

2009

## A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers

Jennifer S. Hainfurther

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/auilr>



Part of the [International Law Commons](#)

---

### Recommended Citation

Hainfurther, Jennifer S. "A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers." *American University International Law Review* 24, no. 5 (2009): 843-895.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *American University International Law Review* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# A RIGHTS-BASED APPROACH: USING CEDAW TO PROTECT THE HUMAN RIGHTS OF MIGRANT WORKERS

JENNIFER S. HAINSFURTHER\*

INTRODUCTION.....	844
I. VIOLATIONS OF THE HUMAN RIGHTS OF MIGRANT WORKERS.....	849
II. APPLYING CEDAW TO WOMEN MIGRANT WORKERS..	856
A. CEDAW OVERVIEW.....	856
B. THE APPLICABILITY OF CEDAW TO MIGRANT WORKERS ....	858
C. SUBSTANTIVE EQUALITY.....	862
i. Substantive Equality in Practice.....	862
ii. CEDAW Demands Substantive Equality.....	866
iii. CEDAW’s Guarantee of Substantive Equality Provides Protection to Women Migrant Workers .....	871
D. STATE OBLIGATIONS .....	873
III. THE CONTRIBUTION OF CEDAW TO THE RIGHTS OF UNDOCUMENTED WORKERS.....	879
A. UNDOCUMENTED MIGRANT WOMEN IN A CEDAW STATE CAN CLAIM THE RIGHTS CONTAINED IN THE CONVENTION.....	883
B. CEDAW ADDS TO THE RIGHTS OF UNDOCUMENTED MIGRANT WORKERS BY EXPANDING THE SCOPE OF LABOR RIGHTS .....	885

---

\* J.D., 2008, New York University School of Law; A.B., 2005, Duke University. I owe a deep debt of gratitude to Margaret Satherthwaite, without whom this project would not have been possible. I would like to extend a special thanks to Jana Rumminger and IWRAW Asia Pacific for introducing me to CEDAW and migrant worker issues. Finally, I would like to thank Leslie Gold, Mitra Ebadolahi, Andrew Delaney, Mathew Miller, and Craig Saperstein for their comments and encouragement.

i. The OP-18 Analysis .....	885
ii. The CEDAW Contribution.....	889
CONCLUSION .....	893

## INTRODUCTION

For two years, Ewi Sudewo could not go outside.<sup>1</sup> Arianti Harikusumo never received a dime for the work she did, and her employer hit her when she asked for her salary.<sup>2</sup> Ani Rukmonto's employer physically and verbally abused her.<sup>3</sup> Melda's employer raped her twice in one year, with the police returning her to her employer's house after the first rape.<sup>4</sup> All migrant workers, these women temporarily lived and worked outside of their native country. The fact that their stories are all too common reveals the need to examine existing legal protections for women migrant workers, to determine if the law provides a framework for ending these abuses.<sup>5</sup>

---

1. See HUMAN RIGHTS WATCH, MAID TO ORDER: ENDING ABUSES AGAINST DOMESTIC MIGRANT WORKERS IN SINGAPORE 47 (2005) [hereinafter MAID TO ORDER] (providing Sudewo's explanation that "[t]he outside door was locked. All the doors were locked, only the bathroom was open. The kitchen was locked. For one day, one week at a time, I would never eat anything. I was hungry, what could I do? . . . I had no day off, I never went outside").

2. See HUMAN RIGHTS WATCH, HELP WANTED: ABUSES AGAINST FEMALE DOMESTIC MIGRANT WORKERS IN INDONESIA AND MALAYSIA 42 (2004) [hereinafter HELP WANTED] (quoting Harikusumo to introduce the topic of unpaid wages when documenting the physical abuse, neglect, and mistreatment endured by female domestic migrant workers).

3. See *id.* at 45-46 (quoting Rukmonto's recollection).  
Every day something made [my employers] angry. Every day the woman hit me many times with a wooden stick. Sometimes she slapped me, sometimes she hit me with a hanger or a comb, sometimes when I was cooking, she hit my head with tools. My body got bruises, I became black from my head to my hips. I never saw a doctor. Sometimes I treated the pain myself with a compress, no medicine. When the woman hit me, the man was working, he didn't know. She would say, "If I hit you, do not lose consciousness. If you do, I will dig a hole and leave you there so nobody knows." Sometimes when I combed the children's hair, the woman said, "You are a monkey, a donkey." Sometimes she said I was stupid, or like a bull. I didn't have anyone to turn to and I was afraid. I was beaten every day and swollen. I was beaten badly three times, and the third time, my head was bleeding and my body broke and then I lost consciousness.

*Id.*

4. HUMAN RIGHTS WATCH, BAD DREAMS: EXPLOITATION AND ABUSE OF MIGRANT WORKERS IN SAUDI 60 (2004) [hereinafter BAD DREAMS].

5. See, e.g., HELP WANTED, *supra* note 2, at 37 (reporting that domestic NGOs in Indonesia estimate that approximately 18,000-25,000 migrants return from countries such as Malaysia each year after suffering abuse).

As of 2005, over 190 million people were migrants living outside the country in which they were born.<sup>6</sup> International law defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”<sup>7</sup> Migration flows move from sending states to receiving states,<sup>8</sup> in part due to structural economic disparities among states.<sup>9</sup>

International watchdogs frequently document human rights abuses against migrant workers,<sup>10</sup> particularly in the domestic service sector, where such abuses are often viewed as an invisible part of an economy.<sup>11</sup> The fact that migrant workers often see many of their human rights violated or unfulfilled is particularly problematic

---

6. See U.N. Dep't of Econ. & Soc. Affairs [DESA], Population Div., *Trends in Total Migrant Stock: The 2005 Revision*, at 1, U.N. Doc. POP/DB/MIG/Rev.2005/Doc (Feb. 2006), available at [http://www.un.org/esa/population/publications/migration/UN\\_Migrant\\_Stock\\_Documentation\\_2005.pdf](http://www.un.org/esa/population/publications/migration/UN_Migrant_Stock_Documentation_2005.pdf) [hereinafter *Total Migrant Stock*].

7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families art. 2(1), Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter *Migrant Workers Convention*].

8. In this Article, I use the sending/receiving state terminology, where a sending state is a country of origin, while a receiving state is a country of destination.

9. See Joan Fitzpatrick & Katrina R. Kelly, *Gender Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 60-65 (1998) (describing structural economic disparities and noting Philippines, Indonesia, Thailand, and Sri Lanka are major source countries for East Asian maid trade while Singapore, Malaysia, Hong Kong, and oil-rich Gulf states constitute states receiving women for migrant labor).

10. See generally MAID TO ORDER, *supra* note 1; HELP WANTED, *supra* note 2; BAD DREAMS, *supra* note 4; HUMAN RIGHTS WATCH, SWEPT UNDER THE RUG: ABUSES AGAINST DOMESTIC WORKERS AROUND THE WORLD (2006) [hereinafter *SWEPT UNDER THE RUG*]; RAY JUREIDINI & NAYLA MOUKARBEL, LEBANESE NGO FORUM: THE MIGRATION NETWORK, BRIEF ON FOREIGN FEMALE DOMESTIC MAIDS IN LEBANON (2000), <http://www.lnf.org.lb/migrationnetwork/mig6.html>.

11. See, e.g., Orly Lobel, *Class and Care: The Role of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89, 95 (2001) (arguing in-home care work is the most invisible of all underground economies); Robert J. Liubicic, *Corporate Codes of Conduct and Private Labeling Schemes: The Limits and Possibilities of Promoting International Labor Rights Through Private Initiatives*, 30 LAW & POL'Y INT'L BUS. 111, 152-53 (1998) (labeling domestic services and sex trade as part of an “invisible economy”).

because the number of migrants is increasing, having more than doubled since 1960.<sup>12</sup>

Migration is a particularly important issue for the fulfillment of women's human rights for two reasons. First, an increasing number of labor migrants are female,<sup>13</sup> prompting many advocates and scholars to refer to the "feminization of migration."<sup>14</sup> Second, women migrant workers are especially vulnerable to discrimination and exploitation that interferes with their enjoyment of many human rights, as illustrated by the stories above.<sup>15</sup> Women migrant workers face discrimination both as women and as non-nationals of the country in which they work.<sup>16</sup>

International law specifically addresses the rights afforded to migrant workers through one of the seven core human rights treaties: the Migrant Workers' Convention ("MWC").<sup>17</sup> Because of the low number of State Parties to the MWC, however, this convention has

---

12. See *Total Migrant Stock*, *supra* note 6, at 1.

13. See *id.* at 3 (noting that by 2005, female migrants constituted almost 50% of all migrants globally, and in developed countries, female migrants outnumbered males).

14. See LIN LEAN LIM ET AL., INT'L LABOUR ORG., PREVENTING DISCRIMINATION, EXPLOITATION, AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE, BOOKLET 1 - INTRODUCTION: WHY THE FOCUS ON WOMEN INTERNATIONAL MIGRANT WORKERS 2 (2003), <http://www.ilo.org/public/english/employment/gems/download/mbook1.pdf> (explaining that feminization of migration is characterized by an overrepresentation of women migrants in vulnerable positions). The feminization of migration refers not only to the increasing number of female migrants, but also to the gendered nature of their work. See, e.g., Fitzpatrick & Kelly, *supra* note 9, at 61 (arguing that the gendered nature of the international labor market channels even well-educated women migrants into domestic service, regardless of their qualifications).

15. See LIM, *supra* note 14, at 15 (highlighting that women are more vulnerable as women compared to men, "as foreigners compared to nationals, as dependant as compared to autonomous migrants, and often as irregular [as opposed] to documented migrants"); see also NICOLA PIPER, GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, GENDER AND MIGRATION 27 (2005), [http://migrantcare.hug-ge.ch/\\_library/pdf/femmes\\_TP10.pdf](http://migrantcare.hug-ge.ch/_library/pdf/femmes_TP10.pdf) (arguing that abusive practices against male migrant workers are more visible since they tend to work in union-represented sectors such as construction and agriculture, while abuses against unskilled women migrant workers typically occur in a more invisible situation, the unregulated work environments).

16. See LIM, *supra* note 14, at 2-3 (discussing the intersection between gender discrimination and discrimination of migrants because they are foreigners and noting that such multi-leveled discrimination places women in an even greater state of vulnerability).

17. See Migrant Workers Convention, *supra* note 7.

little impact in obliging States to provide a minimum core of rights for migrant workers within their boundaries.<sup>18</sup> Professor Margaret Satterthwaite has argued that the rights of women migrant workers are included in the standards set out by the entire range of existing human rights treaties, and not simply in the Migrant Workers' Convention.<sup>19</sup> Building on Satterthwaite's argument, I will examine the Convention on the Elimination of Discrimination Against Women ("CEDAW" or "the Convention"), and explore how it obligates State Parties to respect, protect, and fulfill women migrant workers' human rights.<sup>20</sup> I argue that the substantive equality guarantee of CEDAW, combined with the obligation of the state to take all appropriate measures to eliminate discrimination by "any person, organization, or enterprise,"<sup>21</sup> renders the Convention a powerful tool to hold both sending and receiving states accountable for violations of women migrant workers' human rights. Given both the large number of states that have ratified CEDAW<sup>22</sup> as well as the

---

18. See *infra* notes 65-66 and accompanying text.

19. See generally Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE H.R. & DEV. L.J. 1, 1-24 (2005) (arguing that by using intersectionality, advocates for the rights of migrant workers can invoke other human rights treaties, and then articulating a treaty by treaty argument for how each treaty can be applied to migrant women).

20. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. See also Margaret Satterthwaite, *Beyond Nannygate: Using Human Rights Law to Empower Migrant Domestic Workers in the Inter-American System* 17 (Ctr. for Human Rights & Global Justice Econ. & Soc. Rights Series, Working Paper No. 8, 2006) (discussing the "respect, protect, fulfill" framework for viewing states' roles in protecting individual rights).

21. See CEDAW, *supra* note 20, art. 2(e).

22. See *id.* As of April 2009, CEDAW has 185 States as parties. See United Nations, Status of CEDAW, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=326&chapter=4&lang=en> (last visited Apr. 27, 2009). Although the United States is one of the few United Nations member states that has not ratified CEDAW, the legal situation of migrant worker rights in the United States has been frequently addressed in the literature. See, e.g., Connie de la Vega & Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS 536-49 (Anne F. Bayefsky ed., 2006) (arguing that advocates should use international standards contained in customary international law, the ICCPR, ICESCR, ILO Conventions, and other international law documents to address violations of undocumented migrant workers' rights in the United States). Because the significant rights violations that occur in states

Convention's Optional Protocol mechanism,<sup>23</sup> CEDAW provides one of the most useful tools for holding States accountable for violations of the human rights of migrant workers within their territories. Furthermore, CEDAW's guarantee of substantive equality is particularly valuable for women migrant workers claiming rights.<sup>24</sup>

This Article contributes to the literature in two primary ways. First, although it is frequently assumed that CEDAW embodies a substantive model of equality,<sup>25</sup> scholars and activists alike have yet to show why this is the case. This paper aims to fill that gap by arguing that CEDAW embodies a principle of substantive equality. Second, the human rights of undocumented migrant workers have also been under-theorized in the existing literature, despite the vast number of migrant workers who fall into this category.<sup>26</sup> Continuing within the framework of CEDAW, I connect the Convention to a

---

located in Asia and the Middle East have been less thoroughly addressed, I have chosen to focus on a useful tool for improving the fulfillment of women migrant worker human rights in these states. My argument is also applicable for all State Parties to CEDAW, such as Malaysia, Singapore, Saudi Arabia, Thailand, Jordan, Lebanon, and the Philippines.

23. See Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/4 (Oct. 15, 1999) [hereinafter *Optional Protocol*]. (providing a mechanism for the CEDAW Committee to hold State Parties accountable for human rights violations that moves beyond the reporting process and general comments). The Protocol contains a communications mechanism that allows individuals or groups of individuals under the jurisdiction of a State party to bring complaints to the CEDAW Committee alleging a violation of any of the rights set forth in the Convention. See *id.* art. 2. The Protocol also contains an inquiry procedure whereby the Committee is empowered to initiate an inquiry into "grave or systematic violations by a State of rights set forth in the Convention," after receiving reliable information of such violations. *Id.* art. 8.

24. See *infra* Part II-C.

25. See *infra* note 94 and accompanying text.

26. See Janie Chuang, *Redirecting the Debate over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 Harv. Hum. Rts. J. 65, 99 n.102 (1998) (defining undocumented migrant workers as those "who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas," and hypothesizing that the Migrant Workers Convention's broad commitment to state sovereignty over immigration controls undermines or potentially defeats the human rights protections granted to some migrants (quoting Linda S. Bosniak, *Human Rights, State Sovereignty and the Protection of Undocumented Migrants*, 25 Int'l Migration Rev. 737, 742 (1991))).

rights framework developed by the Inter-American Court in order to advance the development of a theory of undocumented worker rights.

In Part I, I discuss abuses and human rights violations frequently experienced by women migrant workers. In Part II, I examine how CEDAW can be used to advocate for the rights of women migrant workers, focusing on substantive equality and state obligations under the Convention. Finally, in Part III, I explore the contribution of CEDAW to the rights of undocumented migrant workers.

## I. VIOLATIONS OF THE HUMAN RIGHTS OF MIGRANT WORKERS

Women migrant workers are particularly vulnerable to a number of abuses in both the sending and receiving state.<sup>27</sup> The abuse and exploitation of women involved in the maid trade implicates several sets of international norms, including: “the right to physical integrity; the right to the equal protection of the law and to fair legal process; freedom of movement and protection against forced labor; and protection of labor rights such as collective bargaining, fair wages, decent conditions of work and security of earnings.”<sup>28</sup> Because violations of migrant worker human rights have been well documented,<sup>29</sup> a brief overview will suffice.

Abuses in the sending state typically arise in the context of securing employment. Women are often taken advantage of by recruitment agencies, particularly illegal ones.<sup>30</sup> Recruitment

---

27. See LIM, *supra* note 14, at 22 (summarizing the abuses and vulnerabilities women migrant workers face at different stages of the migration process).

28. Fitzpatrick & Kelly, *supra* note 9, at 85 (articulating the international norms implicated by the abuse and exploitation of women, and suggesting that women are particularly vulnerable because of the combined alienation they face as a result of their foreign status, race, and gender).

29. See *supra* note 10 and accompanying text.

30. See LIM, *supra* note 14, at 19 (documenting the dangers women face in the recruitment stage of illegal migration, including excessive fees to traffickers, being detained in “training camps,” and being targeted for deceptive practices by traffickers); U.N. Econ. & Soc. Council [ECOSOC], Comm’n on Human Rights., *Report of the Special Rapporteur: Specific Groups and Individuals: Migrant Workers*, ¶ 39, U.N. Doc. E/CN.4/2004/76 (Jan. 12, 2004) (prepared by Gabriela Rodríguez Pizarro) [hereinafter *Migrant Workers*] (documenting actions taken by illegal agencies, including abuse of female migrants, bribery of immigration officials, and the charging of excessive recruitment expenses). Women migrant workers are more likely to use illegal recruitment centers due to a limited access to

agencies typically charge exorbitant fees; many migrant workers “go into long-term debt or sell property to pay these fees.”<sup>31</sup> Labor contracts are concluded between the employer and the recruitment agency, with the woman migrant worker lacking any input.<sup>32</sup> Often, recruitment agencies mislead migrant workers about their placements by providing false information about the terms of employment.<sup>33</sup>

In receiving states, human rights abuses typically occur at the hands of both state law and private employers. At the governmental level, most states do not count domestic workers as “employees” under their labor codes.<sup>34</sup> Thus, even if a state’s labor code has

---

information, lack of time to search for legal channels, and lack of money to pay the fees. *See* LIM, *supra* note 14, at 19.

31. *See* LIM, *supra* note 14, at 19 (discussing the fees illegal agencies are able to charge, and why migrant women often face little choice except to borrow money to pay them); *Migrant Workers*, *supra* note 30, at ¶ 37 (discussing the heavy burden debt places on migrant workers, and the role that debt plays once the migrant reaches the receiving country).

32. *Cf.* BAD DREAMS, *supra* note 4, at 20-21 (describing situations in Saudi Arabia where officials confiscate contracts signed in the sending country, and force migrants to sign new Arabic language contracts, whose contents are unknown); *Migrant Workers*, *supra* note 30, at ¶ 52 (concluding that by signing contracts that they do not understand, migrant workers often end up in detrimental and dangerous situations).

33. *See* Fitzpatrick & Kelly, *supra* note 9, at 73 (explaining that broker middlemen often make false or misleading claims about placements). *See, e.g.*, HELP WANTED, *supra* note 2, at 27; SWEPT UNDER THE RUG, *supra* note 10, at 69. Migrant workers are also misled about their wages. BAD DREAMS, *supra* note 4, at 21.

34. *See, e.g.*, Employment Act §§ 2, 36, 38, 89 (Cap. 91, 1996 Rev. Ed.) (Sing.), *available at* [http://statutes.agc.gov.sg/non\\_version/cgi-bin/cgi\\_retrieve.pl?actno=REVED-91](http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-91) (defining workman under Singapore law to specifically exclude domestic workers, exempting such workers from protections including a minimum of one rest day per week, fourteen days of paid sick leave, and a maximum on weekly hours); Labour Law No. 8, 1996, art. 3 (Jor.), *available at* [http://www.nabeelaw.com/documents.labour.ch1\\_3\\_en/main.html](http://www.nabeelaw.com/documents.labour.ch1_3_en/main.html) (excluding domestic servants, gardeners, cooks, and all agricultural employees from various labor protections under Jordanian law); Malaysia Employment Act 1955 § 12 and First Schedule (excluding domestic servants in Malaysia from protections of rest days, hours of work, and holidays); BAD DREAMS, *supra* note 4, at 27 (noting that Article 3(a) of Saudi Arabia’s 1969 labor law also provides that its provisions “shall not apply” to “domestic servants and persons regarded as such”); *see also* LIN LEAN LIM ET AL., INTERNATIONAL LABOUR ORGANIZATION, PREVENTING DISCRIMINATION, EXPLOITATION, AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE—BOOKLET 4: WORKING AND LIVING ABROAD 12 (2003), <http://www.ilo.org/public/english/employment/gems/download/mbook4.pdf> (listing other states that exclude domestic workers from their labor legislation). *But*

protections for workers such as overtime pay, minimum wage, and regulation of hours, women migrants often work in domestic service jobs that are not covered by these regulations.<sup>35</sup> Domestic workers are also frequently exempted from health insurance, social security, unemployment programs, and other government services.<sup>36</sup>

In addition to inadequate regulation concerning domestic work and other jobs typically performed by migrant workers, there is often very little domestic governmental monitoring of the worksite.<sup>37</sup> This lack of monitoring permits private employers to violate the rights of migrant workers. Employers frequently fail to pay the migrant worker on time or according to the contract terms.<sup>38</sup> In addition, they often withhold pay for long periods of time, or will only pay the migrant worker reduced wages.<sup>39</sup> Even when the employers abide by

---

*see, e.g., Government Gazette 23732, GN 1068, 15 Aug. 2002 (S. Afr.), available at <http://www.labour.gov.za/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/Sectoral%20Determination%207%20-%20Domestic%20Workers.pdf> (demonstrating that, under Sectoral Determination 7: Domestic Worker Sector, South Africa presents a notable exception, where domestic workers, gardeners, caretakers in private homes, and chauffeurs are all protected by labor legislation that mandates a minimum wage, an annual wage increase, a maximum number of 45 hours per week, overtime pay, and rest breaks during the day).*

35. *See* REPORT OF THE COMMITTEE OF EXPERTS, INTERNATIONAL LABOUR CONFERENCE, 87TH SESSION, MIGRANT WORKERS 105–06 (1999) (describing women migrant workers as particularly vulnerable in part due to fact that they often hold jobs for which there is little protection under social legislation).

36. *See, e.g.,* SOCIAL SECURITY ADMINISTRATION, NO. 13-11802, OFFICE OF POLICY, SOCIAL SECURITY PROGRAMS THROUGHOUT THE WORLD: ASIA AND THE PACIFIC, 2004, at 45, 68, 130, 149, 163 (2005), *available at* [http://digitalcommons.ilr.cornell.edu/key\\_workplace/168](http://digitalcommons.ilr.cornell.edu/key_workplace/168) (noting that Bahrain, Hong Kong, Malaysia, Oman, and Saudi Arabia exclude domestic workers from their social insurance programs). In Malaysia, voluntary coverage exists for domestic servants and foreign workers in the provident fund, covering old age, disability, and survivor benefits. *Id.* at 130. Brunei, Malaysia, Nepal, Singapore, and Syria exclude domestic workers from workmen's compensation funds. *Id.* at 52, 133, 140, 169, 176.

37. HELP WANTED, *supra* note 2, at 37.

38. *See* MAID TO ORDER, *supra* note 1, at 48–52 (discussing and providing examples of employers withholding wages from migrant workers in Singapore); BAD DREAMS, *supra* note 4, at 38–41 (describing how some employers in Saudi Arabia withhold salaries and/or do not fully pay their migrant workers, and explaining how women workers are particularly vulnerable to this type of abuse).

39. *See* HELP WANTED, *supra* note 2, at 42 (interviewing fifty-one domestic workers in Malaysia and finding that twenty-six did not receive their full salary, twelve received no salary, and many others were still working and hoping they

the migrant workers' contracts, the contract terms typically include substandard wages, long hours, and little or no time off.<sup>40</sup>

Women migrant workers in the domestic sector are especially vulnerable to restrictions on their freedom of movement.<sup>41</sup> Some states have taxes on employers to ensure that the migrant worker does not "run away."<sup>42</sup> Thus, employers often have an incentive to keep the migrant worker locked in the house. Employers commonly confiscate travel documents,<sup>43</sup> and forbid women to leave the house alone, or have any contact with the outside world.<sup>44</sup> Migrant domestic workers are isolated from others.<sup>45</sup> Because of their close proximity to and dependence on their employers, women migrant workers are often vulnerable to gender-based violence in the workplace, which often goes unreported.<sup>46</sup> In at least one study, nearly half of all foreign domestic workers interviewed reported physical, psychological, or sexual abuse.<sup>47</sup> In some states a migrant worker can be fined for leaving abusive employment situations,

---

would be paid at the end of their two-year contracts).

40. See MAID TO ORDER, *supra* note 1, at 38–40 (discussing the dangers, both financial and physical, that face migrant workers who labor under unfair employment contracts); *Migrant Workers*, *supra* note 30, at ¶ 31 (discussing working conditions and hours that amount to slave labor).

41. See HELP WANTED, *supra* note 2, at 40–42 (describing typical restrictions on migrant workers' freedom of movement, including rules against going outside, the practice of locking workers inside employers' homes, and the utilization of surveillance systems and alarms); MAID TO ORDER, *supra* note 1, at 42–48 (discussing the practice of forced confinement in Singapore).

42. See MAID TO ORDER, *supra* note 1, at 4 (noting, for example, that employers in Singapore forfeit S\$5000 to the government if their domestic worker runs away).

43. See *Migrant Workers*, *supra* note 30, at ¶ 34; SWEPT UNDER THE RUG, *supra* note 10, at 77 (documenting the "routine" practice of employers in Singapore, Malaysia, and Saudi Arabia to confiscate passports and work permits, thereby ensuring that any employees that escape face the risk of being caught by government officials, arrested and deported).

44. MAID TO ORDER, *supra* note 1, at 42–46; SWEPT UNDER THE RUG, *supra* note 10, at 73–76.

45. See BAD DREAMS, *supra* note 4, at 47 (describing forced confinement and isolation as "gender-specific abuse").

46. See HELP WANTED, *supra* note 2, at 48–50 (discussing sexual abuse and harassment at the hands of employers); BAD DREAMS, *supra* note 4, at 57 (discussing women migrant workers' vulnerability to sexual abuse, rape, and the possibility of contracting HIV/AIDS); MAID TO ORDER, *supra* note 1, at 75–78, 82–84 (discussing both physical and sexual abuse of domestic workers by employers in Singapore).

47. HELP WANTED, *supra* note 2, at 46.

because she is no longer in the country legally once she has stopped working.<sup>48</sup>

Despite the prevalence of human rights abuses, both domestic law and international law typically fail to help migrant workers. In the domestic context, most sending states do very little to assist migrant workers before their departure or while they are living abroad, and rarely provide information to educate migrants about what to expect if they migrate.<sup>49</sup> States fail to monitor and close down illegal recruitment agencies, or to regulate legal recruitment agencies.<sup>50</sup> States are even less likely to monitor private employers.<sup>51</sup>

For their part, many receiving states fail to recognize legal rights for migrant workers. As previously mentioned, many receiving states exclude migrant workers from their labor codes and other benefits.<sup>52</sup> A lack of effective enforcement mechanisms leaves governments with little capacity to manage migration, particularly by monitoring

---

48. *Id.* at 66; SWEPT UNDER THE RUG, *supra* note 10, at 76; *see also* Fitzpatrick & Kelly, *supra* note 9, at 77-78 (discussing Filipina household workers in Hong Kong who must leave within two weeks of termination of their employment contracts).

49. *See* HELP WANTED, *supra* note 2, at 27-29 (discussing a general lack of information among migrant women); *cf.* LIN LEAN LIM ET AL., INTERNATIONAL LABOUR ORGANIZATION, PREVENTING DISCRIMINATION, EXPLOITATION, AND ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE—BOOKLET 2: DECISION-MAKING AND PREPARING FOR EMPLOYMENT ABROAD 16 (2003), <http://www.ilo.org/public/english/employment/gems/download/mbook2.pdf> (noting the unrealistic perceptions and expectations about working abroad that migrant workers often hold).

50. *See* HELP WANTED, *supra* note 2, at 21-22 (describing how the Ministry of Manpower in Singapore fails to rigorously monitor labor suppliers); *Migrant Workers*, *supra* note 30, at Executive Summary (discussing the lack of watchdog mechanisms and inadequate government monitoring); SWEPT UNDER THE RUG, *supra* note 10, at 69 (arguing that inadequate regulation and government oversight give employment agencies “enormous influence over the fates of migrant domestic workers”); MAID TO ORDER, *supra* note 1, at 102 (claiming that sending states typically do not have systems in place to monitor employment agencies).

51. *See, e.g.*, BAD DREAMS, *supra* note 4, at 47 (explaining that government authorities tolerate private employers who subject women to forced confinement); *see also* MAID TO ORDER, *supra* note 1, at 70 (arguing that inadequate state regulation of domestic workers’ wages has led to disproportionately low wages as compared to other types of labor, as well as discriminatory practices by agencies who determine wages according to nationality); *see also* SWEPT UNDER THE RUG, *supra* note 10, at 34 (claiming that “inadequate monitoring creat[es] an environment of impunity for employers”).

52. *See supra* note 38 and accompanying text.

illegal recruiters and employers who violate migrant workers' rights. Many receiving states do not let migrants form unions, leaving them unable to effectively organize and demand that employers respect their human rights.<sup>53</sup> These receiving states also do little to encourage migrant women to report violations of their rights, and often erect barriers to access to the judiciary or other competent tribunals.<sup>54</sup>

The international framework for migrant workers fares little better. In 1990 the UN General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families ("Migrant Workers' Convention" or "MWC"), encompassing a wide variety of protections.<sup>55</sup> The MWC,

---

53. See VITIT MUNTARBHORN, INTERNATIONAL LABOUR ORGANIZATION, THE MEKONG CHALLENGE: EMPLOYMENT AND PROTECTION OF MIGRANT WORKERS IN THAILAND: NATIONAL LAWS/PRACTICE VERSUS INTERNATIONAL LABOUR STANDARDS 16 (2005) (noting that Thailand prohibits foreign workers from forming or organizing unions, and while there is no prohibition on foreign workers joining unions, irregular migrants are unlikely to be accepted as members); *Human Rights Watch, Building Towers, Cheating Workers: Exploitation of Migrant Workers in the United Arab Emirates*, 18 HUM. RTS. WATCH 1, 7 (2006) [hereinafter *Cheating Workers*] (discussing the United Arab Emirates' prohibition on foreign workers organizing unions, but noting that this ban may be changing); see also BAD DREAMS, *supra* note 4, at 69-70 (pointing out that Saudi Arabia prohibits all workers, the majority of whom are migrants, from striking or organizing trade unions); Satterthwaite, *supra* note 19, at n.259 (citing an ILO report which states "that 'only two countries in Asia (Hong Kong and Japan) have legally registered independent migrant trade unions'").

54. See Fitzpatrick & Kelly, *supra* note 9, at 76-77 (describing formal barriers that impede access to legal protection for migrant victims of sexual assault, and noting that prosecutions of employers who commit crimes against migrant household workers are "extremely rare"); see also LIM, *supra* note 34, at 11 (explaining women migrant workers usually do not have access to labor courts). Barriers to access to a competent tribunal can also be economic. For example, although Hong Kong has established a tribunal to adjudicate contractual disputes between migrant workers and their employers, the migrant workers must pay a significant cash fee to immigration authorities to extend their leave to remain in Hong Kong while the case is pending. See Fitzpatrick & Kelly, *supra* note 9, at 78. Malaysia similarly requires migrant workers to purchase a special pass visa, renewable monthly, in order to stay in the country after leaving work due to abuse or exploitative work conditions and filing a labor dispute. See TENAGANITA, MIGRANT WORKERS: ACCESS DENIED 26 (2004).

55. Migrant Workers Convention, *supra* note 7. The MWC was the product of a decade-long drafting process in which all United Nations member states could contribute to the Working Group. See Rachel Li Wai Suen, *You Sure Know How to Pick 'Em: Human Rights and Migrant Farm Workers in Canada*, 15 GEO. IMMIGR. L.J. 199, 217 (2000).

which entered into force on July 1, 2003, contains clear non-discrimination and equal protection standards, prohibiting States from discriminating based on alien status.<sup>56</sup> Equal protection of the law is guaranteed to all migrant workers, whether documented or undocumented, male or female.<sup>57</sup> The MWC contains numerous substantive rights, which must be granted to all migrant workers irrespective of their employment or residency status.<sup>58</sup> The MWC grants additional substantive rights to documented migrant workers or migrant workers in a “regular situation.”<sup>59</sup> Although in theory the MWC holds states accountable for fulfilling a vast number of human rights for migrant workers, in practice, only forty-one countries had ratified the treaty as of April 2009.<sup>60</sup> Furthermore, none of the primary receiving states for migrant workers have ratified the MWC.<sup>61</sup> Thus, despite the broad protections it offers, in practice the MWC is a weak and ineffective mechanism for claiming rights.

---

56. See Satterthwaite, *supra* note 19, at 22.

57. See *id.*; see also Migrant Workers Convention, *supra* note 7, arts. 18-19.

58. Migrant Workers Convention, *supra* note 7, arts. 8-35. Substantive rights include, for example, the right to life, the right to be free from torture, and the right to be free from slavery, servitude or forced or compulsory labor. *Id.* arts. 9-11. All migrants are guaranteed freedom of religion, as well as the right to liberty and security of person and property. *Id.* arts. 12, 16. Article 25 guarantees to all migrant workers, whether regular or irregular in status, “treatment not less favourable than that which applies to nationals of the State of employment,” with respect to remuneration, overtime, hours of work, vacation time, and other conditions and terms of employment. *Id.* art. 25. Migrant workers are also guaranteed social security on the same terms as nationals, along with the right to emergency medical care and access to education for their children. *Id.* art. 27.

59. See Migrant Workers Convention, *supra* note 7, art. 36-56.

60. See United Nations, Status of the Migrant Workers Convention, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=138&chapter=4&lang=en> (last visited Apr. 27, 2009).

61. See Daniel A. Bell, *Justice for Migrant Workers? The Case of Foreign Domestic Workers in Hong Kong and Singapore*, in GLOBAL JUSTICE AND THE BULWARKS OF LOCALISM: HUMAN RIGHTS IN CONTEXT 291, 303 (Christopher L. Eisgruber & Andrés Sajó eds., 2005); see also Sarah H. Cleveland, *International Decisions: Legal Status and Rights of Undocumented Workers. Advisory Opinion OC-18/03*, 99 AM. J. INT’L L. 460, 462 n.23 (2005); Ratna Kapur, *Travel Plans: Border Crossings and the Rights of Transnational Migrants*, 18 HARV. HUM. RTS. J. 107, 121 (2005) (noting that the treaty has yet to be ratified by a state in the “global North”). By contrast, many receiving states that have not ratified the Migrant Workers Convention—such as Singapore, Malaysia, Saudi Arabia, and Lebanon, to give a few examples—have ratified CEDAW. Compare Status of the Migrant Workers Convention, *supra* note 60, with Status of CEDAW, *supra* note 22.

Yet as Satterthwaite explains, the other core human rights treaties provide a strong basis for advocating for migrant workers' human rights.<sup>62</sup> In the next section I explore why CEDAW is a particularly compelling tool to advocate for the fulfillment of the human rights of migrant workers.

## II. APPLYING CEDAW TO WOMEN MIGRANT WORKERS

### A. CEDAW OVERVIEW

The United Nations General Assembly adopted CEDAW on December 19, 1979.<sup>63</sup> The Convention's preamble expresses concern for extensive discrimination against women that continued to exist, despite a number of instruments (including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights ("ICCPR"), and the International Covenant on Economic, Social and Cultural Rights ("ICESCR")) that were intended to provide for equal rights for men and women.<sup>64</sup>

CEDAW contains a broad definition of discrimination against women,<sup>65</sup> and describes a number of measures that States must

---

62. See Satterthwaite, *supra* note 19, at 4–5 (arguing that the rights of women migrant workers are included in standards set out by other human rights treaties). See generally OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, FACT SHEET NO. 30, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM, <http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf> (last visited Mar. 20, 2009) (providing a background on these core human rights treaties, specifically the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social Rights (ICESCR), the Convention on the Elimination of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), the Convention Against Torture (CAT), and the Convention on the Elimination of Discrimination Against Women (CEDAW)).

63. CEDAW, *supra* note 20; INTERNATIONAL WOMEN'S RIGHTS ACTION WATCH ASIA PACIFIC, OUR RIGHTS ARE NOT OPTIONAL: ADVOCATING FOR THE IMPLEMENTATION OF THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) THROUGH ITS OPTIONAL PROTOCOL 2 (2005) [hereinafter OUR RIGHTS ARE NOT OPTIONAL].

64. See CEDAW, *supra* note 20, pmb.

65. See *id.* art. 1 ("For the purposes of the present Convention, 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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.").

undertake to eliminate this discrimination.<sup>66</sup> Further evidencing the Convention's goal of advancing the treatment of women around the world, CEDAW permits—and even encourages—States to adopt temporary special measures that treat men and women differently in order to accelerate the achievement of equality between men and women.<sup>67</sup>

Articles 7 through 16 contain substantive provisions relating to certain areas such as participation in politics and public life at both national and international levels, changing or retaining nationality, education, employment, health care, economic and social life, rural women, and family relations.<sup>68</sup> In each area, the State agrees to undertake measures to eliminate discrimination against women, and ensure the fulfillment of certain human rights on an equal basis with men.<sup>69</sup>

Part V of the Convention establishes the CEDAW Committee (“the Committee”), which is comprised of twenty-three experts selected by State Parties according to various rules.<sup>70</sup> The Committee is allowed to make its own rules of procedure,<sup>71</sup> and considers reports made by State Parties “on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect.”<sup>72</sup> The Committee is empowered to make general recommendations and suggestions after examining the State Party reports.<sup>73</sup> In practice, the Committee issues Concluding Comments to reporting State Parties, providing each State with specific recommendations that should be undertaken or begun in the time period before the next report.<sup>74</sup> The Committee has also issued

---

66. *Id.* art. 2.

67. *Id.* art. 4; *see also infra* note 131 and accompanying text (discussing the CEDAW Committee General Recommendation on temporary special measures).

68. CEDAW, *supra* note 20, arts. 7-16.

69. *Id.* art. 3.

70. *Id.* art. 17.

71. *Id.* art. 19.

72. *Id.* art. 18.

73. *Id.* art. 21.

74. *See, e.g.,* Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cape Verde*, U.N. Doc. CEDAW/C/CPV/CO/6 (Aug. 25, 2006) [hereinafter *Cape Verde*]; Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of*

twenty-six General Recommendations, the latest one produced in 2009.<sup>75</sup> After a number of short recommendations, often on procedural issues such as reporting guidelines,<sup>76</sup> or reservations to the Convention,<sup>77</sup> the Committee decided in 1991 to put forth more detailed and comprehensive recommendations based on specific provisions of the Convention, and “cross-cutting themes” such as domestic violence or women’s health.<sup>78</sup>

## B. THE APPLICABILITY OF CEDAW TO MIGRANT WORKERS

Because CEDAW is one of the most widely ratified international human rights treaties,<sup>79</sup> it has the potential to be a potent tool for

---

*Discrimination Against Women: Chile*, U.N. Doc. CEDAW/C/CHI/CO/4 (Aug. 25, 2006) [hereinafter *Chile*]; Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cambodia*, U.N. Doc. CEDAW/C/KHM/CO/3 (Jan. 25, 2006) [hereinafter *Cambodia*]; Committee on the Elimination of Discrimination Against Women, *Concluding Comments: Italy*, U.N. Doc. CEDAW/C/ITA/CC/4-5 (Feb. 15, 2005) [hereinafter *Italy*].

75. See Office of the United Nations High Commissioner for Human Rights, Committee on the Elimination of Discrimination Against Women, General Recommendations, <http://www2.ohchr.org/english/bodies/cedaw/comments.htm> (last visited April 27, 2009).

76. See, e.g., U.N. General Assembly (UNGA), Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women, Fifth Session*, ¶ 16, U.N. Doc. A/41/45 (1986) [hereinafter *Fifth Committee Report*], see also U.N. General Assembly (UNGA), Committee on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women, Sixth Session*, ¶ 577, U.N. Doc. A/42/38 (1987) [hereinafter *Sixth Committee Report*].

77. See *Sixth Committee Report*, *supra* note 76, at ¶ 576.

78. See Office of the United Nations High Commissioner for Human Rights, *supra* note 75.

79. See Status of CEDAW, *supra* note 22 (noting that as of March 2009, CEDAW has 185 State Parties, which constitutes over 90% of United Nations’ members). By contrast, as of September 2008, the International Covenant on Civil and Political Rights (ICCPR) had 162 State Parties, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) had 159 State Parties, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) had 173 State Parties, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) had 145 State Parties, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) had 37 State Parties. See Status of CEDAW, *supra* note 22. Of the seven core human rights treaties, only the Convention on the Rights of the Child (CRC), with 193 State Parties, has more parties than CEDAW. See United Nations, Status of CRC, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=133&chapter=4&lang=en> (last visited

empowering female domestic migrant workers. Although the Convention does not specifically mention migrant workers, the text of CEDAW supports an argument in favor of the treaty's broad applicability. In addition to the broad discrimination definition of Article 1,<sup>80</sup> Article 2 condemns discrimination against women "in all forms,"<sup>81</sup> and Article 3 obliges States to take appropriate measures "in all fields" to guarantee that women enjoy their human rights.<sup>82</sup> Furthermore, in contrast to several other human rights treaties, CEDAW does not explicitly distinguish between the rights of citizens and non-citizens.<sup>83</sup>

For its part, the CEDAW Committee reads the Convention as encompassing more than its text.<sup>84</sup> For example, although violence against women is not explicitly mentioned in the text of CEDAW, the Committee has determined that gender-based violence is "discrimination" within the meaning of Article 1 of CEDAW, thus obliging State Parties to take measures to combat violence against

---

Apr. 27, 2009).

80. See CEDAW, *supra* note 20, art. 1.

81. *Id.* art. 2.

82. *Id.* art. 3.

83. See, e.g., International Convention on Civil and Political Rights art. 25, Dec. 16 1966, 999 U.N.T.S. 171 [hereinafter Civil Rights Convention] (granting several rights specifically to citizens, including the right to vote and participate in public affairs). Other articles of the convention refer to rights for "everyone" or provide for measures that shall happen to "no one." See, e.g., *id.* arts. 7, 8, 9, 12. By contrast, CEDAW refers only to the rights of "women." See generally CEDAW, *supra* note 20. The Migrant Worker's Convention distinguishes between the human rights of all migrant workers and the human rights of migrant workers in a documented or regular situation. Compare Migrant Workers Convention, *supra* note 7, arts. 8-35, with *id.* arts. 36-56. The ICESCR permits developing countries to limit the economic rights of non-nationals. See International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16 1966, 993 U.N.T.S. 3 [hereinafter Cultural Rights Covenant]. CERD does not prohibit a State from making distinctions, exclusions, restrictions, or preferences between citizens and non-citizens. See International Convention on the Elimination of All Forms of Racial Discrimination art. 1, Dec. 21, 1965, 660 U.N.T.S. 195.

84. See International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.7 (May 12, 2004) [hereinafter *Compilation of Comments*] ("The Convention is a dynamic instrument. Since the adoption of the Convention in 1979, the Committee, as well as other actors at the national and international levels, have contributed through progressive thinking to the clarification and understanding of the substantive content of the Convention's articles and the specific nature of discrimination against women and the instruments for combating such discrimination.").

women.<sup>85</sup> Although the Committee's general recommendations are not legally binding,<sup>86</sup> State Parties are expected to implement general recommendations in order to fulfill their obligations under the Convention.<sup>87</sup> The Committee recently formulated a general recommendation on women migrant workers.<sup>88</sup>

Though the General Recommendation on women migrant workers is new, the CEDAW Committee has consistently recognized the applicability of the Convention to women migrant workers.<sup>89</sup> In its concluding comments and recommendations to State Parties that have submitted reports, the Committee has frequently expressed concern for their rights.<sup>90</sup> Additionally, in its general

---

85. See Office of the High Commissioner for Human Rights, *CEDAW General Recommendation 19: Violence Against Women*, ¶ 6, U.N. Doc. A/47/38 (Jan. 29, 1992) [hereinafter *Recommendation 19*] (highlighting specific articles of the Convention that are relevant to violence against women and then making specific recommendations for States).

86. See High Commissioner for Human Rights, Discrimination Against Women, <http://www.unhchr.ch/html/menu6/2/fs22.htm>; see also Charles J. Ogletree Jr. & Rangita de Silva-de Alwis, *The Recently Revived Marriage Law of China: the Promise and Reality*, 13 TEX. J. WOMEN & L. 251, 303 (2004) (stating that General Recommendation 19 is "authoritative jurisprudential interpretation" of CEDAW but is not binding on state parties).

87. See Office of the High Commissioner for Human Rights, *Treaty Bodies*, <http://www.unhchr.ch/pdf/leafletontreatybodies.pdf> (last visited Mar. 20, 2009) (explaining that a State party is expected to implement the recommendations of treaty bodies).

88. CEDAW, *General Recommendation No. 26 on Women Migrant Workers*, U.N. Doc. CEDAW/C/2009/WP.1/R (Dec. 5, 2008) [hereinafter *Women Migrant Workers*].

89. See United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, *United Nations Report of the Committee on the Elimination of Discrimination Against Women, Fifteenth Session*, ¶ 186, U.N. Doc. A/51/38 (1996) [hereinafter *Fifteenth Session*] (noting with regard to Belgium, for example, that "[i]nterest and concern were expressed by the Committee as regards efforts to address the needs of minority groups such as migrant women").

90. See, e.g., United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Cyprus*, ¶ 30, U.N. Doc. CEDAW/C/CYP/CO/5 (May 30, 2006) [hereinafter *Cyprus*] ("The Committee calls on the State party to monitor closely the terms and conditions of contracts, conditions of work and salaries of women migrants and devise strategies and policies for their full integration in the labour force and for elimination of direct and indirect discrimination."); see *Cambodia*, *supra* note 74, at ¶ 22 ("The Committee calls on the State party to focus on the causes of women's migration and to develop policies and measures to protect migrant women against

recommendation on women and health, the Committee noted that “special attention should be given to the health needs and rights of” migrant women and other especially vulnerable groups.<sup>91</sup> Thus, the Convention’s applicability to women migrant workers is clear.<sup>92</sup>

I turn next to the principal reasons why CEDAW is particularly helpful to women migrant workers: the Convention’s guarantee of substantive equality and the obligation it imposes on States to eliminate discrimination by non-State actors within its jurisdiction. Although the Committee and others have assumed that CEDAW provides for substantive equality, the legal argument for this proposition is typically overlooked.<sup>93</sup> Thus, I attempt to put forth support for this proposition through a textual analysis<sup>94</sup> of the Convention.

---

exploitation and abuse.”); *see also* United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Australia*, ¶ 29, U.N. Doc. CEDAW/C/AUL/CO/5 (Feb. 3, 2006) [hereinafter *Australia*] (“The Committee urges the State party to take more effective measures to eliminate discrimination against refugee, migrant and minority women and girls.”); *United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, Concluding Comments: Ireland*, ¶ 37, U.N. Doc. CEDAW/C/IRL/CO/4-5 (July 22, 2005) [hereinafter *Ireland*] (“The Committee calls on the State party to ensure that women domestic workers, including migrant women, are duly protected against discrimination.”).

91. *See* Office of the High Commissioner for Human Rights, *CEDAW General Recommendation 24: Women and Health*, ¶ 6, Doc. A/54/38/Rev.1 (Feb. 2, 1999) [hereinafter *Recommendation 24*].

92. *See Women Migrant Workers*, *supra* note 88, ¶ 2 (“[T]he Convention on the Elimination of All Forms of Discrimination against Women protects all women, including migrant women, against sex- and gender-based discrimination.”).

93. *See, e.g.,* Andrew Byrnes et al., *State Obligations and the Convention on the Elimination of Discrimination Against Women* 115 (Univ. of New South Wales Faculty of Law Research Series, Working Paper No. 48, 2007) (advocating for a General Recommendation on CEDAW Article II stating, among other principles, that CEDAW embodies the concept of substantive equality); OUR RIGHTS ARE NOT OPTIONAL, *supra* note 63, at 4 (describing CEDAW as promoting a model of substantive equality).

94. Textual analysis is a legitimate (and often preferred) approach to the interpretation of treaties. *See, e.g.,* Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*] (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

### C. SUBSTANTIVE EQUALITY

#### *i. Substantive Equality in Practice*

Substantive equality moves beyond a notion of formal, or *de jure*, equality—the idea that the law must treat men and women equally.<sup>95</sup> Instead, the concept of substantive equality has been defined as “directed at eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political, and cultural participation in society.”<sup>96</sup> Thus, treating people equally from a substantive equality point of view does not necessarily mean treating them identically. Because of discrimination that a group (such as women) has historically faced, along with existing discriminatory attitudes, a law that facially puts men and women alike does not necessarily treat them equally, under the substantive equality model.

To illustrate by way of example, consider the United States’ Family and Medical Leave Act (“FMLA”), which grants up to twelve weeks of unpaid leave within a twelve-month period for reasons such as the birth of a child, a serious health condition, or to care for a dependent.<sup>97</sup> This gender-neutral statute applies to all “eligible employees,” defined by the amount of time a person has been employed for an employer of a certain size.<sup>98</sup> Thus, under the FMLA, men and women have an equal statutory right to unpaid leave. This formal equality, however, may not be enough to achieve substantive equality of women in the workplace. As some scholars have argued:

To expect women to accommodate their childbearing needs to policies dealing with sickness is to impose a male norm on women—they may participate in the workplace as long as they are like men. Women require special treatment—an

---

95. See Renu Mandhane, *The Use of Human Rights Discourse to Secure Women’s Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 302 n.184 (2004).

96. RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* 176 (1996).

97. See 29 U.S.C. § 2612 (1993).

98. *Id.* § 2611 (defining “eligible employees” as those who have worked for an employer for twelve months, or 1,250 hours during a twelve month period).

acknowledgment that they bear children while male workers do not—to put them on an equal footing in the workplace.<sup>99</sup>

Acknowledging that women are situated differently from men, due to both biology and societal attitudes towards child-rearing, a substantive view of equality might demand additional pregnancy leave for women on top of the twelve weeks of leave granted by the FMLA (leave that could still be taken for other serious health conditions and to care for dependents). Although men and women are not formally treated equally under this proposal, it would help women achieve true equality in the workplace by helping them achieve equal opportunity to participate in the labor market.<sup>100</sup>

Certain national courts have recognized substantive equality in their jurisprudence,<sup>101</sup> and decisions of these courts have helped develop and define the concept.<sup>102</sup> For example, the Canadian Charter of Rights and Freedoms—which contains a textually less

---

99. See Sally J. Kenney, *Pregnancy Discrimination: Toward Substantive Equality*, 10 WIS. WOMEN'S L. J. 351, 362 (1995).

100. See, e.g., Scott A. Caplan-Cotenoff, Note, *Parental Leave: The Need for a National Policy to Foster Sexual Equality*, 13 AM. J. L. & MED. 71, 86-88 (1987) (describing the feminist debate over whether equality for women is best achieved by equal treatment or special accommodations); Kenney, *supra* note 99, at 362; Susan A. Kidwell, Note, *Pregnancy Discrimination in Educational Institutions: A Proposal to Amend the Family Medical Leave Act of 1993*, 79 TEX. L. REV. 1287, 1312-13 (2001); Ann O'Leary, *How Family Leave Law Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 40 (2007) (describing the debate between equality feminists and proponents of a statute guaranteeing women pregnancy leave).

101. In addition to Canada and South Africa, whose domestic courts have explored substantive equality in the most detail, substantive equality has also been recognized in India. See *Minerva Mills Ltd. v. Union of India*, (1981) 1 S.C.R. 206, 220 (India) (recognizing substantive equality in India by stating that “[t]he equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice”).

102. See, e.g., *Nat'l Coal. for Gay & Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517 (CC), at ¶¶ 60-64 (S. Afr.) (demonstrating that the concept of substantive equality has been developed not only with respect to women, but also with respect to other historically discriminated-against groups). For example, the South African Constitutional Court acknowledged the contemplation of substantive equality in that country's Constitution in a case holding that the criminalization of sodomy in private between consenting males severely limited the right to equality for gay men and lesbians. *Id.*

expansive guarantee of equality than does CEDAW<sup>103</sup>—has been interpreted by the Canadian Supreme Court as containing a guarantee of substantive equality.<sup>104</sup> The Canadian Supreme Court explained, “Section 15(1) guarantees more than formal equality; it guarantees that equality will be mainly concerned with ‘the impact of the law on the individual or the group concerned.’”<sup>105</sup> The South African Constitutional Court reached a similar conclusion about its Constitution, declaring that “Section 9 of the constitution . . . clearly contemplates both substantive and remedial equality.”<sup>106</sup>

As the concept of substantive equality has developed, various definitions of the term have emerged,<sup>107</sup> centered on the idea that

103. See Constitution Act, 1982 S.C., ch. 12 § 15 (Can.):

(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

*Id.* It should be noted that the “discrimination based on . . . sex” language of §15 is similar to the “distinction, exclusion or restriction made on the basis of sex” language of CEDAW, further supporting the argument that this language does not preclude a substantive equality interpretation of the Convention. See CEDAW, *supra* note 20, art. 1; see also Vienna Convention, *supra* note 94, art. 31(1) (providing guidance on how to interpret treaties).

104. See *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 165 (Can.).

105. See *Symes v. The Queen*, [1993] 4 S.C.R. 754 (quoting *Andrews*, [1989] 1 S.C.R. at 165 (Can.)).

106. *Nat'l Coal.*, 1998 (12) BCLR 1517 (CC) at ¶ 62 (S. Afr.) (noting that the State had a constitutional obligation to implement measures to foster substantive equality).

107. See, e.g., Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CALIF. L. REV. 1271, 1294 n.94 (2006) (stating that “[w]hile formal equality emphasizes equal opportunity, substantive equality emphasizes equal outcomes”); Renu Mandhane, *The Use of Human Rights Discourse to Secure Women’s Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 302 n.184 (2004) (explaining that “[s]ubstantive equality . . . aims at achieving *de facto* equality such that women might be treated differently than men in order to ensure an equitable outcome”); Thomas Trelogan et al., *Can’t We Enlarge the Blanket and the Bed? A Comparative Analysis of Positive/Affirmative Action in the European Court of Justice and the United States Supreme Court*, 28 HASTINGS INT’L & COMP. L. REV. 39, 51 (2004) (claiming that “[i]n contrast to formal equality, a results-oriented or substantive equality focuses on the goal of equalizing burdens and benefits for women and men. Persons

substantive equality moves beyond formal equality to address the systemic roots of discrimination.<sup>108</sup> Substantive equality demands that a state provide the institutional tools to create equal opportunities—tools that go beyond merely treating all persons alike under the law. As the South African Constitutional Court explained, “the creation of democracy and equal treatment before the law are not enough to foster substantive equality.”<sup>109</sup> Similarly, the Canadian Supreme Court, in developing its conception of substantive equality as embodied in the Charter of Rights and Freedoms, noted that “it is clear that a law may be discriminatory even if it is not directly or expressly discriminatory.”<sup>110</sup> This idea of “adverse effects discrimination”<sup>111</sup> is captured by the “effect or purpose” language in CEDAW.<sup>112</sup>

A key element to achieving substantive equality is the idea that the state may—and should—take measures designed to advance persons previously or currently discriminated against. Thus, the Constitutional Court of South Africa proclaimed,

Substantive equality is envisaged when section 9(2) [of the Constitution] unequivocally asserts that equality includes ‘the full and equal enjoyment of all rights and freedoms.’ The state is further obliged ‘to promote the achievement of such equality’ by ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’, which envisages remedial equality.<sup>113</sup>

---

committed to substantive equality attempt distributions that are equal in their effect on the lives of women and men”).

108. See *Nat'l Coal.*, 1998 (12) BCLR 1517 (CC) at ¶ 60 (S. Afr.) (identifying circumstances in which substantive equality is preferable to formal equality). “Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.” *Id.*

109. See *Minister of Finance v. Van Harden* 2004 (11) BCLR 1125 (CC) at ¶ 73 (S. Afr.) (opinion of Justice Mogkoro).

110. *Symes*, 4 S.C.R. at 755 (Can.).

111. *Id.* (detailing cases that enumerate the principle of adverse effects discrimination).

112. See *infra* notes 116, 118-21, 123 and accompanying text.

113. *Nat'l Coal.*, 1998 (12) BCLR 1517 (CC) at ¶ 62 (S. Afr.).

This obligation on the South African State is similar to that of State Parties to CEDAW under Article 4, the temporary special measures provision,<sup>114</sup> in that both envision unequal treatment as potentially necessary to create equal opportunity. The temporary special measures provision helps provide the legal basis for CEDAW's guarantee of substantive equality. I next set forth the full argument for why CEDAW demands that State Parties provide substantive, rather than formal, equality.

*ii. CEDAW Demands Substantive Equality*

The text of CEDAW moves beyond a commitment to formal equality for women. The discrimination definition encompassed in Article 1 includes distinctions, exclusions, or restrictions made on the basis of sex that have the "effect or purpose" of impairing women's equality.<sup>115</sup>

One could argue that the language in CEDAW defining discrimination as "any distinction, exclusion or restriction *made on the basis of sex*" supports an interpretation that States are only obliged to take steps to ensure formal equality of the law.<sup>116</sup>

---

114. See CEDAW, *supra* note 20, art. 4

Adoption by States Parties of temporary special measures aimed at 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; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

*Id.*, see also Office of the High Commissioner for Human Rights, *CEDAW General Recommendation 5: Temporary Special Measures*, U.N. Doc. A/43/38 (Apr. 3, 1988) [hereinafter *Recommendation 5*] (noting that changing discriminatory laws has not completely remedied inequality between men and women, and recommending that states make more use of temporary special measures).

115. See CEDAW, *supra* note 20, art. 1

For the purposes of the present Convention, 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, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

*Id.*

116. See *id.* (emphasis added). But see Andrea D. Friedman, *Using the Convention on the Elimination of All Forms of Discrimination Against Women to Advocate for the Political Rights of Women in a Democratic Burma*, 28 HARV. J. L. & GENDER 481, 483 (2005) (arguing that CEDAW parties "cannot just pay 'lip

However, as I will explain, the text in other articles of the Convention supports a substantive equality interpretation, and this is in fact the interpretation the CEDAW Committee has adopted in practice. Furthermore, the terms of a treaty must be interpreted “in their context and in the light of [the treaty’s] object and purpose.”<sup>117</sup> The object and purpose of CEDAW is to eliminate discrimination against women “in all its forms and manifestations.”<sup>118</sup> These words, and indeed the entire Preamble, indicate that the object and purpose of CEDAW is to eradicate more than presently existing formal discrimination.

The “effect or purpose” language of Article 1 thus supports a substantive equality approach to rights. As Katharine Bartlett explains:

[A] substantive equality approach looks to a rule’s results or effects. It points out that equal treatment leads to outcomes that are unequal because of differences between men and women. Advocates of substantive equality demand that rules take account of these differences in order to eliminate the disadvantages they bring to women.<sup>119</sup>

Thus, while a law may not facially discriminate against women, it may still be discriminatory in fact, and as a result, a State Party to CEDAW has a legal obligation to change the law. For example, a law permitting only property owners to vote, in a country that only recently gave women the right to own property, effectively discriminates against women.<sup>120</sup> Although formally both men and

---

service’ to gender equality”). *See generally* Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19 (2005) (focusing on how States’ reservations to CEDAW have impacted monitoring).

117. *See* Vienna Convention, *supra* note 94, art. 31(1); *see also id.* art. 31(2) (including not only the text, but also the “preamble and annexes” within the context of treaties).

118. *See* CEDAW, *supra* note 20, pmb1.

119. Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL’Y 1, 4 (1994) (discussing further the different models of substantive equality); *see also Nat’l Coal.*, 1998 (12) BCLR 1517 (CC) at ¶ 61 (making a similar point, albeit more succinctly, that “treating people identically can sometimes result in inequality”).

120. International Women’s Rights Action Watch Asia Pacific contains a similar example in its training materials on non-discrimination. *See* INTERNATIONAL

women can vote under the law, most landowners, and thus voters, are likely to be male, given that women could only recently start accumulating land.<sup>121</sup> Similarly, a tax that Singapore imposes on employers when a domestic servant runs away could be found to have an adverse effect on women, who make up a disproportionate share of the domestic servants finding themselves in situations of forced confinement due to this tax.<sup>122</sup> Although formally the law treats men and women equally, this equal treatment nevertheless leads to unequal outcomes because it primarily impacts women workers.

The Preamble of CEDAW also indicates that the Convention contemplates something more than formal equality. For example, it states that “the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields.”<sup>123</sup> A mere commitment to formal equality will not necessarily result in the maximum participation of women in all fields. Substantive equality acknowledges that women must be guaranteed not only equal opportunity, but also equal access to opportunity and equal outcomes.<sup>124</sup>

Article 3 provides further indication of the Convention’s embrace of substantive equality: Ensuring the “full development and

---

WOMEN’S RIGHTS ACTION WATCH, BUILDING CAPACITY FOR CHANGE: A TRAINING MANUAL ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (on file with author).

121. See INT’L FOOD POLICY RESEARCH INST., EMPOWERING WOMEN AND FIGHTING POVERTY: COCOA AND LAND RIGHTS IN WEST AFRICA 6 (2002), available at <http://www.ifpri.org/media/cocoa.pdf> (recommending that the Ghanaian government inform women their recently acquired rights to own land in order to enable women to exercise those rights).

122. See MAID TO ORDER, *supra* note 1, at 42 (arguing that requiring employers to pay a security bond to the government encourages employers to place restrictions on their domestic servants that limit the servants’ mobility and communication with the outside world); see also CEDAW, *supra* note 20, art. 15 (mandating that women have equal rights with men as to the movement of persons).

123. CEDAW, *supra* note 20, pmbl.

124. See OUR RIGHTS ARE NOT OPTIONAL, *supra* note 63, at 4 (noting that formal equality may not be sufficient to achieve nondiscrimination); see also Claire L’Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363, 368 (2002) (describing substantive equality as affording “equality of opportunity and of result, not just similar treatment for those similarly situated”).

advancement of women” envisions both equality of access to opportunity and equality of result, a key tenet of substantive equality.<sup>125</sup> Furthermore, the State is obliged to take “all appropriate measures” to provide for this advancement.<sup>126</sup> With respect to equality of opportunity, women should have equal access to the resources of a country.<sup>127</sup> Even if a State’s laws and policies guarantee equal protection for women, the State must also ensure that obstacles do not exist to bar women from the enjoyment and fulfillment of their human rights.<sup>128</sup>

The fact that CEDAW’s drafters intended it to provide for more than formal equality is further evidenced by Article 4, which permits States to enact temporary special measures to accelerate de facto equality between men and women.<sup>129</sup> States are not simply permitted, but in fact are encouraged by the CEDAW Committee to adopt temporary special measures.<sup>130</sup> Temporary special measures are provisional measures, such as positive action, preferential treatment, and quota systems, that are directed at women to help move them into a more equal situation with men.<sup>131</sup> If the Convention aimed only to provide women with formal equality, there would be no need for these temporary special measures. States would simply be required to get rid of laws that formally discriminate against women, and enact provisions providing for formal equality.

Finally, the CEDAW Committee itself has acknowledged in its concluding comments to various State Parties that State Parties should pursue the achievement of substantive equality. For example,

---

125. See CEDAW, *supra* note 20, art. 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural 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

*Id.*

126. *Id.*

127. INTERNATIONAL WOMEN’S RIGHTS ACTION WATCH, BUILDING CAPACITY FOR CHANGE: A TRAINING MANUAL ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (on file with author), *supra* note 120.

128. *Id.* at 4.

129. See CEDAW, *supra* note 20, art. 4 (maintaining that these measures will not be considered as discrimination).

130. See *Recommendation 5*, *supra* note 114 (recommending that “States Parties make more use of temporary special measures”).

131. *Id.*

in 2005 the Committee recommended that Algeria adopt certain temporary special measures “so as to accelerate the realization of the substantive equality of rural women.”<sup>132</sup> Similarly, the Committee urged Bhutan to “implement policies and programmes specifically addressed to women and girls . . . in order to accelerate the achievement of substantive equality.”<sup>133</sup>

The Committee’s vision of substantive equality, and its grounding in the text of CEDAW, has never been made clear; as previously explained, this paper seeks to fill that gap.<sup>134</sup> The closest the Committee has come to articulating a vision of substantive equality occurs in several of its general recommendations, although the Committee has never *explicitly* mentioned substantive equality in this context. For example, in its General Recommendation on violence against women, the Committee recommended that States take measures to overcome “attitudes and practices” that perpetuate violence against women and “should introduce education and public information programmes to help eliminate prejudices that hinder women’s equality.”<sup>135</sup> Taking steps to overcome attitudes and prejudices moves beyond formal equality into the substantive model, aiming to create an environment where women have equal access to opportunity and results. Similarly, the General Recommendation on equality in marriage and family relations specifically acknowledges that *de jure* equality is not enough to fulfill a State’s obligations under the Convention because of the pervasive tendency for societies to treat women as inferior to men.<sup>136</sup> Addressing and aiming to

---

132. See United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Algeria*, ¶ 160, U.N. Doc. A/60/38 (2005) [hereinafter *Algeria*].

133. See United Nations General Assembly [UNGA], Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Bhutan*, ¶ 106, U.N. Doc. A/59/38 (2004) [hereinafter *Bhutan*].

134. See, e.g., Byrnes et al., *supra* note 93, at 115 (stating that equality under the law is insufficient on its own); OUR RIGHTS ARE NOT OPTIONAL, *supra* note 63, at 4 (basing the Convention on three principles, one of which is substantive equality).

135. *Recommendation 19*, *supra* note 85, at ¶ 24(f).

136. See Office of the High Commissioner for Human Rights, *CEDAW General Recommendation 21: Equality in Marriage and Family Relations*, ¶ 12, U.N. Doc. 04/02/94 (Apr. 2, 1994) [hereinafter *Recommendation 21*]. The Recommendation notes that in some countries, *de jure* equality still does not exist, and that:

[e]ven where *de jure* equality exists, all societies assign different roles, which are

improve social structures that appear to provide equality of opportunity but create *de facto* inequality comports with a substantive model of equality.<sup>137</sup>

*iii. CEDAW's Guarantee of Substantive Equality Provides Protection to Women Migrant Workers*

Substantive equality assists migrant workers in claiming their human rights. As Satterthwaite explains, “[i]n 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,”<sup>138</sup> unless the State can identify a legally permissible justification for its law or policy.<sup>139</sup>

As an example of the benefits of substantive equality, many states have labor legislation that does not cover domestic workers.<sup>140</sup> If most domestic workers in the country are female, then such a law would have the effect of discriminating against women, even though there is no formal inequality because both male and female domestic

regarded as inferior, to women . . . . In this way, principles of justice and equality contained in particular in article 16 and also in articles 2, 5 and 24 of the Convention are being violated.

*Id.*

137. See Jason Morgan-Foster, Note, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 73, 80 (2003) (distinguishing between the goals of formal equality and substantive equality).

138. Satterthwaite, *supra* note 19, at 21.

139. Human rights law recognizes that a state may treat different persons or groups differentially in order to achieve a legitimate purpose. See, e.g., United Nations General Assembly [UNGA], Office of the High Commissioner for Human Rights, Human Rights Committee, *CCPR General Comment No. 18: Non-Discrimination*, ¶ 13, U.N. Doc. 10/11/89 (Nov. 10, 1989) [hereinafter *Comment No. 18*]; United Nations General Assembly [UNGA], Committee on the Elimination of Racial Discrimination, *Report on the Committee on the Elimination of Racial Discrimination*, at 115, U.N. Doc. 22/03/93 (Sept. 15, 1993) [hereinafter *Racial Committee Report*] (observing that “a differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the [CERD] Convention”); Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium (Merits), 6 Eur. Ct. H.R. (ser. A), ¶ 10 (1968) (holding that principle of equality in European Convention is violated only if distinction has no objective and reasonable justification).

140. See *supra* note 34 and accompanying text.

workers are excluded. Since the definition of discrimination encompassed by Article 1 includes laws that have the “effect or purpose”<sup>141</sup> of discriminating against women, the State has an obligation under CEDAW Article 2 to undertake measures to eliminate that discrimination.<sup>142</sup> A State violates its legal obligations under CEDAW by maintaining laws that exclude domestic workers from requirements covering mandatory days off, minimum wages, and other labor protections offered to workers in other fields, unless it has a legally permissible justification for doing so—that is, a legitimate justification that comports with the purpose of the Convention.<sup>143</sup> Thus, State Parties to CEDAW have a legal obligation to alter their labor laws to better protect domestic workers, including the many women migrant workers who fill domestic service jobs.

Because CEDAW is a non-discrimination treaty, the comparative group matters; however it is not clear what two groups should be compared to see if discrimination exists. One may argue that women domestic workers should be compared to male domestic workers; so long as male domestic workers are excluded from labor codes, discrimination against women does not exist if female domestic workers are similarly excluded. However, this argument fails to grasp the import of substantive equality: a problem exists in that women work more frequently in the domestic service sector than in other types of work that are protected by labor codes.<sup>144</sup> Women in the work force should be compared to men in the work force—and if women exist in the work force in far fewer numbers than men, substantive equality examines that factor as well. CEDAW thus demands that States alter their labor codes to provide domestic

---

141. See CEDAW, *supra* note 20, art. 1.

142. *Id.* art. 2 (agreeing to pursue non-discrimination by all appropriate means).

143. Cf. *Comment No. 18*, *supra* note 139, ¶ 13 (noting that human rights law recognizes that a state may treat different persons or groups differentially in order to achieve a legitimate purpose); *Racial Committee Report*, *supra* note 139, ¶ 2 (ensuring that the Committee looks to see whether the differentiation of treatment has an effect contrary to the Convention); *Case Relating*, 6 Eur. Ct. H. R. (ser. A) ¶ 10 (stating that “the existence of such a justification must be assessed in relation the aim and effects of the measure under consideration”).

144. See, e.g., BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, CURRENT POPULATION SURVEY 215 (2006), available at <http://www.bls.gov/cps/cpsa2006.pdf> (comparing the percentage of women in the domestic service industry with the percentage in other occupations).

workers with the same benefits received by workers in male-dominated jobs.

#### D. STATE OBLIGATIONS

On its own, substantive equality may not be a particularly helpful tool. Most of the abuses of migrant worker human rights take place at the hands of the employer or recruitment agency, rather than at the hands of the State.<sup>145</sup> While the labor legislation discussed above is a prime example of a law that has the effect of discriminating against women, thus triggering the State Party's obligations under CEDAW, there are few other obvious examples of State practices that directly discriminate against women migrant workers.<sup>146</sup> A far bigger problem stems from States' lack of worksite monitoring, enabling an environment where abuses such as passport confiscation, wage withholding, unfair contracts, and domestic violence take place.<sup>147</sup>

Significantly, CEDAW obligates State Parties to eliminate discrimination against women by private actors as well. As Article 2(e) sets forth, States must "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise."<sup>148</sup> Combined with CEDAW's guarantee of substantive equality, the State obligations detailed in Article 2 enable migrant workers and their advocates to claim that a State has violated its legal obligations under CEDAW by failing to monitor the recruitment agencies and employers who frequently commit abusive practices.<sup>149</sup>

---

145. See *supra* Part I (outlining the nature of the human rights violations that migrant workers suffer).

146. See *Women Migrant Workers*, *supra* note 88, at ¶¶ 17, 21 (describing several other examples, such as a lack of access to health services, a lack of access to the justice system, and ineligibility for legal aid from the government).

147. See *Migrant Workers in the Middle East*, UNION VIEW (Int'l Trade Union Confed., Brussels, Belgium), Dec. 2007, at 2, 12-13, available at [http://www.ituc-csi.org/IMG/pdf/VS\\_Jordanie\\_EN.pdf](http://www.ituc-csi.org/IMG/pdf/VS_Jordanie_EN.pdf) (providing examples of abusive and unfair work environments throughout the Middle East); Felipe Gómez Isa, *The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination Against Women: Strengthening the Protection Mechanisms of Women's Human Rights*, 20 ARIZ. J. INT'L & COMP. LAW 291, 300-01 (2003) (arguing that most serious violations of women's rights occur in the private sphere).

148. CEDAW, *supra* note 20, art. 2(e).

149. Cf., e.g., Ms. A.T. v. Hungary, Communication No 2/2003, Committee on the Elimination of Discrimination Against Women, ¶ 9.2 (Jan. 26, 2005) [hereinafter Ms. A.T.] (considering a woman's claim that the State had failed to uphold its CEDAW obligations by not protecting her from her abusive husband);

Given that so many violations of women migrant workers' rights take place at the hands of private actors, State Parties' obligations under Article 2(e) play an essential role in creating the States' legal obligations towards women migrant workers under CEDAW.

The notion that a State Party can violate CEDAW by failing to effectively monitor and regulate the conduct of private parties is neither a novel idea nor a stretch of the law. The CEDAW Committee has previously held a State Party responsible for the failure to protect a woman from abuse of her human rights by a private person.<sup>150</sup> Because the State failed to protect the woman from her former husband's battering,<sup>151</sup> it violated her rights under CEDAW.<sup>152</sup> The Committee made a number of recommendations to the State Party, including that the State act "with due diligence to prevent and respond to . . . violence against women" and to "provide victims of domestic violence with safe and prompt access to justice."<sup>153</sup> The State's failure to protect the victim from abuse by a private citizen can be analogized to the situation of women migrant workers. States frequently fail to protect migrants from abuse at the hands of private employers and recruitment agencies.<sup>154</sup> Because the Committee has already demonstrated a willingness to apply CEDAW to areas where a State failed to prevent discrimination by a private party, taking similar action in the situation of a State's failure to

---

*see also* Optional Protocol, *supra* note 23, arts. 1-7 (describing the communications and inquiry procedures of the Optional Protocol which may be used to make such claims to the CEDAW Committee). Migrant workers and their advocates may make arguments using CEDAW in domestic legal proceedings. *See id.* art. 4(1) (providing that the Committee will not entertain a communication until all domestic remedies have been exhausted or otherwise deemed ineffective).

150. *See* Ms. A.T., *supra* note 149, ¶ 9.4 (analyzing the issue pursuant to the communications procedure of the Optional Protocol); *see also* Optional Protocol, *supra* note 23, arts. 1-7.

151. *See* Ms. A.T., *supra* note 149, ¶ 9.4 (ruling complainant was unable through civil or criminal proceedings to bar her former husband from her apartment, could not get a restraining or protection order because those options did not exist in the State, and was unable to flee to a shelter because there were not any shelters equipped to accept her with her children, one of whom was disabled).

152. *Id.* ¶ 9.6.

153. *Id.* ¶ 9.6 II(b), (g); *see also infra* notes 161-72 and accompanying text (discussing the due diligence standard).

154. *See* Elaine Dewhurst, *Agencies of Slavery: the Exploitation of Migrant Workers by Recruitment Agencies*, 13 TEX. WESLEYAN L. REV. 377, 383-84 (2007) (observing that despite existing regulation of private parties, migrant workers still suffer from exploitation).

protect migrant workers does not require an expansive interpretation of the Convention. A State that not only fails to monitor private parties recruiting and employing women migrant workers, but also denies women migrant workers access to its justice system, would violate CEDAW just as Hungary did in the *Ms. A.T.* case.<sup>155</sup>

The CEDAW Committee has further recognized the obligation of State Parties to eliminate discrimination by private actors in its general recommendations and concluding comments.<sup>156</sup> In its general recommendation on violence against women, the Committee stated, “[u]nder 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.”<sup>157</sup> This comment constitutes an endorsement of the notion of due diligence as applicable under CEDAW,<sup>158</sup> a standard first articulated by the Inter-American Court of Human Rights in order to expand the concept of state responsibility to account for human rights abuses committed by private actors.<sup>159</sup>

In international law, “the doctrine of state responsibility [typically] holds a state accountable for breaches of international obligations committed by or attributable to the state.”<sup>160</sup> However, particularly with respect to human rights law, the concept of state responsibility has expanded to account for rights violations committed by private actors.<sup>161</sup> The due diligence standard first developed by the Inter-

---

155. See *supra* notes 150-54 and accompanying text (finding that Hungary violated a woman’s rights under CEDAW by failing to protect her from brutality subjected upon her by her ex-husband).

156. See *Recommendation 24, supra* note 91, ¶ 31(d) (noting that the Committee recommended that State Parties “[m]onitor the provision of health services to women by public, non-governmental and private organizations, to ensure equal access and quality of care”).

157. *Recommendation 19, supra* note 85, ¶ 9.

158. See Byrnes et al., *supra* note 93, at 52 (observing that following *Recommendation 19, supra* note 85, the CEDAW Committee has continued to use the concept of due diligence as an appropriate standard for measuring State responsibility); see also *supra* note 155 and accompanying text (discussing due diligence standard in the *A.T.* case).

159. See *infra* notes 163-66 and accompanying text (describing the due diligence standard articulated in the *Velasquez-Rodriguez* case).

160. Rebecca J. Cook, *State Responsibility for Violations of Women’s Human Rights*, 7 HARV. HUM. RTS. J. 125, 127 (1994).

161. *Id.* at 151 (explaining that while individuals are generally not subject to

American Court has played an important role in this expansion, by providing a standard by which to measure state responsibility. A state cannot be held accountable for all harms inflicted by private actors, so it is necessary to develop criteria to determine when a state is responsible.<sup>162</sup>

In *Velasquez-Rodriguez*, the Inter-American Court held that international responsibility can attach to a State for an illegal act which, although not directly imputable to the State, nevertheless renders the State responsible because of “the lack of due diligence to prevent the violation [of human rights] or to respond to it.”<sup>163</sup> The court explained that the State has an obligation to “prevent, investigate, and punish any violation of the rights recognized” in the Inter-American Convention.<sup>164</sup> Further, the court asserted that it is the State’s legal duty to implement the mechanisms necessary to prevent violations of the Convention and to engage in meaningful investigations of violations, as well as identify those responsible, impose punishment, and ensure compensation to the victim.<sup>165</sup> The duty to prevent violations of human rights requires the State to use all “means of a legal, political, administrative, and cultural nature that promote the protection of human rights and to ensure that violations are treated as illegal acts.”<sup>166</sup>

The *Velasquez-Rodriguez* concept of due diligence has been accepted by other international tribunals<sup>167</sup> and human rights

---

liability under international law, states may be liable for the results of an individual’s actions under some circumstances).

162. See INT’L COUNCIL ON HUMAN RIGHTS POLICY, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL LEGAL OBLIGATIONS OF COMPANIES 51-52 (2002) (arguing that holding states accountable for all private actions would trivialize human rights).

163. *Velásquez-Rodríguez v. Honduras (Merits)*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf).

164. See *id.* ¶ 166 (reasoning that carrying out these obligations ensures “the free and full exercise” of the rights enumerated in the Inter-American Convention).

165. *Id.* ¶ 174 (limiting a State’s legal obligation to human rights violations that occur under its jurisdiction).

166. See *id.* ¶ 175 (cautioning that the existence of a violation does not necessarily signify a failure to take preventive measures).

167. See, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J., No. 91, ¶430 (Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> (describing the notion of due diligence as critically important in determining

bodies<sup>168</sup>—including the CEDAW Committee<sup>169</sup>—and provides a useful mechanism for determining the extent of a State’s obligations under CEDAW. Where a State fails to make any attempt to monitor recruitment agencies or private employers, or take other “reasonable steps” to prevent rights violations, the State fails to act with due diligence to prevent violations of migrant workers’ rights.

With respect to specific provisions of CEDAW, for example, where it has been documented that employers frequently subject their domestic servants to forced confinement, a State may be failing to act with due diligence to protect women’s equal rights as to the movement of persons.<sup>170</sup> When recruitment agencies consistently mislead migrant workers about their placements and wages, the State’s lack of monitoring of recruitment agencies may violate the State’s obligation to respect, protect, and fulfill a woman’s “right to free choice of profession and employment.”<sup>171</sup>

---

whether state has met its obligation to prevent genocide).

168. See, e.g., United Nations General Assembly [UNGA], Office of the High Commissioner for Human Rights, Human Rights Committee, *CCPR General Comment No. 31 [80]: The Nature of the General Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) [hereinafter *Comment No. 31*] (describing the legal obligation imposed on state parties to the ICCPR).

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, investigate or redress the harm caused by such acts by private persons or entities.*

*Id.* (emphasis added); see also Smita Narula, *The Right to Food: Holding Global Actors Accountable Under International Law*, 44 COLUM. J. TRANSNAT’L L. 691, 764-66 (2006) (discussing the due diligence standard as applied by several international tribunals).

169. See *Recommendation 19*, *supra* note 85, ¶ 9 (embracing the due diligence standard based on both “general international law and specific human rights agreements”).

170. See CEDAW, *supra* note 20, art. 15 (including the freedom to choose residence and domicile); see also *Women Migrant Workers*, *supra* note 88, ¶ 26(d).

State parties should ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to women migrants. State parties should also take steps to end the forced seclusion or locking in the homes of women migrant workers, especially those working in domestic service. Police officers should be trained to protect the rights of women migrant workers from such abuses.

*Id.*

171. CEDAW, *supra* note 20, art. 11(c); see also *Women Migrant Workers*, *supra* note 88, ¶ 26(h) (imploring states to protect women migrant workers’ rights by implementing regulations, monitoring private parties, and prosecuting rights

State obligations under Article 2 interact with substantive equality in order to mandate that State Parties to CEDAW protect and provide for the rights of women migrant workers. For example, when employers withhold wages from domestic workers, fail to pay domestic workers their full wages according to contracts, or enter into contracts with migrant workers for substandard wages, Article 11(d) of the Convention has been violated.<sup>172</sup> Women migrant workers in these situations have not been guaranteed “the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value.”<sup>173</sup> These violations of the right to equal remuneration by private employers primarily occur in the domestic service sector, which employs far more women than men.<sup>174</sup> Thus, a substantive equality reading of the Convention provision, combined with the State’s obligation to act with due diligence to prevent violations of rights, leads to the argument that the State has failed to take “all appropriate measures” to eliminate discrimination against women under Article 11.<sup>175</sup>

Although the State does not have an obligation to prevent every single situation of abuse, it must put some sort of framework in place that would help detect and prevent abuses and punish violators.<sup>176</sup> For example, in 2004 New York passed a law requiring licensed employment agencies to provide applicants for domestic or household work, as well as their potential employers, a written statement detailing the rights of the worker and the obligations of the employer.<sup>177</sup> Employment agencies must keep a statement on file for

---

violations).

172. CEDAW, *supra* note 20, art. 11(d).

173. *Id.*

174. *Cf. supra* notes 138-42 and accompanying text (discussing states’ obligations when laws disproportionately affect migrant women).

175. CEDAW, *supra* note 20, art. 11(1).

176. The General Recommendation on Women Migrant Workers explains that States should have such monitoring systems, but does not flesh out the details of such systems. *See Women Migrant Workers, supra* note 88, ¶ 26(h) (“State parties should adopt regulations and design monitoring systems to ensure that recruiting agents and employers respect the rights of all women migrant workers. State parties should closely monitor recruiting agencies and prosecute them for acts of violence, coercion, deception, or exploitation.”).

177. *See* N.Y. LAB. LAW § 691(1) (Consol. 2007) (requiring employer to provide full text of statement on employer’s website, if any); *see also id.* § 721 (defining “employer” as “any person conducting a business or employing another” but not including the “government or any political or civil subdivision or other

three years signed by the employer indicating that the employer read and understands the statement.<sup>178</sup> The employment agency must also provide job applicants with a statement, approved by the labor commissioner, describing the job conditions of each potential employment situation, wages, hours of work, the kind of services to be performed, and certain other information.<sup>179</sup> The labor commission and persons aggrieved by violations of these laws may institute criminal proceedings, where violators of the act will be found guilty of a misdemeanor, and can be subject to a fine, imprisonment, or both.<sup>180</sup> Laws such as this one might satisfy a State Party's obligations to take all appropriate measures to eliminate discrimination by private actors under the due diligence standard. "Appropriate measures" and the measures each State Party must take to fulfill its obligations will likely differ for each State.

In sum, a violation of the principle of non-discrimination against women, who are guaranteed substantive equality with men under CEDAW, combined with State Parties' obligations under Article 2, reveals a legal requirement for State Parties to CEDAW to respect, protect, and fulfill the human rights of women migrant workers guaranteed by the Convention.

### III. THE CONTRIBUTION OF CEDAW TO THE RIGHTS OF UNDOCUMENTED WORKERS

Undocumented migrant workers pose a special problem for human rights advocates.<sup>181</sup> In one view, providing rights for migrant workers

---

agency thereof"). The law specifically notes that the domestic and household employment industry disproportionately impacts women migrant workers:

The placement of domestic or household employees into the homes of employers creates special problems, including the risk of abuse and exploitation. The majority of domestic or household employees in the State of New York are immigrant women of color who, because of race and sex discrimination, language barriers and immigration status, are particularly vulnerable to unfair labor practices.

*Id.* § 691 (1) (discussing legislative intent in historical and statutory notes of § 691 (1)).

178. *Id.* § 691(2) (Consol. 2007).

179. *See id.* § 691(1) (clarifying that such statements must embody provisions of both state and federal law).

180. *See id.* § 694 (stipulating that the fine shall not exceed one thousand dollars and imprisonment shall be for no more than one year).

181. *See Bosniak, supra* note 26, at 746-51 (providing a thorough summary of competing perspectives on the extension of human rights protections to undocumented migrant workers).

in an undocumented situation both encourages and rewards violations of a state's borders and its immigration laws.<sup>182</sup> Although principles of state sovereignty grant each state the right to determine its own criteria governing admission to the state,<sup>183</sup> the state must comply with its treaty obligations in doing so.<sup>184</sup> In addition to a

---

182. See RYSZARD CHOLEWINSKI, *MIGRANT WORKERS IN INTERNATIONAL HUMAN RIGHTS LAW: THEIR PROTECTION IN COUNTRIES OF EMPLOYMENT* 187 & n.216 (1997) (describing the position of Germany and the United States during the drafting of the MWC); Bosniak, *supra* note 26, at 749 (discussing the view of many governments that extending more rights to irregular migrant workers would encourage and reward further violations of state territorial borders); *see also id.* at 742 (describing the designation of "irregular" migrants as presupposing either the breach or failure of national territorial borders, and noting that rule of territorial sovereignty is a fundamental governing principle of international legal system).

183. See Migrant Workers Convention, *supra* note 7, art. 79 ("Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families."); United Nations General Assembly [UNGA], Office of the High Commissioner for Human Rights, Human Rights Committee, *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 5, U.N. Doc. 11/04/86 (Apr. 11, 1986) [hereinafter *Comment No. 15*] ("It is in principle a matter for the State to decide who it will admit to its territory."); Linda S. Bosniak, *Opposing Prop. 187: Undocumented Immigrants and the National Imagination*, 28 CONN. L. REV. 555, 571 (1996) (describing this principle as a "cardinal norm" of state sovereignty); CHOLEWINSKI, *supra* note 182, at 192-93 (discussing the origins of Article 79 of the Migrant Workers Convention); Hiroshi Motomura, *Federalism, International Human Rights, and Immigration Exceptionalism*, 70 U. COLO. L. REV. 1361, 1371-72 (1999) ("It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892))).

184. See, e.g., *Liu v. Russia*, App. No. 42086/05, Eur. Ct. H.R., ¶ 49 (2007); *Gül v. Switzerland*, App. No. 23218/94, Eur. Ct. H.R., ¶ 38 (1996) (reaffirming the principle that "[as] a matter of well-established international law and *subject to its treaty obligations*, a State has the right to control the entry of non-nationals into its territory.") (emphasis added). In cases before it, the European Court of Human Rights commonly considers a state's obligations under Articles 3 and 8 of the European Convention on Human Rights, prohibiting torture, inhuman or degrading treatment or punishment and securing the right to respect for family and private life, respectively. See Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3, 8, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention on Human Rights*]. Therefore, despite the state's right to control entry into its territory, it cannot expel an individual to a country where that individual would face a real risk of torture, inhuman, or degrading punishment. See *Sheekh v. Netherlands*, App. No. 1948/04, Eur. Ct. H.R., ¶ 135 (2007). Similarly, in cases where the expulsion or denial of entry to a non-national would disrupt family life, the court determines whether the government has struck a fair balance

state's sovereign right to control its borders through its migration policy, a state also has the right to regulate its domestic employment policy.<sup>185</sup> International law does not regard documentation status as a prohibited basis of discrimination.<sup>186</sup> Furthermore, human rights law has developed through state consent,<sup>187</sup> and states have not consented to granting rights to those not lawfully within their borders.<sup>188</sup>

---

between its own interests in controlling immigration and the non-national's interests. *Tuquabo-Tekle v. Netherlands*, App. No. 60665/00, Eur. Ct. H.R., ¶ 44 (2005). The United Nations General Assembly has also urged states to review and revise their "immigration laws, policies, and practices so that they are free of racial discrimination and compatible with their obligations under international human rights instruments." G.A. Res. 57/195, ¶ 6, U.N. Doc. A/RES/57/195 (Feb. 27, 2003).

185. See Doug Cassel, *Equal Labor Rights for Undocumented Migrant Workers*, in HUMAN RIGHTS AND REFUGEES, INTERNALLY DISPLACED PERSONS AND MIGRANT WORKERS 477, 487, 501-02 (Anne F. Bayefsky ed., 2006) (observing that States may prosecute and imprison migrants who obtain employment in their countries without permission); see also William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 28 (1995) (discussing how MWC recognizes state power to bar employment of undocumented workers).

186. Cassel, *supra* note 185, at 502. See, e.g., Civil Rights Convention, *supra* note 83, art. 2(1) ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); American Convention on Human Rights, art. 1, Nov. 22 1969, 1144 U.N.T.S. 123 [hereinafter American Convention]

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

*Id.*

187. Cf. Jianming Shen, *National Sovereignty and Human Rights in a Positive Law Context*, 26 BROOK. J. INT'L L. 417, 438 (2000) (noting that States must consent to international human rights law arrangements in order for human rights protections to become more than a matter of domestic law).

188. See Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 101 (1998) (describing international law as having a general tendency "to exclude undocumented aliens from fundamental rights and freedoms"); cf. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 174 (1995) (noting that the United Nations Charter did not erode the requirement of state consent to new human rights law).

In another view, human rights are universal, and all humans can claim them. “Most fundamental rights are guaranteed to ‘all persons [ . . . ] subject to [a State’s] jurisdiction,’” including undocumented migrant workers.<sup>189</sup> Although an undocumented migrant worker may have violated a state’s immigration laws, this act does not give the state the right to ignore the fundamental human rights guaranteed to all people.<sup>190</sup> In fact, “the legal and social status of irregular migrant workers” in receiving states makes it all the more urgent that human rights protections are extended to them.<sup>191</sup> Furthermore, in response to the argument that providing rights for undocumented migrant workers encourages and rewards violations of a state’s borders and immigration laws, a counter-argument states that according more rights to undocumented migrants will discourage employers from hiring them, thereby improving conditions for national workers and documented migrants.<sup>192</sup>

The challenge, then, is to find a legal basis for upholding a state obligation to respect, protect, and fulfill the human rights of undocumented migrant workers within its territory while still taking into account core principles of state sovereignty. Most of the human rights treaty bodies have not addressed this dilemma in a satisfactory manner, instead focusing on distinctions between citizenship and non-citizenship, rather than distinctions between documented and undocumented non-citizens.<sup>193</sup> Occasionally, a treaty body has

---

189. Cassel, *supra* note 185, at 488; *see also* Chuang, *supra* note 188, at 101 (noting that in theory states must treat non-citizens in a way that does not violate internationally recognized human rights).

190. *See* The People’s Movement for Human Rights Education, Human Rights and Migrant Workers, <http://www.pdhre.org/rights/migrants.html> (last visited Jan. 24, 2009) (“All persons, regardless of their nationality, race, legal or other status, are entitled to fundamental human rights and basic labor protections, including migrant workers and their families.”); *see also* Bosniak, *supra* note 26, at 748 (stating that advocates for protecting the human rights of irregular migrant workers invoke the universality of human rights).

191. *See* Bosniak, *supra* note 26, at 747 (contending that undocumented migrant workers are under constant threat of removal or prosecution).

192. *See id.* at 749 (noting that this will also serve the interests of border control); CHOLEWINSKI, *supra* note 182, at 187 & n.216 (mentioning that the United States and Germany want to restrict the definition of ‘migrant worker’ to ‘regular’ migrants).

193. *See Comment No. 15, supra* note 183, at ¶ 9 (discussing the rights of “aliens,” without clearly stating whether this meant all non-citizens within a State, or only those lawfully present). The Human Rights Committee does state that,

indicated in concluding comments to State Parties that undocumented persons can claim rights under the various treaty bodies.<sup>194</sup> However, in general, the treaty bodies have not directly addressed the applicability of the core human rights treaties to undocumented persons.<sup>195</sup> I turn next to the ways in which CEDAW can contribute to providing a legal basis for protecting and fulfilling the rights of undocumented migrant workers.

#### A. UNDOCUMENTED MIGRANT WOMEN IN A CEDAW STATE CAN CLAIM THE RIGHTS CONTAINED IN THE CONVENTION

One can make a plausible argument that CEDAW applies in its entirety to undocumented migrant women in a receiving state that is a party to CEDAW. CEDAW guarantees rights to “women” and does not distinguish between citizens and non-citizens.<sup>196</sup> Furthermore,

---

“[t]he particular rights of article 13 only protect those aliens who are lawfully in the territory of a State party,” perhaps indicating that all other articles in the Convention apply to all aliens. *Id.* This interpretation has limited support in the case law, however, as seen in *A v. Australia* where the Committee found that the decision to keep a person in detention—even a person who entered the country unlawfully—must be reviewed periodically to comply with Article 9. United Nations General Assembly [UNGA], Office of the High Commissioner for Human Rights, Human Rights Committee, *Views of the Human Rights Committee Under Article 5, Paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights*, ¶ 9.4, U.N. Doc. CCPR/C/59/D/560/1993 (Apr. 30, 1997).

194. *See, e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Spain*, ¶ 12, U.N. Doc. CERD/C/64/CO/6 (Apr. 28, 2004) [hereinafter *CERD Spain*] (“The Committee . . . recommends that the State party ensure the enjoyment of human rights for all foreigners in the country, whether documented or undocumented, regular or irregular.”); Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Spain*, ¶ 7, U.N. Doc. E/C.12/1/Add.99 (June 7, 2004) [hereinafter *ESC Spain*] (expressing concern for the well-being of undocumented workers and their inability to demand that States uphold their fundamental rights and freedoms).

195. *See supra* note 55-58 and accompanying text (declaring that the Migrant Workers’ Convention is, of course, an exception, as its text explicitly contemplates applying certain of its provisions to undocumented workers).

196. *See supra* note 83 and accompanying text. This is presumably the approach of the CEDAW Committee, which included undocumented migrant women within the scope of its newest General Recommendation. *See Women Migrant Workers, supra* note 88, at ¶ 4 (“The scope of this general recommendation is limited to addressing the situations of the following categories of migrant women . . . (a) Women migrant workers who migrate independently; Women migrant workers

because CEDAW does not have a jurisdictional provision, by default it applies to each party with respect to its entire territory.<sup>197</sup> From a textual perspective, then, CEDAW applies to “women” in the territory of a State Party, including undocumented migrant women.<sup>198</sup>

However, flatly proclaiming that a State has obligations to all women within its territory may fail to fully account for core principles of state sovereignty.<sup>199</sup> Human rights bodies have consistently acknowledged differentiation based on citizenship and immigration status is permissible, as long as it is proportional and for the purposes of a legitimate aim. For example, in its general recommendation on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination explained, “[u]nder the Convention, differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”<sup>200</sup>

---

who join their spouses or other members of their families who are also workers; (c) Undocumented women migrant workers who fall into any of the above categories.”).

197. See Vienna Convention, *supra* note 94, art. 29 (“Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”); see also Byrnes et al., *supra* note 93, at 15.

198. Cf. Sandesh Sivakumaran, *The Rights of Migrant Workers One Year On: Transformation or Consolidation?*, 36 GEO. J. INT'L L. 113, 144-45 (2004) (noting that the Human Rights Committee, in its General Comment 15 on the position of aliens, “emphasized that the rights in the Covenant apply to all individuals within the territory of a state and subject to its jurisdiction, making no distinction between regular and irregular aliens”). While Sivakumaran’s interpretation of General Comment 15 is plausible, it is equally plausible to read the General Comment as setting out rights for aliens *lawfully* in the territory, as the Committee did not specifically discuss undocumented aliens. However, Sivakumaran’s interpretation of General Comment 15 is bolstered by the fact that the ICCPR itself specifically refers in certain articles to persons or aliens “lawfully in the territory of a state,” while conferring rights on “everyone” and “anyone” in other articles. Compare Civil Rights Convention, *supra* note 83, arts. 12-13, with *id.* arts. 6-11.

199. See *supra* notes 183-85 and accompanying text (discussing state’s sovereign right to regulate its immigration and employment policies).

200. CERD General Recommendation 30 ¶ 4 CERD/C/64/Misc.11/rev.3 (2004). Similarly, in Advisory Opinion 18, the Inter-American Court acknowledged that states may treat differentially documented and undocumented migrants, or migrants and nationals, if the “differential treatment is reasonable, objective,

Presumably, a State's sovereign interest in regulating its borders qualifies as a legitimate aim, although a State must still ensure that its measures to regulate immigration and employment respect human rights.<sup>201</sup>

Furthermore, States may hesitate to incur further international legal obligations if those obligations must be extended even to those who have broken a State's laws.<sup>202</sup> David Martin has argued that extending legal protections to undocumented peoples, who have violated a state's territorial sovereignty, may create a backlash that will ultimately harm the migrant workers.<sup>203</sup> Thus, expanding human rights standards too greatly may lead states to respond by defensively asserting their sovereignty.<sup>204</sup>

Even assuming undocumented women migrant workers cannot claim all of the rights guaranteed by CEDAW simply by virtue of moving into the territory of a CEDAW State Party, the Convention still plays a useful role by helping to expand the scope of labor rights guaranteed to migrant women because of their employment relationship.

## B. CEDAW ADDS TO THE RIGHTS OF UNDOCUMENTED MIGRANT WORKERS BY EXPANDING THE SCOPE OF LABOR RIGHTS

### *i. The OP-18 Analysis*

In September 2003, the Inter-American Court of Human Rights handed down a landmark advisory opinion in which the court held

---

proportionate, and does not harm human rights." Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 119 (Sept. 17, 2003).

201. See *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 119 (reporting that the Inter-American court, in discussing differential treatment, specifically explained that States may establish mechanisms to control the flow of undocumented migrants into and out of its territory, although the State must guarantee due process and respect for human dignity).

202. See Joan Fitzpatrick, *The Human Rights of Migrants*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 173, 177 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (arguing that state "[r]esistance to legal obligations that might impede enforcement measures to combat illegal migration" plays a role in deterring ratification of the MWC).

203. See David A. Martin, *The Authority and Responsibility of States*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS*, *supra* note 202, at 31, 32 (remarking that migrant workers would be harmed only after entering a state).

204. *Id.* at 44.

that “[a] migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment.”<sup>205</sup> The court relied primarily on the principle of non-discrimination and the employment relationship as the source of rights for migrant workers.

First, the court held that the prohibition on discrimination has attained *jus cogens* status, giving rise to obligations *erga omnes*.<sup>206</sup> Because the principle of equality and non-discrimination was found to be a *jus cogens* norm, the court reasoned that every migrant worker, whether documented or undocumented, was entitled to non-discrimination and equality before the law.<sup>207</sup> While a State may treat undocumented migrants differently from documented migrants or nationals, the differential treatment must be reasonable, objective, and proportionate, and may not harm human rights.<sup>208</sup>

Secondly, the court pointed to the employment relationship as a source of rights for undocumented migrant workers: once a person enters a State and enters into an employment relationship, that person acquires labor rights in the State of employment, regardless of his undocumented status.<sup>209</sup> States and individuals within the State are not required to offer employment to undocumented migrants, but once the employment relationship is begun, it confers labor rights on

---

205. *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 134, available at <http://www.unhcr.org/refworld/docid/425cd8eb4.html>; see also Beth Lyon, *The Inter-American Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18*, 28 N.Y.U. L. REV. & SOC. CHANGE 547, 548 (2004).

206. See *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 110; see also Lyon, *supra* note 205, at 587 (noting that the opinion marked the first time a human rights tribunal had found non-discrimination to be a *jus cogens* obligation); Sarah H. Cleveland, *Legal Status and Rights of Undocumented Workers*, 99 AM. J. INT'L L. 460, 462 (2005) (adding that the decision was also “the most extensive articulation to date of the workplace rights of undocumented workers”).

207. *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 118.

208. *Id.* ¶ 119. Thus, for example, a state is permitted to establish mechanisms to control the entry into and departure from its territory with respect to undocumented migrants, but these mechanisms must comport with guarantees of due process and respect for human dignity. See *id.*

209. *Id.* ¶¶ 133-134.

the worker.<sup>210</sup> These labor rights include all “rights recognized to workers by national and international legislation.”<sup>211</sup>

By examining the differential treatment of undocumented workers through the framework of non-discrimination, the court failed to set a minimum of rights guaranteed to undocumented migrant workers.<sup>212</sup> Instead, states may not withhold from migrant workers the protections available to other, legally authorized workers.<sup>213</sup> As a result, migrant workers in states with more robust worker protections will be entitled to greater protection of rights.<sup>214</sup> If documented workers do not have labor rights, then there is no basis for using a non-discrimination treaty such as CEDAW to argue for undocumented worker rights.

However, the court did identify certain “inalienable rights,” including the prohibitions on forced labor and child labor, “rights corresponding to freedom of association and to organize and join a trade union, [ . . . ] fair wages for work performed, social security, judicial and administrative guarantees, and a working day of reasonable length with adequate working conditions, [ . . . ] rest and compensation.”<sup>215</sup> The court also stated that even undocumented migrant workers should have access to courts, and although a migrant worker may face deportation, she should still have the right to be represented in court, to ensure full recognition of the labor rights she acquired as a worker.<sup>216</sup>

---

210. *Id.* ¶¶ 135-136.

211. *Id.* ¶ 155. This conception of rights includes “rights embodied in the Constitution, labor legislation, collective agreements, agreements established by law, decrees,” specific and local practices, and “in any international treaty to which the state is a party.” *Id.* Domestic and international norms should be interpreted in a manner that best protects the individual worker, so that the domestic norm should be applied where it is more favorable than the international norm, and the international norm applied when it is more favorable than the domestic norm. *Id.* ¶ 156.

212. *See* Lyon, *supra* note 205, at 584 (discussing the difference between analyzing distinct treatment of unauthorized workers as an economic, social, and cultural rights violation versus a violation of non-discrimination and equality).

213. Cleveland, *supra* note 206, at 464.

214. *See id.* (giving the example of rights for undocumented workers in the U.S. agriculture industry).

215. *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 157.

216. *Id.* ¶ 159.

Although its advisory jurisdiction merely interprets the Inter-American Convention on Human Rights,<sup>217</sup> the Inter-American Court's human rights jurisprudence has often been influential and adopted by other human rights bodies.<sup>218</sup> For example, the Inter-American Court developed the due diligence standard to hold states accountable for human rights violations not directly committed by state actors; although this development was based on an interpretation of the Inter-American Convention, numerous other human rights bodies have adopted it.<sup>219</sup> In considering the rights of undocumented migrant workers, other human rights bodies, including the CEDAW Committee, should similarly adopt the OP-18 analysis—particularly recognizing the employment relationship as a source of rights. Looking at the employment relationship in this way strikes a proper balance between state sovereignty on the one hand, and human rights on the other. States may regulate and keep undocumented persons out of their borders, but once an employment relationship is formed, certain fundamental human rights cannot be denied. An employee does not forfeit all human rights protection by entering a state with an undocumented status.<sup>220</sup> However, the State may take measures to prevent the employment relationship in the first place.<sup>221</sup>

Other international tribunals should adopt the OP-18 analysis because it provides the optimal framework for dealing with questions concerning the applicability of human rights law to undocumented workers. Furthermore, the OP-18 analysis is particularly ripe for adoption by other tribunals, as the Inter-American Court interpreted not only the Inter-American Convention, but also the Universal

---

217. See JO M. PASQUALUCCI, *THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 29 (2003) (noting that, as an advisory opinion, the decision does not create legal obligations, even for parties to the Convention). However, advisory opinions do “strengthen the protections provided by the Inter-American human rights system.” *Id.* at 33.

218. *Cf. id.* (explaining that the Inter-American Court contributes to the evolving law of international human rights through its advisory opinions).

219. See *Velásquez-Rodríguez*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 174-175.

220. *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 122 (stating that migrants should have certain minimum guarantees of due process regardless of their legal status).

221. *Id.* ¶ 135 (declaring that states and employers do not have to hire migrants that are in the country illegally).

Declaration of Human Rights and ICCPR in reaching its conclusions.<sup>222</sup>

*ii. The CEDAW Contribution*

According to the OP-18 framework, when a migrant worker enters into an employment relationship, she gains recognition of her labor rights, including all rights recognized to workers by domestic and international law.<sup>223</sup> CEDAW can thus increase the scope of human rights recognized to undocumented migrant women by providing a foundation for expanding the labor rights granted to workers.

For women migrants working in a State Party to CEDAW, Article 11 of the Convention provides a direct source of labor rights for workers: Women are guaranteed, on an equal basis with men, the right to free choice of profession and employment, the right to equal remuneration, the right to equal treatment in respect of work of equal value, the right to social security, the right to paid leave, the right to the protection of health and safety in working conditions, and various other labor rights.<sup>224</sup> CEDAW provides a direct source of labor rights because State Parties have agreed to this international legal obligation. So long as a State grants labor rights to documented, male workers, it must grant those same rights to documented, female workers, per CEDAW.<sup>225</sup> The OP-18 framework then transfers these rights, provided by international law, to undocumented workers, male and female, because the employment relationship guarantees these workers all labor rights recognized by international law, including CEDAW.<sup>226</sup>

It is equally important, however, to recognize that CEDAW can be used as a mechanism to expand the *domestic* labor rights granted to workers. I have previously discussed how the substantive equality and non-discrimination provisions contained within CEDAW require State Parties to amend labor legislation that excludes domestic workers from labor protections involving overtime pay, a day of rest,

---

222. *Id.* ¶ 55.

223. *See supra* notes 207–08 and accompanying text.

224. CEDAW, *supra* note 20, art. 11(1).

225. *Id.* art. 11 (listing the rights of equality for women in the field of employment).

226. *See Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 148 (declaring that States must ensure the human rights of workers whether they are citizens or foreigners).

regulation of hours, and minimum wage.<sup>227</sup> Though a domestic law requires amendment because of the rights CEDAW affords to women *lawfully* within the territory of the State Party, the new law's protections are then extended to undocumented migrant women through their employment relationship per the OP-18 framework. The employment relationship provides the source through which undocumented migrant women can claim their labor rights under the new law.

Combining CEDAW with the OP-18 analysis to provide rights for undocumented workers is a two-step process. First, women migrant workers make use of CEDAW domestically to change the law for documented women domestic workers. To use our familiar example, a State that provides overtime pay to workers but excludes domestic workers from this benefit violates CEDAW.<sup>228</sup> Because domestic worker jobs are primarily held by women, substantive equality requires that this predominantly female-filled type of work contain the same benefits as male-dominated work—such as overtime pay and days off—in order to achieve equality in the workforce. Comparing women to men to look at discrimination in the workforce in a State, CEDAW demands a change in the law. Thus, by using CEDAW to change domestic law, documented women domestic workers gain new rights.

Second, undocumented workers are then compared to documented workers under the OP-18 analysis. Documented domestic workers have gained labor rights due to CEDAW—for example, labor legislation containing overtime pay, a minimum wage, and other benefits now includes these workers. The OP-18 framework provides that undocumented domestic workers can claim labor rights due to their employment status.<sup>229</sup> Under the OP-18 non-discrimination framework, undocumented workers can claim all labor rights recognized to workers in national legislation.<sup>230</sup> These rights now include overtime pay and other benefits for domestic workers. Undocumented workers can thus now claim these rights too, once an

---

227. See *supra* notes 141-43 and accompanying text.

228. See CEDAW, *supra* note 20, art. 11(d) (stating that women should get equal treatment for performing work of equal value to men).

229. See *generally* Lyon, *supra* note 205 (discussing the impact of the OP-18 framework on the status of undocumented domestic workers).

230. See *supra* note 207 and accompanying text.

employment relationship has begun. Using CEDAW to expand the nexus of labor rights that all workers can claim thus expands the rights owed to undocumented workers.

This analysis also takes care of the comparative group problem that arises with non-discrimination treaties: here, the argument that undocumented women migrant workers should be compared to undocumented male migrant workers to determine what rights must be provided under the OP-18 framework. Under my analysis, the female workforce is first compared to the male workforce to gain more rights for women working lawfully within a State (comparator group one).<sup>231</sup> In the second step, it does not matter if a narrow comparative group is used—comparing undocumented women domestic workers to documented women domestic workers (comparator group two)—because rights for documented domestic workers have already been expanded. Undocumented women migrant workers are not compared to undocumented male migrant workers, because the OP-18 framework compares the labor rights offered to documented workers as opposed to other undocumented workers.<sup>232</sup> In this second step, it is not CEDAW's provision of non-discrimination that is used to advance rights, but rather, the *jus cogens* norm of non-discrimination recognized in OP-18.

To look at another example, under CEDAW's substantive equality model a State may have an obligation to provide a tribunal or other forum for women to bring complaints of private abuse.<sup>233</sup> In step one, CEDAW's requirement of non-discrimination demands a comparison between women and men, and may require an expansion of rights for women. Turning to step two, the provision of a forum for documented women workers to bring complaints against their employers would then require undocumented women workers to be given access to it as well, as a part of their labor rights (using the

---

231. See *supra* Part II.C.iii.

232. See *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 111 (declaring that the Court will apply the principles of equality and non-discrimination to undocumented workers).

233. Cf. *supra* note 150 and accompanying text (discussing holding a CEDAW State Party responsible for failure to protect women from battering, in part due to lack of effective judicial mechanisms). Provisions that require migrant workers to pay large sums to remain in a State in order to bring a complaint might similarly be held to violate CEDAW, if these provisions disproportionately impact women. See *supra* notes 141-42 and accompanying text.

second comparator group: documented and undocumented women workers). As the Inter-American Court expressly recognized, “even though an undocumented migrant worker could face deportation, [she] should always have the right to be represented before a competent body so that [she] is recognized all the labor rights [she] has acquired as a worker.”<sup>234</sup>

Furthermore, a migrant worker acquires rights from the employment relationship, regardless of whether the employer is the State or a private party.<sup>235</sup> Thus, if CEDAW requires a State to adopt measures to monitor recruitment agencies and private employers,<sup>236</sup> these labor protections regulating private relationships apply equally to undocumented workers. So long as documented women migrant workers have gained labor rights due to CEDAW, undocumented women migrant workers would gain the labor rights as well.

In sum, whenever advocates use the provisions of CEDAW to effectively argue for a change in domestic law affecting *labor* rights, the expansion in labor rights will then apply to undocumented migrant women by virtue of their employment relationship. The primary flaw of my argument is its dependence on States providing at least some labor rights for lawful male workers. As previously discussed, because CEDAW is a non-discrimination treaty, women are guaranteed rights on an equal basis with men. Thus, for example, if male workers lawfully within a country lack the right to overtime pay, it would be difficult for women to claim this right under CEDAW, as they are only guaranteed rights on an equal basis with men. Under my analysis, male worker rights lead to increased rights for women workers under CEDAW. This expansion of labor rights to female workers then leads to rights for undocumented women workers under the OP-18 framework.

There are two responses to this potential flaw. First, most states with large populations of migrant workers do have labor codes providing rights to workers.<sup>237</sup> These codes provide the basis that

---

234. *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 159.

235. *See id.* ¶ 140 (describing the State’s obligation to ensure that private employers comply with human rights decisions).

236. *See supra* Part II.D (discussing State obligations to regulate private actors, and to prevent them from discriminating against women migrant workers).

237. *See supra* note 34 and accompanying text.

leads to increased rights for women workers under CEDAW, because the exclusion of domestic workers from these codes violates the Convention. Second, even where male workers are not granted certain labor rights, CEDAW's guarantee of substantive equality may allow women to claim these rights in order to achieve substantive equality in the workplace.<sup>238</sup> Because of biological differences between men and women, along with different levels of discrimination that women have faced, women might need more labor rights than men in order to be able to participate equally in the workforce. Therefore women might be able to claim that a state must grant them pregnancy leave, although male workers do not have this right.<sup>239</sup> Even where a state provided absolutely no labor rights for workers, men might still be more protected in the workplace because of existing societal attitudes and historical discrimination towards women.<sup>240</sup> Under a substantive equality approach, a State might need to provide women with certain labor rights, merely to afford them a substantively equal opportunity to participate in the workforce with men, regardless of whether male workers are guaranteed any rights.

## CONCLUSION

Although the Migrant Workers' Convention lacks teeth because of the small number of states that have ratified it,<sup>241</sup> advocates for women migrant workers in the 185 State Parties to CEDAW need look no further than that Convention to hold States accountable for protecting and fulfilling the human rights of women migrant workers within their territories. Because the Convention provides for a guarantee of substantive equality between women and men, and because States have an obligation to take "all appropriate measures" to eliminate discrimination by private persons,<sup>242</sup> CEDAW obliges States to take appropriate measures where discrimination disproportionately impacts women. For example, many migrant worker abuses—such as labor codes that exclude domestic workers from labor protections, or employers who lock women migrant

---

238. CEDAW, *supra* note 20, art. 3.

239. *See supra* notes 97-100 and accompanying text (discussing Family and Medical Leave Act and substantive equality).

240. *See supra* notes 135-37 and accompanying text (observing that *de jure* equality does not immediately cure the effects of long term discrimination).

241. *See* Status of the Migrant Workers Convention, *supra* note 60.

242. CEDAW, *supra* note 20, art. 2.

workers in the house, steal their passports, and refuse to allow a day off—occur in the domestic service sector, and disproportionately impact women workers. A State incurs obligations under CEDAW that may require a change in domestic law, the development of a regulatory framework to monitor private employers and migrant recruitment agencies, and access to the judiciary or another competent tribunal in order to bring abuses to light. A state may have a duty to investigate such complaints, and provide redress.

CEDAW's protections extend beyond obligations towards documented migrant workers. CEDAW's protections may on their face extend to all women within the State Party's territory; this argument and its counterarguments, although addressed briefly in this paper,<sup>243</sup> should be developed further in a future piece of scholarship. At a minimum, however, the use of CEDAW to expand domestic labor protections for documented women workers will improve protections for undocumented workers as well, based on the Advisory Opinion 18 analysis that the employment relationship obligates a State to guarantee labor rights to undocumented migrant workers.<sup>244</sup> A State has every right not to grant employment to an undocumented migrant, but once the employment relationship has begun, the State incurs an obligation towards the worker. Setting up a framework to monitor recruitment agencies and private employers may help a State both fulfill its obligations towards women under CEDAW, as well as reduce the number of undocumented migrant workers within its borders. Although the Advisory Opinion 18 analysis at present applies only to State Parties to the Inter-American Convention, it is the most thorough, well-reasoned analysis of migrant worker human rights that presently exists, and other human rights tribunals considering undocumented migrant workers should move to adopt it.

This Article set out to build on the work of previous scholars who have encouraged migrant worker advocates to look beyond the Migrant Workers' Convention. As I have demonstrated, CEDAW provides a particularly compelling source of rights for women migrant workers. Migrant workers and their advocates should use the

---

243. See *supra* notes 196–98 and accompanying text.

244. See *Undocumented Migrants*, Advisory Opinion OC-18/03, 2003 Inter-Am. Ct. H.R. (ser. A), ¶ 136 (explaining that illegal immigrants cannot be discriminated against because of their undocumented status once they have been employed).

Convention to argue for changes in domestic law, and should bring complaints through the Optional Protocol system,<sup>245</sup> so that the Ewis, Melda, Ariantis, and Anis of the world no longer face the kind of abuse that is all too common for migrant women.<sup>246</sup>

---

245. See Optional Protocol, *supra* note 23 and accompanying text.

246. *Supra* notes 1-4 and accompanying text.