, and provides that everyone has the right to leave any country, including his or her own. ICCPR, supra note 10, at 176.
133. Id.; see also Article 8(1) of the MWC, which guarantees the right of migrant workers and members of their families “to leave any state, including their state of origin” and provides that “[t]his 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.” MWC, supra note 1, at 1525-26.
134. “No one shall be arbitrarily deprived of the right to enter his own country.” ICCPR, supra note 10, art. 12(4), at 176. See also article 8(2) of the MWC which provides that “migrant workers and members of their families shall have the right at any time to enter and remain in their state of origin.” MWC, supra note 1, at 1526.
135. 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. ICCPR, supra note 10, 990 U.N.T.S. at 176.
137. 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.” MWC, supra note 1, at 1534.
138. Article 13 provides that aliens lawfully within the territory of a State party may be
right to leave a country, and to return to one’s home country – and to remain there, however, may not be restricted arbitrarily.\textsuperscript{139} 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.”\textsuperscript{141} 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.\textsuperscript{142} 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.”\textsuperscript{143} Indeed, if they do not exercise due diligence\textsuperscript{144} to end restrictions imposed by private employers – especially expelled from that territory only pursuant to 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. \textit{Id.} at 1527.

139. \textit{See General Comment 27, supra note 136, ¶ 19 (“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.”).}

140. ICCPR, art. 12(4), \textit{supra} note 10, at 176.

141. \textit{General Comment 27, supra note 136, at 177.}

142. \textit{Id.} ¶ 9.

143. \textit{Id.} at 174.

144. 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 \textit{Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, on trafficking in women, women’s migration and violence against women, submitted in accordance with Commission on Human Rights resolution 1997/44, U.N. SCOR., 56th Sess., ¶¶ 51-53, U.N. Doc. E/CN.4/2000/68 (2000).} The Special Rapporteur noted that:

\begin{quote}
...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.\textsuperscript{142}
\end{quote}

The due diligence standard is also likely to be explicitly accepted by the Human Rights Committee as the appropriate yardstick under the ICCPR in the near future. In its draft General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, the Committee stated that:

\begin{quote}
There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties’ permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish,
severe restrictions like locking in the home, which could amount to arbitrary detention in some circumstances—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. 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.” The Committee understood that “[a]ny 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. The Migrant Workers Convention requires states to criminalize the confiscation and destruction of identity documents, such as passports, and residence or work papers.

3. 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. States should ensure that all employers, agencies, and migrant workers are aware of prohibitions against the confiscation and destruction of identity documents.

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145. 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 General Comment 28, supra note 59, 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.”) Id. ¶ 14 (internal citation omitted).

146. CEDAW Article 15(4) requires States to accord to men and women the same rights with regard to the movement of persons. CEDAW, supra note 8, at 20.

147. 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, to leave any country, including one’s own, and to return to one’s country. CERD, supra note 11, at 217.

148. MWC, supra note 1, at 1531.
and work or residence papers. They should further investigate and punish those who disobey this order.\footnote{149} This is especially important in relation to women migrants working in domestic settings.\footnote{150} 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.\footnote{151} Women should be allowed to freely obtain their own individual identity, work, and residence papers.\footnote{152} Arbitrary restrictions on the ability of migrant workers legally in the country of employment to freedom of movement within that country should be removed.\footnote{153} Restrictions on the right of all migrant workers to leave a country,\footnote{154} and arbitrary limits on the ability to enter the

\footnote{149} The CERD Committee has interpreted Article 5(e)(i) to include this obligation. See, e.g., Concluding Observations: Lebanon, CERD Committee, 32nd Sess., ¶ 15, U.N. Doc. CERD/C/304/Add.49 (1998) (“In relation to article 5 (e) (i) of the Convention … 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.”); Concluding Observations: Kuwait, supra note 115. 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.” MWC, supra note 1, at 1531. 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.

\footnote{150} See, e.g., Concluding Observations: Saudi Arabia, CERD Committee, 62nd Sess., ¶ 6, U.N. Doc. CERD/C/62/CO/8 (2003) (“The Committee has also noted with satisfaction that measures have been taken to put an end to the practice of employers retaining the passports of their foreign employees, in particular of domestic workers.”).

\footnote{151} See General Comment 15, supra note 49, at 181:

States parties should provide information on any legal provision or any practice which restricts women’s right to freedom of movement, for example the exercise of marital powers over the wife or of 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.

\footnote{152} Id.


home country and remain there, should be repealed or amended.\footnote{155} Host country governments should take steps to end restrictions imposed by private employers – especially severe restrictions like locking in the home.\footnote{156}

C. Labor Market Discrimination against Women – at Home and Abroad

1. The Problem

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.\footnote{157} 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.

\textit{a. 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.\footnote{158} 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.\footnote{159} Wage-based discrimination –

\begin{itemize}
  \item \footnote{155} ICCPR, art. 12(4), supra note 10, at 176. \textit{See also General Comment 27, supra note 136, at 176 ("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.").}
  \item \footnote{156} \textit{See discussion of due diligence, supra note 144.}
  \item \footnote{157} "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." \textit{BOOKLET 1, supra note 6, at 11.}
  \item \footnote{159} \textit{See ANKER, supra note 6, at 30-35.}\
\end{itemize}
when work of equal and comparable value is treated differently, in terms of renumeration – is a major factor as well. ¹⁶⁰ 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.

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. ¹⁶¹ 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 experience, ¹⁶² with significant differences in wage rates for women domestic workers of different nationalities.

b. Labor Market Segregation

Another way in which indirect institutionalized discrimination also manifests itself is in labor market gender-based segregation. ¹⁶³ 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. ¹⁶⁴ 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. ¹⁶⁵ The impact of the 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. ¹⁶⁶

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 positions such as domestic workers, entertainers and hotel employees. In some countries, the majority of migrant women are employed as domestic workers (“housemaids,”

¹⁶⁰. Id. at 30-35.
¹⁶¹. See BOOKLET 1, supra note 6, at 29.
¹⁶². See al-Najar, supra note 22, at 19-20; Amy Sim & Vivienne Wee, Labour Migration by Filipina Domestic Workers to Hong Kong: Conditions, Process and Implications, 7-10 (unpublished manuscript, on file with author) (documenting the significant wage differentials among domestic workers from the Philippines, Indonesia, and Thailand).
¹⁶³. See generally ANKER, supra note 6.
¹⁶⁴. Id. at 250-285 (reviewing seventeen typical “male” and “female” occupations).
¹⁶⁵. See id. at 7-8.
¹⁶⁶. See Anne Orford, Contesting Globalization: A Feminist Perspective on the Future of Human Rights, in THE FUTURE OF INTERNATIONAL HUMAN RIGHTS 157-8 (Burns H. Weston & Stephen P. Marks eds., 1999) (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 the 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).
Women’s work within the domestic sphere is heavily based on gendered expectations: perceived to be especially fit for 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.\footnote{168}

c. 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 do 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 the 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.

2. UN Human Rights Treaties 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 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.\footnote{169} In 1989, the CEDAW Committee noted that despite the adoption and use of the principle of equal remuneration

\footnotesize{\footnotemark[167] See ANKER, supra note 6, at 22-28. \footnotemark[168] AL-NAJJAR, supra note 22, at 23. \footnotemark[169] CEDAW, supra note 8, at 18. Article 11 also requires States to ensure that women and men equal rights to promotion to vocational and recurrent training, and the application of the same criteria for selection in matters of employment.}
for work of equal value, “more remains to be done to ensure the application of that principle in practice,” and 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 predominate, and they should include the results achieved in their reports [to the Committee].

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. 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. 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.

The ICESCR proscribes discrimination on the basis of gender and outlines substantive rights to just and favorable working conditions for all. These rights explicitly stipulate that women must be “guaranteed

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171. Id.
172. Id.
173. CEDAW Article 5(a) requires State 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. CEDAW, supra note 8, at 17.
174. CEDAW Article 10(e) 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.” Id. at 18.
175. 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.” ICESCR, supra note 9, at 5.
176. 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. ICESCR, supra note 8.
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. The legality of discrimination on the basis of alien status by developing countries under the Convention’s provisions is unclear. Although article 2(3) would appear to allow such discrimination with respect to the economic rights at issue, the Committee on Economic, Social and Cultural Rights has in practice prohibited this kind of discrimination under the Covenant. Taken together, these provisions thus translate into fair living wage guarantees for all regardless 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 this treaty’s non-discrimination regime also 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.

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177. Id.
178. Id. at 5.

   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 Labour Organization (ILO), foreign employees in the State party who are accused of infringing disciplinary rules may be punishable by penalties of imprisonment which can include compulsory labor. According to the same ILO report, the state party also maintains different rates of payment of pensions for foreign and Libyan workers which, in the view of the Committee, is discriminatory. . . . [It is] recommended that the status and working conditions of foreign workers be improved and without undue delay, and that these persons be treated with dignity and fully benefit from the rights enumerated in the Covenant.

   Id. ¶¶ 16, 22 (emphasis added).
181. This is the rule set out by the Human Rights Committee in its General Comment on Non-discrimination: Article 26 of ICCPR “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.” General Comment 15, supra note 49, at 148. 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.
182. 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. CERD, supra note 11, at 222.
183. Id.
Workers Convention guarantees migrant workers – male and female alike – treatment not less favorable than that which applies to nationals in respect of remuneration.\(^{184}\) 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.

3. 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 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,\(^{185}\) and ensure that 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.\(^{186}\) 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.\(^{187}\) Measures may be required on the part of both sending and receiving states to

\(^{184}\) 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. MWC, supra note 1, at 1532.

\(^{185}\) ICESCR, art. 7(a)(i), supra note 9, at 6. CEDAW, 11(1)(d), supra note 7.

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 further 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.

\(^{187}\) See also MWC, art. 25, supra note 1.
facilitate women’s entry into growth sectors of the economy instead of traditionally female-dominated sectors.\textsuperscript{188} 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.\textsuperscript{189}

D. Dangerous and Degrading Working Conditions: Safety and Health

1. The Problem

Many refer to the kind of work migrant laborers typically perform as the “three-D jobs”: dirty, degrading, and dangerous.\textsuperscript{190} 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

\textsuperscript{188} See Concluding Observations: Slovenia, CEDAW Comm., ¶¶ 81-122, U.N. Doc. A/52/38/Rev.1 (1997). The Committee stated that “[it] was concerned about the clustering of female students in certain disciplines, at both schools and universities, that did not provide optimum employment opportunities.” Id. ¶ 103. The Committee recommended ”revised labor legislation” containing quality and non-discrimination provisions “and strong sanctions for non-compliance.” Id. ¶ 115. It also “recommended temporary special measures with concrete numerical goals and timetables in order to overcome employment segregation.” Id.; see also Concluding Observations: Turkey, CEDAW Comm., ¶¶ 160-206, U.N. Doc. A/52/38/Rev.1 (1997) (urging 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”).

\textsuperscript{189} See, e.g., Concluding Observations: Republic of Korea, CERD Comm., 54th Sess., ¶ 16, U.N. Doc. CERD/C/304/Add.65 (1999) (urging “further measures against discrimination in the labour 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.”); Concluding Observations: Lebanon, supra note 149, ¶ 15 (“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.”).

\textsuperscript{190} Taran & Geronimi, supra note 19. See also, BOOKLET 1, supra note 6, at 30 (stating that “women are concentrated in the ‘3D jobs’ – the dirty, dangerous, and degrading jobs”); id. at 19 (“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.”) (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)). As Parreñas has found, employers sometimes intentionally alter household tasks to underline the difference between a domestic worker and her or his 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.

Parreñas, supra note 22, at 174 (citation omitted).
or illegal sectors. The ILO has found that there is a significant link between working in the informal economy, being female, and being poor. Indeed, women in the informal sector are often found in poorly-paid positions within the commercial sex sector, low-wage garment and “sweatshop” 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 non-nationals 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.

192. See BOOKLET 4, supra note 83, at 28-29; see also KEBEDE, supra note 79, at 9, and HUMAN RIGHTS WATCH, supra note 84, at 15 (discussing health and safety concerns for domestic workers in the United States).
193. In the United States, domestic workers are explicitly excluded from regulations implementing the Occupational Safety and Health Act. See HUMAN RIGHTS WATCH, supra note 84, at 30 and Young, supra note 22, 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 BOOKLET 4, supra note 83, at 12.
194. See BOOKLET 4, supra note 83, at 28-29.
195. In the United States, for example, domestic workers are excluded from most state-level workers compensation acts. See Young, supra note 22, at 27-28.
196. 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 BOOKLET 4, supra note 83, 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.
2. UN Human Rights Treaties 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 Elimination of All Forms of Racial Discrimination ensures equality in working conditions and public health and medical care. 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 and that health facilities must be made available for all – including women and immigrants, regardless of status - without discrimination. The

197. CEDAW Article 12 provides that States must ensure women equal access to health care services, including those related to family planning. CEDAW, supra note 8, at 19. 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 XXIV, CEDAW Committee, 20th Sess., U.N. Doc. No. A/54/38/Rev.1 (1999), reprinted in Compilation of General Comments, supra note 42, at 274.

198. 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 and protects women’s right to social security and the right to paid leave, on a basis of equality with men. CEDAW, supra note 8, at 18-19.

199. 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. CERD, supra note 11, at 222. 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. Id.

200. 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. ICESCR, supra note 9, at 8. 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. General Comment 14, The Right to the Highest Attainable Standard of Health, CESC, 22nd Sess., reprinted in Compilation of General Comments, supra note 42, at 86 [hereinafter General Comment 14].

201. ICESCR 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. ICESCR, supra note 9, at 8.

202. 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 201, at 86. In the same General Comment, the Committee explained
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. The Convention also explicitly guarantees to all migrant workers and members of their families the right to receive 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.

3. 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 devise a

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. 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.

203. MWC Article 25 provides that “[m]igrant 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. MWC, supra note 1, at 1532. 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. Id. at 1544.

204. 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 to them by reason of any irregularity with regard to stay or employment. Id. at 1533.
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. Measures 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. Protections must therefore be firmly anchored in scientific knowledge and up-to-date practices. 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.

205. See, e.g., Concluding Observations: Greece, CEDAW Committee, supra note 186, ¶ 210 ("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.").

206. ICESCR, art. 12, supra note 9, at 8; General Comment 14, supra note 200, at 86 (specifying that States must take steps aimed at minimizing the causes of health hazards inherent in the working environment).

207. Id.


209. See, e.g., Concluding Observations: China, CEDAW Comm., 20th Sess., ¶ 325, U.N. Doc. A/54/38 (1999) ("The Committee notes that while prostitution itself is not unlawful, provisions to ensure the health and safety of sex workers are unclear, and there may be discrimination against women in the enforcement of related crimes."); Concluding Observations: Turkey, CEDAW Committee, ¶ 202, U.N. Doc. A/52/38/Rev.1 (1997) (urging Turkey “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.").

210. See Concluding Observations: Saudi Arabia, supra note 150, ¶ 6 ("The Committee welcomes the recent initiative taken to include non-Saudis in a health insurance system."); Concluding Observations: United Kingdom, CESCR, 28th Sess., ¶ 21, U.N. Doc. E/C.12/1/Add.79 (2002) (expressing concern about “the high incidence of HIV/AIDS in some of the state party’s Caribbean territories. It is particularly concerned about . . . the lack of availability of, and access to, anti-retroviral medication for migrant workers. . .").

211. See CEDAW, art. 11, supra note 8, at 11-12.

212. Id.
E. Gender-Based Violence in the Workplace

1. The Problem

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. Describing her employer as “horrible,” she added, “I will not forget it all my life. I still hear him knocking on my door. I still have nightmares.” Two women in another study bore the scars from stab wounds and cuts from broken glass as a result of struggles during attempted rapes by their domestic employers.

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 – their employers, a phenomenon that the ILO reported on in Italy. 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 women 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,

213. See SABBAN, supra note 97, at 30.
214. See KEBEDE, supra note 79, at 10.
217. BOOKLET 4, supra note 83, at 27.
218. 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. Id. at 29.
withholding of wages, and denigrating, abusive, sexist, and racist commentary have all been reported.\footnote{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. Id. at 32. HUMAN RIGHTS WATCH, supra note 84 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.}

Many women working in domestic service report being punished, and even fired, for having “affairs” with their male employers 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.

2. UN Human Rights Treaties 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.\footnote{General Recommendation 19, Violence against Women, CEDAW Comm., 11th Sess., at 247, reprinted in Compilation of General Comments, supra note 42, at 247.} 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 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.\footnote{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. ¶ 18.} The Committee explains that such conduct can be humiliating and may constitute a health and safety problem. It further 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\footnote{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. ICESCR, supra note 9.} as including a prohibition on gender-based violence.\footnote{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. ICESCR, supra note 9.}
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.

3. 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, general comments and 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. Such programs should include monitoring and penalties for

223. See, e.g., Concluding Observations: Georgia, CESC, 29th Sess., ¶ 36, U.N. Doc. E/C.12/1/Add.83 (2002) (recommending that Georgia “implement . . . plans of action for the advancement of women and for combating domestic violence . . . ensure access to effective remedies concerning domestic violence, rape and sexual harassment . . . [and] develop programmes aimed at raising awareness of, and educating law enforcement officials, the judiciary and the general public on, these problems”).


225. 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. CERD, supra note 11, at 220.

226. 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. MWC, supra note 1, at 1528.

227. In its General Recommendation on Violence against Women, 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.

General Recommendation No. 19, CEDAW Comm., Session II (1992), reprinted in Compilation of
abusive employers, as well as services for women who survive gender-based violence. These services should be available to all women – including domestic workers and migrants. Education or “know your rights” campaigns might be required to ensure migrant women know they can obtain legal redress. Police, the judiciary, and health providers must respond effectively to gender-based violence against women migrant workers, and may require training in this area. Host governments may also 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. 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.

F. Gendered Forms of Racism and Xenophobia against Women Migrant Workers

1. Abuses

In addition to gender-based discrimination, women migrants – like their male counterparts – often face pervasive racial, ethnic, and religious discrimination. The types of discrimination faced by migrant workers

General Recommendations, supra note 42, at 248.


229. General Comment 15, supra note 49 (expressing special concern for the situation of domestic workers and affirming that their working conditions should be monitored by State Parties, in part to prevent sexual abuse). See also Concluding Observations: China, supra note 209, ¶¶ 327-28 (recommending that China “monitor and take action to protect women migrant workers from abuse and violence, as well as to prevent such violence”).

230. See, e.g., Concluding Comments: Germany, CEDAW Comm., supra note 111, ¶ 318 (urging Germany “to strengthen its efforts for the social integration of foreign women through educational and employment services, and through awareness-raising of the population,” and recommending 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.”)

231. See, e.g., Concluding Observations: Cuba, CEDAW Comm., 23rd Sess., ¶¶ 244-77, U.N. Doc. A/55/38 (2000); id. at ¶ 264 (calling on Cuba “to assess . . . 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;” to raise public awareness by “launching a zero-tolerance campaign on violence against women;” and also “to increase the awareness of public officials and the judiciary about the seriousness of such violence.”); Concluding Observations: China, supra note 209.

232. See BOOKLET 1, supra note 6, at 49-53 for a discussion of the impact of racism and xenophobia on women 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) and in the media, to employment and housing discrimination and racist and xenophobic violence. The ILO reports that most migrant workers face discrimination and xenophobia aimed at foreigners in host countries. Indeed, a study conducted by the ILO found widespread (up to 37% in some places) xenophobic discrimination against legal workers in employment settings. Based on anecdotal evidence, discrimination against irregular workers is often even more intense. Furthermore, some efforts to strictly enforce immigration laws by states concerned with their security have reportedly contributed to intolerance against immigrants in general. 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.

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. 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 was a strong preference – often reflected in wages – for women domestic workers of certain nationalities and/or races.

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233. The 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. BOOKLET 4, supra note 83, at 17 (citing ASIAN MIGRANT CENTRE: ASIA MIGRANT YEARBOOK 2000: MIGRATION ANALYSIS AND ISSUES IN 1999 (2000)).

234. 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/fdw.htm#fdw.


236. See BOOKLET 4, supra note 83, at 2-3.

237. Id.


239. See JUREIDINI, supra note 89, at 2 (noting the “racial and discriminatory stigma attached to domestic employment” in Lebanon); D’ALCONZO ET AL., supra note 215, at 12 (noting that “in Italian, ‘Filipino’ is a synonym for ‘housekeeper’”).

240. See PARREÑAS, supra note 22, at 176.

241. AL-NAJJAR, supra note 22, at 19-20.

242. See id. As one scholar has observed: [T]he 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
wage differentials were based on stereotypes about the “honesty,” “morality,” and “intelligence” of different groups as compared to the “wantonness” and “stupidity” of others.\(^{243}\)

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, regardless 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 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.

2. UN Human Rights Treaties 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

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. Sabban, supra note 97, at 24. 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 22, 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”).

243. See Abdul Rahman et al., supra note 22, 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); Lan, supra note 96, at 6 (noting that “[a]n 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 89, 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 Young, supra note 22, 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); see generally Abigail Bakan & Daiva Stasialis, Making the Match: Domestic Placement Agencies and the Racialization of Women’s Household Work, 20 Signs 303 (1995).
origin, the CERD Committee has made clear that states have obligations under the Convention to proactively prevent and redress acts of racism and xenophobia aimed at women.\textsuperscript{244} CERD makes clear that the state obligation to end racial and xenophobic discrimination and equality should be understood according to the substantive equality model.\textsuperscript{245} 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 CERD Committee has made clear 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.”\textsuperscript{246} In addition, the Convention’s prohibitions against discrimination will apply to aliens whenever 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

\begin{itemize}
  \item \textsuperscript{244} As the CEDAW Committee has noted:

  [T]he 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 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.


  \item \textsuperscript{245} Article 1 of CERD defines the term “racial discrimination” to as “any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.” CERD, supra note 11, at 216. 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.” Id. at 216. 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.” Id. 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. Id.

  \item \textsuperscript{246} General Comment 15, supra note 49, ¶ 3.
\end{itemize}
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.

3. 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/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 state or non-state actors, including collecting disaggregated data and conducting studies

247. Id. ¶ 2.
248. ICCPR, supra note 10, at 178.
250. General Comment 23, Rights of Minorities to Enjoy, Profess, and Practise Their Own Culture, U.N. GAOR, Hum. Rts. Comm., 50th Sess., reprinted in Compilation of General Comments, supra note 42, at 159. 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. at 52.
251. MWC, supra note 1, at 1527-28. 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.
concerning the circumstances of such discrimination.\footnote{Allegations of abuse by state agents must be promptly investigated and, if substantiated, adequately punished.\footnote{Public awareness campaigns\footnote{and attention to the intersection of racial and gender-based 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.\footnote{States should educate migrant women about their rights and about any services that may be available to them.\footnote{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.}}}}}}

G. Restrictions on Migrant Women’s Ability to Organize for Their

and racism in Sweden . . . [and] 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 availabilty of social services and legal remedies\footnotemark[45].

\footnotetext[253]{See, e.g., Concluding Observations: Qatar, CERD Comm., 60th Sess., ¶ 21, U.N. Doc. CERD/C/60/CO/11 (2002) (requesting “further information on the practical implementation of [the principle of equal protection of all workers], particularly given the high proportion of migrant workers in Qatar . . . [including] 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”).

\footnotetext[254]{See, e.g., Concluding Observations: Switzerland, U.N. GAOR, Hum. Rts. Comm., 58th Sess., ¶ 13, U.N. Doc. CCPR/C/79/Add.70 (1996) (expressing concern over “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 . . . reports on the authorities’ failure to follow up complaints of ill-treatment by the police and the disproportionate nature, if not absence, of penalties”).


\footnotetext[256]{See, e.g., Concluding Observations: Poland, CESC, 29th Sess., ¶ 15, U.N. Doc. E/C.12/1/Add.82 (2002) (noting “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,” and expressing concern “that the rights enshrined in the Covenant are insufficiently protected for a large number of migrant workers residing in Poland”).

\footnotetext[257]{See, e.g., Concluding Observations: Germany, CEDAW Comm., supra note 111, ¶ 318 (calling on Germany 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;” urging 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;” and recommending “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”).

\footnotetext[258]{See, e.g., Concluding Observations: Russian Federation, CERD Comm., 62nd Sess., ¶ 27, CERD/C/62/CO/7 (2003) (expressing concern over neo-Nazi attacks on minorities, recommending that Russia “strengthen its efforts to prevent racist violence and to protect members of ethnic minorities and foreigners, including refugees and asylum-seekers . . [and] request[ing] that the state party provides a list of the cases that have been investigated and brought before the courts in its next periodic report”).}
Rights

1. Abuses

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.259 In other places, domestic workers may be specifically barred from workplace protections concerning organizing or from union membership,260 sometimes because they are not legally considered full employees under applicable labor law.261 Even in 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.263

259. The ILO reports that “[o]nly two countries in Asia (Hong Kong and Japan) have legally registered independent migrant trade unions.” BOOKLET 4, supra note 83, at 16.
260. 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 22, at 27-29.
261. 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 women, 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 BOOKLET 4, supra note 83, at 16.
The goals of such efforts are to regularize domestic laborers’ status as workers and to obtain 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.

2. UN Human Rights Treaties 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 the equal right to participate in NGOs and associations in the public sphere. The ICESCR guarantees everyone 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


264. See Lan, supra note 96, at 13-14 (discussing migrants’ rights organizations in Taiwan). In the United States, Domestic Workers United of New York has succeeded in passing citywide legislation protecting domestic workers, and the organization is now pushing for a statewide 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. For further information, see http://www.domesticworkersunited.org.

265. CEDAW, supra note 8, at 17. 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. Id.

266. ICESCR, supra note 9, at 6-7. Article 8 guarantees everyone the right 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. Id.

267. In a comment on globalization, the CESCHR 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. Globalization and Economic, Social and Cultural Rights, CESCHR, 18th Session, (1998), at http://www.unhchr.ch/tbs/doc.nsf/0/adc44375895aa10dd8025686f003cc06e?OpenDocument (last visited Feb. 15, 2005).
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. 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.

268. ICCPR, art. 22, supra note 10, at 178.
269. General Comment 15, supra note 49, at 140.
270. ICCPR Article 27 states:
   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.
   ICCPR, supra note 10, 999 U.N.T.S. at 179.
272. 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.” CERD, supra note 11, at 220-221.
273. MWC Article 26(1)(a) protects the 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 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 as aforesaid 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 as aforesaid.” Article 26(2) specifies that no restrictions may be placed on the exercise of these rights except in a very narrow set of circumstances. MWC, supra note 1, 30 I.L.M., at 1532-1533.
274. 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. Id. at 1534.
3. 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, ethnic or national origin, 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 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.

H. 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

275. ICCPR, arts. 2, 22, supra note 10, at 173-174, 178, (as interpreted in General Comment 15, supra note 49). See, e.g., Concluding Observations: Jordan, CESCER, ¶ 19, 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.”); see also Concluding Observations: Venezuela, CERD Comm., 49th Sess., ¶ 15, U.N. Doc. CERD/C/304/Add.17 (1996) (announcing 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”).

276. CERD, art. 5(e)(ii), supra note 11, at 222; ICESCR, arts. 2(2) and 8(1)(a), supra note 9, at 5, 7.

277. Id.; see also, e.g., Concluding Observations: Croatia, CERD Comm., 53rd Sess., ¶ 20, U.N. Doc. CERD/C/304/Add.55 (1999) (announcing that Croatia “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”).

278. CEDAW, arts. 3, 7, supra note 8, at 16-17; CERD, art. 5(e)(ii), supra note 11, at 222, ICESCR, arts. 2(2), 3, and 8(1)(a), supra note 9, at 5-6.

279. See, e.g., Concluding Observations: Senegal, U.N. Human Rights Committee, 61st Sess., ¶ 16, U.N. Doc. CCPR/C/79/Add.82, (1997) (expressing concern “that foreign workers are barred from holding official positions in trade unions, and that trade unions may be dissolved by the executive,” and recommending that Senegal “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”).

280. Id.
migrant workers have also suffered from discrimination 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 disempower women migrants. These policies restrict women migrants’ 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 repealed in 1991 when the government was persuaded that its actions had backfired by creating a market for sham marriages and trafficking.\(^{281}\) 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.\(^{282}\) 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).\(^{283}\) 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.\(^{284}\) In 2003, the government of Indonesia announced that it would impose a temporary ban on women migrant workers to protect them from abuse.\(^{285}\) 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.\(^{286}\)

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.\(^{287}\) Singapore imposes burdensome taxes on


\(^{282}\) See Rita Asfar, Issues Related to Transnational Migration of Female Domestic Workers from Bangladesh, 8-9 (Feb. 25, 2004) (unpublished manuscript, on file with author.).

\(^{283}\) Id. at 8-11.

\(^{284}\) Fitzpatrick & Kelly, supra note 281, at 72-73 (citing CYNTHIA ENLOE, BANANAS, BEACHES & BASES: MAKING FEMINIST SENSE OF INTERNATIONAL POLITICS 188-189 (1990)).


\(^{286}\) The Ban on Female Workers by Indonesia is Not the Solution, supra note 285; Ban on Deployment of Indonesian Maids: Death Memo to Migrant Workers, supra note 285.

\(^{287}\) Fitzpatrick & Kelly, supra note 281, at 79 (citing Noeleen Heyzer & Vivienne Wee, Domestic Workers in Transient Overseas Employment: Who Benefits, Who Profits, in TRADE IN
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.  

As scholars have noted, 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. 

Although they have not always been called upon in this context, 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 . . .

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 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 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, setting 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 empower women migrants to claim and enforce their human rights rather than imposing paternalistic bans that serve to exacerbate the discrimination such workers already experience in the course of their migration and work.

VI. 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 28 states that had ratified the Convention at the time of writing, none are key receiving states. Further, a singular focus on the MWC would undercut the potential for implementing the strong body of binding norms that already exists, and would reduce 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 women crossing

292. See, e.g., Taran, supra note 1.

293. For a discussion of the obstacles to widespread ratification, see Shirley Hune & Jan Niessen, Ratifying the U.N. Migrant Workers Convention: Current Difficulties and Prospects, 12 NETHS. Q. HUM. RIGHTS 12 (1994), and Taran, supra note 1, at 94-96 (outlining obstacles but also expressing limited optimism).

294. See supra note 2.
borders, should be countered with clear analyses and 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 body whose role goes beyond enforcing 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 the MWC can be used as models for productive engagement with states receptive to improving their treatment of migrant workers on both the sending and receiving end.

Perhaps as important as supporting the work of the Committee and clarifying the fact that many claims can be supported by existing law, those concerned with migrant workers’ rights must remain attentive to emerging claims. The processes through which the nascent claims of individuals and groups are articulated within the 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.

Feminists have developed methodologies aimed at excavating women’s claims that have not yet been acknowledged as human rights through the formal mechanisms of the international human rights machinery. One of these methodologies involves close attention to

295. 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 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.


One important effort that should be closely followed is the organizing work being done by the International Human Rights Law Group, 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 The Respect Network, Migrant Domestic Workers Charter of Rights, at http://www.solidar.org/Document.asp?DocID=162&tod=63616 (Feb. 17, 2005).
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. To identify what lies in this “space in between” a felt sense of need and an articulation of right, 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 promoted 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. Human rights advocates could then use an intersectional approach to formulate claims anchored within existing rights standards but which respond to the multiple forms of discrimination making up the limits on women’s lives. Moving such claims to the center of advocacy efforts would honor the agency of the women migrant workers whose experiences have so far been described and analyzed only through existing legal norms.

The importance of paying attention to emerging claims is exemplified in the historical debates over violence against women. As mentioned

297. 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, e.g., Elisabeth Friedman, Women’s Human Rights: The Emergence of a Movement, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 18 (Julie Peters & Andrea Wolper eds., 1995); Bond, supra note 28, at 77-92. 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 id., at 138-142. See also UNDP, Gender Mainstreaming Tools, 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
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” and “private” more generally. Through intensive advocacy and careful legal work, women’s rights advocates definitively established 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 fought over 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’ sense of their own 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), what human rights are. Indeed, feminists have developed methodologies aimed at excavating women’s claims that have not yet been acknowledged as human rights through the formal mechanisms of the international human rights machinery. Such methodologies are especially important correctives to the gendered biases embedded in international human rights law, since they refocus the attention of advocates not on what human rights law appears to protect already, but on what it needs to be brought to bear.


299. 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 298, at 85.

300. For a discussion of this shift, see UNIFEM, NOT A MINUTE MORE: ENDING VIOLENCE AGAINST WOMEN 16-25 (2003).
may become cognizable within the larger human rights discourse if not (yet) the human rights legal framework.

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 intersectionality. 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 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.

301. 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. .


302. 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 22, at 227.