

FARMWORKERS WORLDWIDE: THE INVISIBLE CITIZENS

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ABSTRACT

This article examines the peculiar failure of international human rights law to adequately support rights protections for migrant farmworkers, one of the most exploited groups of persons worldwide. Unlike other human rights instruments such as the United Nations Convention on the Rights of the Child and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, which received enthusiastic support and high ratification rates upon their publication, the few instruments detailing protections for farmworkers were uniformly ignored by both migrant-sending and migrant-receiving states. Devoid of recognition and protection at the international level, migrant farmworkers, especially irregular migrant workers, experience systematic trafficking; sexual abuse; physical abuse; forced labor; and child labor, among other horrors. Through evaluating the pertinent international human rights instruments that have been published and dissecting the available jurisprudence, this essay, as the first of its kind, endeavors to illuminate the status of farmworkers in international law and serve as a resource for advocates and academics alike.

BIOGRAPHY

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À ma mère, mon inspiration.

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I. INTRODUCTION

A. *The Problem*

“My contractual work hours were from 7am to 4pm with an hour break [226 work hours per month], but instead I worked 13 hours per day with only half a day off on Sundays.” – H.H., a 24 year old woman from Cambodia working on a farm in South Jeolla Province, South Korea.¹

“I’ve been working since 11. My parents said we needed to earn as much as possible because we had a lot of debt. Everything [I earn] goes to my parents because they know what to do with it.” – Jose M., 17, in Saline, Michigan, U.S.²

“I’ve asked my employer so many times to give me a pay slip but he keeps delaying it, he says next month you’ll get it... but when it arrived there was a 1,000 baht difference...[W]e don’t see the transaction.” – W.U., a farmworker in Afula, Israel.³

“Better that I not call the police, better that I not say anything.” – Marisol Z., a New York farmworker that experienced systematic sexual violence by her employer.⁴

Among the most influential participants in the modern global economy, perhaps no commodity is more highly valued than that of labor. This is exceptionally true for the industry of agriculture, the world’s largest employer. At its current estimate, agriculture now employs over one-third of the international working population.⁵ However, in tandem with economic growth and the rising expansion of higher-income countries is the chronic shortage of farmworkers; as

¹ Amnesty International, *Bitter Harvest: Exploitation and Forced Labour of Migrant Agricultural Workers in South Korea* 20 (2014), <https://www.amnesty.org/en/documents/ASA25/004/2014/en/>.

² Human Rights Watch, *Fields of Peril: Child Labor in U.S. Agriculture* (2010), <https://www.hrw.org/report/2010/05/05/fields-peril/child-labor-us-agriculture#page>. [hereinafter *Fields of Peril*].

³ Human Rights Watch, *A Raw Deal: Abuse of Thai Workers in Israel’s Agricultural Sector* (2015), <https://www.hrw.org/report/2015/01/21/raw-deal/abuse-thai-workers-israels-agricultural-sector>.

⁴ Human Rights Watch, *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment* (2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and-sexual> [hereinafter *Cultivating Fear*].

⁵ Philip L. Martin, *Migrant Workers in Commercial Agriculture* INTERNATIONAL LABOUR ORGANIZATION IX (2016), http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---

countries grow, domestic interest in the agricultural sector lapses into a steady decline.⁶ To solve this crisis of need, nation states have increasingly sought the engagement of migrant workers, who are hopeful for the opportunity to enter a more economically sound state to support their families abroad.⁷ However, this alternative has not elicited the desired effects; instead, it has facilitated the creation of a system crafted for the regulated exploitation of vulnerable groups.

Of the estimated 16.7 million migrant workers in the global agricultural sector, nearly 2 million are in situations of forced labor.⁸ For others, sexual violence, withholding wages, child labor, physical abuse, and dangerously unsafe environments are all well-documented daily occurrences.⁹ Rather than invest in much needed regulatory programs safeguarding migrant workers from abuse, governments tend to ignore these particular offenses.¹⁰ Few farmworkers receive the protection of trade unions, and an even smaller number complain of violations of labor laws.¹¹ The small number of complaints can be attributed to two primary responses; fear of workplace retribution, or, in the case of irregular migrants, fear of detainment or deportation.¹²

The law's disregard for farmworkers—and, more broadly, migrant workers— extends from the domestic into the international sphere. Although there have been recent initiatives to

⁶ *Id.* See also *Employment by sector -- ILO modelled estimates, November 2017* INTERNATIONAL LABOUR ORGANIZATION (Nov. 2017), http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page3.jspx?MBI_ID=33&_afLoop=590870417410785&_afWindowMode=0&_afWindowId=164eyz4ee4_63#!%40%40%3F_afWindowId%3D164eyz4ee4_63%26_afLoop%3D590870417410785%26MBI_ID%3D33%26_afWindowMode%3D0%26_adf.ctrl-state%3D164eyz4ee4_128.

⁷ Martin, *Migrant Workers in Commercial Agriculture supra* n. 5 at IX.

⁸ International Labour Organization, *ILO Global Estimates on Modern Slavery: Forced Labour and Forced Marriage* 32 (2017), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf. See also International Labour Organization, *ILO Global Estimates on Migrant Workers: Results and Methodology* xiii (2015), http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_436343.pdf. Regarding migrant farmworkers, researchers face “systematic data gaps” as a result of the transitional nature of the occupation. Martin, *Migrant Workers in Commercial Agriculture supra* n. **Error! Bookmark not defined.** at x.

⁹ *Id.* at 35. See generally Human Rights Watch, *Fields of Peril supra* n. 2; Human Rights Watch, *Cultivating Fear supra* n. 4.

¹⁰ Martin, *Migrant Workers in Commercial Agriculture supra* n. 5 at IX-X.

¹¹ FELICITY THOMAS, *HANDBOOK OF MIGRATION AND HEALTH* 233-234 (2016)

¹² *Id.* See also Martin, *Migrant Workers in Commercial Agriculture supra* n. 5 at IX-X.

introduce rights provisions in private bilateral and multilateral trade agreements between sovereign nations, this impetus has not been mirrored on the world stage. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, while incorporating substantive protections for migrant workers, has the lowest ratification rate of the 9 core international human rights treaties at 51 ratifications. Notably, this Convention has only been ratified by three of the 35 countries in the Organization for Economic Cooperation and Development (OECD), which is comprised of the world's major migrant-receiving countries. Ratifying states include major migrant-sending countries, including Mexico and the Philippines.

This report serves as a collection of modern international jurisprudence on the rights of migrant farmworkers. To this end, the first section of the paper will consider the instruments applicable to migrant farmworkers authored by the United Nations. This will include any relevant jurisprudence or communications by the treaty bodies with states on the subject of migrant workers from the prior two years (2016-2017). The following section will then consider the salient International Labour Organization's Conventions and Recommendations on Agricultural Workers and Migrant Workers, respectively. Finally, this essay will conclude with a brief outline of the recent initiatives to protect the rights of farmworkers as introduced by the United Nations and the ILO.

Before this, however, relevant terminology must be explained.

B. *Terminology*

Throughout this essay, the term *migrant worker* will refer to individuals that reside in a nation in which they do not retain citizenship for the purpose of work.¹³ Although there are

¹³ *International Organization of Migration and Migrant Labour*, INTERNATIONAL ORGANIZATION OF MIGRATION (2008), https://www.iom.int/sites/default/files/our_work/ICP/IDM/Labour-Migration-Infosheet-2008.pdf.

various categories of migrant workers recognized by the International Organization of Migration (e.g., seasonal migrant workers, contract migrant workers, highly-skilled migrant workers, and project-tied migrant workers, among others), for the purposes of this essay and accompanying reports, the authors have opted to use this broadly applicable term.¹⁴

Irregular migration or *irregular migrants* means individuals that have circumvented the standard legal procedures for securing employment in foreign jurisdictions.¹⁵ Another common term for this population is *undocumented migrants*. Through escaping the radar of formal processing by the host government, irregular migrants are therefore exempt from standard labor regulations, rendering them a *vulnerable population*. In the context of international human rights law, this term is synonymous with group of persons that are especially susceptible to abuse or exploitation by those better situated.

Existing jurisprudence reflects some confusion on the definition of “*farmworkers*”. Here, the authors elect to use the term’s plain meaning; that is, “a person employed to work on a farm”, seasonal or permanent employees.¹⁶ This does not include farmers or the landowners (i.e. the farmworkers’ employers), who are typically citizens of the state or receive certain privileges by virtue of their status as landowners.

II. ANALYSIS

A. *The United Nations*

1. Universal Declaration of Human Rights

¹⁴ *Id.* See also Thomas, Handbook of Migration and Health *supra* n. 11 at 233.

¹⁵ *Key Migration Terms*, INTERNATIONAL ORGANIZATION FOR MIGRATION (2018), <https://www.iom.int/key-migration-terms#Irregular-migration>.

¹⁶ *Farmworker*, MERRIAM-WEBSTER (2018), <https://www.merriam-webster.com/dictionary/farmworker>.

The Universal Declaration of Human Rights is an instrument concluded between nations with the intention of outlining the most basic entitlements and obligations of individuals.¹⁷ Although it lacks legal standing by virtue of its status as a declaration, it is commonly recognized that the UDHR has become customary international law, meaning that all States are bound regardless of signature or participation.¹⁸ Indeed, even the courts of the United States, which have traditionally been disinclined to reference international or foreign legal materials in their opinions, have cited to the Declaration in their decisions.¹⁹ With regard to work, the document contains three key provisions: first, Article 17 on the right to freedom of association; Article 23 on the right to work; and Article 24 on leisure and the establishment of reasonable working hours.²⁰ Collectively, these rights generally affirm the entitlement of persons to a working environment that protects their inherent dignity, the core principle with which the document is aligned.

As a rule, it is extremely difficult for individuals to vindicate their rights under the UDHR at the domestic level. Because the commitments within the Universal Declaration are not uniformly recognized as source of obligations immediately enforceable upon the states, petitioners would have considerable trouble acquiring relief under these general guarantees. However, the inclusion of the right to work and its associated entitlements were later considered in the International Covenant on Economic, Social, and Cultural Rights.

2. International Covenant on Economic, Social, and Cultural Rights

¹⁷ See generally G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter “UDHR” or “the Declaration”].

¹⁸ Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law* 25 G.A. J. INT’L & COMP. L. 287-397, 322 (1996).

¹⁹ E.g., *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003). Here, the Third Circuit Court of Appeals cited to the UDHR’s prohibition of torture when determining an immigration case. See also *Jamur Productions Corp. v. Quill*, 273 N.Y.S.2d 348, 356 (N.Y. Sup. Ct. 1966). In this case, the New York Supreme Court referred to the UDHR as a legal authority for determining the definition of “actionable behavior” with regard to the right to strike.

²⁰ Universal Declaration of Human Rights *supra* n. 17 at Arts. 17, 23 & 24.

Although initially introduced in the UDHR, the operative content of the right to work and the right to freedom of association were not substantially developed until the production of the International Covenant on Economic, Social, and Cultural Rights in 1966.²¹ In Article 6, the text reaffirms the liberty of individuals to pursue any vocation in a safe and non-discriminatory working environment.²² To satisfy this mandate, State Parties must “take appropriate steps to safeguard this right.”²³ “Appropriate steps” are defined in Article 2 of the Covenant, and require State Parties to ensure the respect, protection, and fulfillment of enumerated rights “to the maximum of its available resources...with a view to achieving progressively the full realization of rights... without discrimination.”²⁴

Concerning the right to work, the basic prerequisites for States are: to ensure remuneration, including fair and equal wages; safe working conditions; equal opportunity for promotions; as well as reasonable working hours, rest, and proper remuneration for work on public holidays.²⁵ To provide further direction to State Parties on their fundamental responsibilities under the Covenant, the Committee on Economic, Social, and Cultural Rights has produced two applicable General Comments: General Comment 18 on the Right to Work and General Comment 23 on the Right to Just and Favorable Conditions of Work.²⁶ First, General Comment 18 stipulates that State Parties must actively introduce measures, called “core obligations”, that are intended:

²¹ International Covenant on Economic Social and Cultural Rights. art. 6, art. 7 G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess. Supp. No. 16, U.N. Doc. A/6316, at 49 (Dec. 16, 1966).

²² *Id.* at Art. 2(2) and Art 6(1).

²³ *Id.* at Art. 6(1).

²⁴ *Id.* at Art. 2(1).

²⁵ *Id.* at Art. 6.

²⁶ *See generally* U.N. Committee on Economic, Social, and Cultural Rights, General Comment 18: The Right to Work E/C.12/GC/186 (Feb. 2006); *see also* U.N. Committee on Economic, Social, and Cultural Rights, General Comment 23: The Right to Just and Favorable Conditions of Work E/C.12/GC/23 (Apr. 2016).

- (a) To ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups... (b) To avoid any measure that results in discrimination and unequal treatment...of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; (c) To...implement a national employment strategy... addressing the concerns of all workers on the basis of a participatory and transparent process that includes employers' and workers' organizations.²⁷

Similarly, General Comment 23 enumerates core obligations that direct the States to eradicate discriminatory policies in the workplace, to improve the health and safety of employees through the adoption of a nationwide policy, and to adopt legislation prohibiting harassment (including, especially, sexual harassment).²⁸ Although these General Comments are not in themselves binding, the satisfaction of the “core obligations” are necessary to fulfil the “minimum essential level” of the right as articulated in the Covenant, which is a binding instrument.²⁹

Should State Parties wish to expose themselves to further measures of accountability at the international level, they may accede to the Optional Protocol to the ICESCR.³⁰ Under this scheme, if the CESCR receives “reliable information” that the party is committing “grave or systematic” violations of human rights, the Committee may then conduct an independent investigation into the actions of the accused party.³¹ The investigation procedure is confidential, and is dependent upon the continued recognition of the Committee’s competence to undergo investigations by the State.³² Should the State choose to rescind its compliance with the investigation procedure, it may do so at any time with notice to the Secretary General.³³

²⁷ General Comment 17: The Right to Work *supra* n. 26 at ¶ 31.

²⁸ General Comment 23: The Right to Just and Favorable Conditions of Work *supra* n. 26 at ¶ 65.

²⁹ *Id.* See generally International Covenant on Economic Social and Cultural Rights *supra* n. 21.

³⁰ See generally U.N. General Assembly, Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights A/RES/63/117 (Dec. 10, 2008).

³¹ *Id.* at Art. 11(2).

³² *Id.* at Art. 11(8).

³³ *Id.*

At the conclusion of the investigation, the CESCR submits the report, along with recommendations for further action, to the State Party. The State Party must then respond with its own observations of the perceived issue. If the State does not respond within six months, the CESCR may then “invite” the State to detail actions taken to bring its practice into compliance with the recommendations contained within the aforementioned report.³⁴

The CESCR has taken a pronounced interest in the issues faced by migrant workers in its contemporary jurisprudence. Specifically, the Concluding Observations produced in 2017 contained several references to poor working condition in the agricultural sector, and generated a number of recommendations for improving domestic protection for both nationals and migrant workers.³⁵ Although the 2016 Concluding Recommendations contain less content on migrant workers in agriculture, they often include assessments of working conditions for non-nationals more generally.³⁶ This trend is a positive step towards facilitating more international attention to the abuses of migrant workers in agriculture.

3. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was drafted in 1990, with the intention of facilitating “international protection of the rights of all migrant workers and members of their families, reaffirming and

³⁴ *Id.* at Art. 11 & Art. 12.

³⁵ *See, e.g.* Committee on Economic, Social and Cultural Rights, Concluding Observations on the Fourth Periodic Report of the Republic of Korea E/C.12/KOR/CO/4 ¶¶ 36-37 (Oct. 2017) (mentioning specifically the issue of migrant workers in agriculture); Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Colombia ¶¶ 36-38 E/C.12/COL/CO/6 (Oct. 2017);

³⁶ *See, e.g.* Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland ¶¶ 34-35 E/C.12/GBR/CO/6 (July 2016); Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Cyprus ¶¶ 27-28 E/C.12/CYP/CO/6 (Oct. 2016) (an outlier that does explicitly contain a section on vulnerable and migrant workers in the “farming and agricultural sector”); Committee on Economic, Social and Cultural Rights, Concluding Observations on the Sixth Periodic Report of Poland ¶¶ 21-22 E/C.12/POL/CO/6 (Oct. 2016) (noting especially the exploitation of migrants in the informal economy).

establishing basic norms in a comprehensive convention which could be applied universally.”³⁷ This modest objective did not inspire widespread acclimation to the text, however; the collective resistance to ratification slowed the formal implementation of this Convention until 2003.³⁸ Since then, the document has garnered a remarkably underwhelming 51 ratifications.³⁹ There is no single rationale for this irregular aversion to a human rights instrument, but some proposed reasons include the unique politicization of migration, especially irregular migration and human trafficking, the lack of resources or will to implement the Convention’s mandates, and the resistance of major economic powerhouses to the introduction of (expensive) human rights protections.⁴⁰

The Migrant Workers’ Rights Convention includes few “new” rights. The foremost principle that underlines the document is rather the articulation of how existing rights apply to both documented and undocumented migrant workers.⁴¹ Although some rights are specifically reserved for documented migrants, including the right to join a trade union, equality of treatment with nationals, and the right to transfer remittances (among others), a wide range of fundamental rights are included for undocumented migrants.⁴² The right to life, the right to security of identification documents, the right to individual expulsion procedures, and the right to equality

³⁷ United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families *supra* n. **Error! Bookmark not defined.** at Preamble.

³⁸ Adreas Inghammar, *The Employment Contract Revisited: Undocumented Migrant Workers and the Intersection Between International Standards, Immigration Policy and Employment Law* 12 EUR. MIGRATION & L.J. 193, 214 (2010).

³⁹ See “Status of Ratification Interactive Dashboard,” *supra* n. **Error! Bookmark not defined.**

⁴⁰ Paul de Guchteneire & Antoine Pécoud, *Introduction: The UN Convention on Migrant Workers’ Rights* in MIGRATION IN HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS’ RIGHTS 1-44 (Ryszard Cholewinski, Paul de Guchteneire & Antoine Pécoud, eds. 2010).

⁴¹ *Id.* at 8. See generally United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families *supra* n. **Error! Bookmark not defined.**

⁴² United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families *supra* n. **Error! Bookmark not defined.** at Art. 40, Art. 43 & Art. 47.

with nationals concerning remuneration and working conditions are some of the guarantees enumerated here.⁴³

Like other human rights treaties, all State Parties are required to submit periodic reports on the concrete actions taken to bring its practices into compliance with the Convention.⁴⁴ Other measures of accountability include the optional ratification of Articles 76 and 77, which respectively permit other State Parties and individual petitioners to submit complaints to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families.⁴⁵ Since the Convention's formal entry into force, only Mexico, Guatemala, El Salvador, and Uruguay have made the requisite declarations to implement Article 77 on the submission of individual petitions. Only El Salvador has accepted the submission of inter-state communications under Article 76.⁴⁶

The Committee on Migrant Workers, established by Article 72, has produced four General Comments since its formal establishment in 2003. The first concerns the rights of migrant domestic workers, or “a person who performs work within an employment relationship in or for other people’s private homes, whether or not residing in the household.”⁴⁷ The second General Comment is broader in application, and details the rights of workers being held in an “irregular situation”.⁴⁸ The Committee employs the Convention’s definition of an “irregular situation”, meaning that it encompasses migrant workers “not authorized to enter, to stay or to engage in a

⁴³ *Id.* at Art. 9, Arts. 21-22, & Art. 25.

⁴⁴ *Id.* at Art. 73.

⁴⁵ *Id.* at Arts. 76-77.

⁴⁶ “International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: Status as at 16-11-2017 05:00:28 ED,” UNITED NATIONS TREATY COLLECTION (Nov. 16, 2017), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&clang=_en.

⁴⁷ United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 1 on Migrant Domestic Workers, CMW/C/GC/1 ¶ 5 (Feb. 2011).

⁴⁸ *See generally* United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families, CMW/C/GC/2 (Aug. 13, 2013).

remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which it is a party”.⁴⁹ Although there is little reliable data on the approximate number of migrants being held in “irregular situations”, there is consensus that this group constitutes a large portion of the demographics.⁵⁰

General Comment 2 also includes reference to the normative framework for the protection of migrants in irregular situations, including major international and regional human rights and labor instruments.⁵¹ In line with these collective mandates, general principles are surmised with regard to irregular migrants: first, states have unbridged authority to admit or deny the entry or continued residence of migrant workers, but must defer to the Convention on “other matters”, including a migrant’s legal situation; second, that migrants are obliged to follow the laws and regulations of every state in which they maintain a presence; that States must consider, but are emphatically not obligated to pursue the “regularization” of migrant workers in irregular situations; and that State Parties must coordinate to optimize policies to promote the accessibility of regular channels of migration.⁵² The following sections outline the civil, political, economic, social and cultural rights of migrants in irregular situations, generally reaffirming the measures in the Convention and specifying potential methods of implementation.⁵³

⁴⁹ *Id.* at ¶ 3. *See also* United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families *supra* n. **Error! Bookmark not defined.** at Art. 5.

⁵⁰ The Office of the UN High Commissioner for Human Rights described the issue thus: “[m]ost official data systems fail to capture either the number or the circumstances of migrants, and many international data on migration do not accurately account for irregular migrants.” United Nations Human Rights Office of the High Commissioner for Human Rights, *The Economic, Social, and Cultural Rights of Migrants in an Irregular Situation* p. 6 (2014), http://www.ohchr.org/Documents/Publications/HR-PUB-14-1_en.pdf.

⁵¹ General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families *supra* n. 48 at ¶ 6-12.

⁵² *Id.* at ¶ 6-12.

⁵³ *See generally id.*

The Third and Fourth General Comments are “Joint Comments” written in conjunction with the Committee on the Rights of the Child.⁵⁴ Produced on November 16, 2017, they are one of the most recent official publications on the subject. These complementary Joint Comments both concern the rights of children in international migration; as one of the most at-risk categories of refugees, this joint venture is a timely addition to the scholarship during this era of migration crises.⁵⁵ The Third Comment delineates five fundamental principles from both the ICRMW and the Convention of the Rights of the Child applicable to migrant children.⁵⁶ The first is the prohibition of discrimination against migrant children in development and implementation of migration policies and border control procedures.⁵⁷ Next, the “best interests of the child” must be considered when making any decision affecting their welfare.⁵⁸ Third, children should have the right to free expression and participation in administrative or judicial forums and the development of policies that affect them.⁵⁹ Fourth, the child’s right to life and the “physical, mental, moral, spiritual and social dimensions of his or her development” must be considered and upheld in any State-commissioned response to migration.⁶⁰ Finally, the Committees emphasize deference to the principle of non-refoulement, or the prohibition of expelling migrants

⁵⁴ See generally United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families and the United Nations Committee on the Rights of the Child, Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the General Principles Regarding the Human Rights of Children in the Context of International Migration, CMW/C/GC/3-CRC/C/GC/22 (Nov. 16, 2017) [hereinafter “Joint Comment 3”]; see also United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families and the United Nations Committee on the Rights of the Child, Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State Obligations Regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return CMW/C/GC/4-CRC/C/GC/23 (Nov. 16, 2017) [hereinafter “Joint Comment 4”].

⁵⁵ See generally *id.*

⁵⁶ See generally G.A. Res. 44/25, Convention on the Rights of the Child (Sept. 2, 1990) [hereinafter “the CRC”].

⁵⁷ Parties may deviate from this principle, insofar as they observe the following limitation: “[a]ny differential treatment of migrants shall be lawful and proportionate, in pursuit of a legitimate aim and in line with the child’s best interests and international human rights norms and standards.” Joint Comment 3 *supra* n. 54 at ¶ 22.

⁵⁸ *Id.* at ¶ 27-33.

⁵⁹ *Id.* at ¶ 34-39.

⁶⁰ *Id.* at ¶ 40-44. The right to development also compels the State Parties to extend their consideration to the impact of migration policies on the parents of the migrant children. *Id.* at ¶ 44.

from a State’s jurisdiction if there is a risk of “persecution, torture, gross violations of human rights or other irreparable harm”.⁶¹

Joint Comment 4 builds on these fundamental principles, but targets specifically the treatment of migrant children within the borders of the host state.⁶² Whereas the Third General Comment delineated principles salient to the migration policies of all State Parties of the ICRMW and the CRC, Joint Comment 4 is more particular in its directives.⁶³ This Comment first mandates that certain civil and political rights essential to fair treatment and the maintenance of the child’s legal status be upheld and preserved.⁶⁴ Next, the Committees include essential economic, social, and cultural guarantees, including the right to protection of family life, the prohibition of child labor and trafficking, the right to health and an adequate standard of living, and the right to education and professional training.⁶⁵

The General and Joint Comments of the Committee on the Rights of Migrant Workers are useful resources for States to consult when developing plans to combat the recent global migration crises. Although non-binding and often over-deferential to the concept of national sovereignty, the inclusion of a normative set of principles is an invaluable asset in the current political climate.

The Migrant Workers Committee does not have as robust a jurisprudence as its counterpart U.N. organizations, which may be attributed to the low signature and ratification rate of the

⁶¹ *Id.* at ¶ 45-47. The principle of non-refoulement has arguably been incorporated into international customary law for its inclusion in a wide variety of instruments, including the Convention Against Torture, the Convention Relating to the Status of Refugees, and the Convention for the Protection of All Persons from Enforced Disappearance. *See* G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3 (Dec. 10, 1984); Convention Relating to the Status of Refugees, 189 U.N.T.S. 137, Art. 33 (Jul. 28, 1951); G.A. Res. 61/77, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 16 (Jan. 12, 2007).

⁶² *See generally* Joint Comment 4, *supra* n. 54.

⁶³ *Id.* *See also* Joint Comment 3, *supra* n. 54.

⁶⁴ Joint Comment 4, *supra* n. 54 at ¶ 3-19. These civil and political guarantees include the right to liberty, due process and access to justice, and the right to name, identity and nationality. *Id.*

⁶⁵ *Id.* at ¶ 27-63.

Migrant Workers Convention.⁶⁶ However, the recent years have produced a marked increase in Concluding Observations.⁶⁷ In tandem with considering the unique problems faced by migrant workers, the Committee has acknowledged the various forms of labor exploitation taking place in the agricultural and fishery sectors, including forced labor, sexual abuse, child labor, and physical violence, among other forms of abuse.⁶⁸ Although the reference to agricultural workers in by no means prolific, in countries that are especially plagued by rights violations in this area the Committee has provided some substantive recommendations for the improvement of mechanisms for accountability.⁶⁹

4. Convention on the Rights of the Child

In stark contrast to the ICRMW, the Convention on the Rights of the Child sustains one of the highest ratification rates of any treaty at 196 countries.⁷⁰ This widespread acclimation to the text is a valuable resource for the vindication of migrants' rights, as many irregular migrants are child laborers that have been trafficked through various channels or organizations.⁷¹ The United Nations International Children's Emergency Fund (UNICEF) estimates that there are 150

⁶⁶ See generally "Status of Ratification Interactive Dashboard," *supra* n. **Error! Bookmark not defined.**

⁶⁷ The Migrant Workers Committee produced only two Concluding Observations annually from 2006-2008; averaged 4 from 2008-2015; published 8 in 2016 and 6 in 2017. See *Committee on the Rights of Migrant Workers* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2018), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=5.

⁶⁸ See, e.g. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Concluding Observations on the Initial Report of Indonesia ¶¶ 32-33 CMW/C/IDN/CO/1 (Oct. 2017); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Concluding Observations on the Initial Report of Honduras ¶¶ 42-43 CMW/C/HND/CO/1 (Oct. 2016); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Concluding Observations on Nigeria in the Absence of a Report ¶¶ 31 and 55 CMW/C/NGA/CO/1 (May 2017).

⁶⁹ See generally *id.*

⁷⁰ "Status of Ratification Interactive Dashboard," *supra* n. **Error! Bookmark not defined.** Only the United States has failed to ratify the Convention, although it has signed the document. *Id.*

⁷¹ International Program on the Elimination of Child Labor, "Migration and Child Labor," INTERNATIONAL LABOUR ORGANIZATION (2017), http://www.ilo.org/ipecc/areas/Migration_and_CL/lang--en/index.htm. See also "Child Protection: Current Status and Progress," UNITED NATIONS INTERNATIONAL CHILDREN'S EMERGENCY FUND (2017), <https://data.unicef.org/topic/child-protection/child-labour/#>

million child laborers, and more than half of this number is involved in the agricultural sector.⁷² The script of the Convention does not explicitly reference migrant children beyond those with refugee status; however, the rights contained therein are especially relevant to the vulnerable class.⁷³

The rights in the CRC must be ensured and protected without regard to the child's status or nationality.⁷⁴ This is significant, as the mandates within the document often direct State Parties to make available a wide range of public services, and to guarantee that the development of the child is safeguarded from any external threats.⁷⁵ Article 3 is demonstrative: "State Parties must...undertake to ensure the child such protection and care as is necessary for his or her well-being... [and] shall take all appropriate legislative and administrative measures."⁷⁶ For example, in the event that a fundamental aspect of a child's identity has been comprised, such as their nationality, name, or familial relations, State Parties are obligated to provide "speedy" assistance to re-establish the status of the child.⁷⁷

Regarding labor, the CRC implements a comprehensive ban on work that is "likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."⁷⁸ Certain preconditions to employment, including minimum age and maximum hours must be established through the

⁷² "Child Protection: Current Status and Progress," *supra* n. 72. See also International Program on the Elimination of Child Labor "Child Labor in Agriculture," INTERNATIONAL LABOUR ORGANIZATION (2017), <http://www.ilo.org/ipec/areas/Agriculture/lang--en/index.htm>.

⁷³ Convention on the Rights of the Child *supra* n. 56 at Art. 22.

⁷⁴ *Id.* at Art. 2(2). The Convention outlines a blanket prohibition of discrimination on any basis: "States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status." *Id.*

⁷⁵ See generally *id.*

⁷⁶ *Id.* at Art. 3(2).

⁷⁷ *Id.* at Art. 8.

⁷⁸ *Id.* at Art. 32(1).

appropriate legislative channels, as well as enforcement measures for any violations to these rules.⁷⁹

The Committee on the Rights of the Child, established by Article 43 of the Convention, has also produced a General Comment on the matter of child labor in response to the increasingly globalized economy and concurrent trends of outsourcing and decentralization.⁸⁰ Though the United Nations has yet to produce an international treaty regarding business practices and human rights, U.N. Committees such as the CRC have included increasingly robust protections for those affected by illicit corporate practices.⁸¹ General Comment 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights includes seven sections, four of which are of note: the Nature and Scope of State Obligations, State Obligations in Specific Contexts, Framework for Implementation, and Dissemination.

The Nature and Scope of State Obligations section affirms that the State must endeavor to employ all legislative, administrative, or other appropriate measures to implement the rights contained in the Convention; as a uniquely vulnerable population, children have a "special status" under international human rights law that obligates all States to consider their interests in the formulation and implementation of policies.⁸² This sentiment is reminiscent of the obligations to implement rights as outlined in the Committee's General Comment 5, which

⁷⁹ *Id.* at Art. 32(2).

⁸⁰ *Id.* at Art. 43; *see generally* Committee on the Rights of the Child, General Comment 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights CRC/C/GC/16 (2013) [hereinafter "General Comment 16"].

⁸¹ *See* General Comment 16 *supra* n. 80 at ¶ 8. Although there is currently no binding U.N. Treaty, an Intergovernmental Working Group on Transnational Corporations and Other Business Organizations has been established to draft such a document. *See* "Third Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights," UNITED NATIONS HUMAN RIGHTS COUNCIL (2017), <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx>.

⁸² *See* General Comment 16 *supra* n. 80 at ¶ 24.

mandates that State Parties ensure the fulfillment of rights to the maximum extent possible, paying special attention to the most vulnerable groups.⁸³

The State Obligations in Specific Contexts is a unique section that details what practices states should employ to prevent or abolish practices that generate a negative impact the development of the child.⁸⁴ This includes a discussion of the informal economy, which notes the potential dangers of the agriculture industry:

Such work frequently involves precarious employment status, low, irregular or no remuneration, health risks, a lack of social security, limited freedom of association and inadequate protection from discrimination and violence or exploitation. It can prevent children from attending school, doing schoolwork and having adequate rest and play, potentially infringing articles 28, 29 and 31 of the Convention.⁸⁵

Although the General Comment does not go on to prescribe mandatory actions States must take to prevent these violations to the Convention, it does include suggestions that target the root of the practice. These include awareness-raising, gathering data, predictable land use laws, and easy access to registration facilities, among other measures.⁸⁶

The recent jurisprudence of the CRC directs some attention to the issue of child labor in agriculture throughout their Concluding Observations on State Parties, but it is typically contained within the broader theme of eradicating child labor.⁸⁷ A common recommendation to

⁸³ The pertinent section reads: “[w]hatever their economic circumstances, States are required to undertake all possible measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups”. Committee on the Rights of the Child, General Comment 5: General measures of implementation of the Convention on the Rights of the Child, CRC/GC/2003/5 at ¶ 8 (Nov. 27, 2003).

⁸⁴ The specific themes in this section include: Provision of Services for the Enjoyment of Children’s Rights; The Informal Economy; Children’s Rights and the Global Operations of Business; International Organizations (working with UN-sponsored bodies and ensuring the practices of private organizations do not exceed the limits of the law); and Emergencies and Conflict Situations. General Comment 16 *supra* n. 80 at ¶ 32-52.

⁸⁵ *Id.* at ¶ 35.

⁸⁶ *Id.*

⁸⁷ *See, e.g.* Committee on the Rights of the Child (CRC), Concluding Observations on the Combined Third and Fourth Reports Submitted by the United States of America under Article 12 (1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography ¶ 22 CRC/C/OPSC/USA/CO/3-4 (July 2017); Committee on the Rights of the Child (CRC), Concluding Observations on the Combined Third to Fifth Periodic Reports of Bulgaria ¶¶ 54-55 CRC/C/BGR/CO/3-5 (Nov. 2016); Committee

States is to “[t]ake effective measures to prevent child labour, especially in agriculture...and to mainstream its elimination in the relevant sectoral and intersectoral strategies and action plans.”⁸⁸ Migrant children are considered by the Committee to be an especially vulnerable class; therefore, many Concluding Observations recommends their inclusion in governmental initiatives and data gathering.⁸⁹

5. Convention on the Elimination of All Forms of Discrimination Against Women

The United Nations Convention on the Elimination of All Forms of Discrimination Against Women entered into force in September of 1981.⁹⁰ Like the Convention on the Rights of the Child, it received a high number of ratifications, garnering the accession of 189 State Parties.⁹¹ In the context of an increasingly globalized agriculture industry and the advent of massive economic migration, women are particularly at-risk.⁹² Due to their isolation, lack of knowledge of their rights, the denigration of their credibility, and (often) their status as irregular migrants, farmworker women have been labeled the “perfect victims” for abuses such as sexual

on the Rights of the Child (CRC), Concluding Observations on the Second Periodic Report of South Africa ¶¶ 67-68 CRC/C/ZAF/CO/2 (Oct 2016).

⁸⁸ Committee on the Rights of the Child (CRC), Concluding Observations on the Fifth Periodic Report of Romania ¶ 41 CRC/C/ROU/CO/5 (July 2017); *see also* Committee on the Rights of the Child (CRC), Concluding Observations on the Combined Fourth and Fifth Periodic Report of the Republic of Moldova ¶ 38 CRC/C/MDA/CO/4-5 (Oct. 2017); Committee on the Rights of the Child (CRC), Concluding Observations on the Combined Third and Fourth Periodic Reports of Suriname ¶¶ 37-38 CRC/C/SUR/CO/3-4 (Dec. 2016).

⁸⁹ *See generally id.* This is particularly true of recommendations on resource allocation, which typically suggests that the government take migrant children and other vulnerable classes into consideration when framing plans for public expenditure. Committee on the Rights of the Child (CRC), Concluding observations on the Combined Fifth and Sixth Periodic Reports of Ecuador ¶ 10 CRC/C/EQU/CO/5-6 (Oct. 2017).

⁹⁰ *See generally* Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (Sept. 1981).

⁹¹ “Status of Ratification Interactive Dashboard,” *supra* n. **Error! Bookmark not defined.** Like the Convention on the Rights of the Child, the United States is a notable outlier in the small minority on non-ratifying states. Other states include the Holy See, Iran, Niue, Palau, Somalia, Sudan, and Tonga. *Id.*

⁹² For example, in the United States, the magazine *Time* has recently published an article on the sexual harassment of female farmworkers. It includes a letter written on behalf of 700,000 farmworkers that have experienced or are currently experiencing sexual abuse by their employers. “700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault,” *TIME* (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/>.

assault, harassment, and trafficking in the normal course of their employment.⁹³ The gravity and regularity of these offenses necessitates strong international and domestic protections to secure their fundamental rights.

The drafters of the Convention recognized the special situation of both migrant women and women working in rural areas.⁹⁴ The text contains two especially pertinent guarantees; first, a special prohibition on “all forms” of trafficking of women in Article 9, and a section on the rights of women living in rural areas in Article 14. The latter Article takes particular consideration of the economic survival of women, noting that States must ensure that women living in rural areas enjoy the same rights and freedoms as those residing in more urban settings.⁹⁵ CEDAW is the first Convention to expressly recognize the problems faced by rural populations, and implicitly acknowledge the difficulties in implementing substantive protections for isolated populations.⁹⁶

Like the aforementioned Conventions, the drafters of CEDAW also included a Committee to receive reports and communications on behalf of States or disaffected individuals and parties.⁹⁷ The Committee also undertakes to issue General Recommendations to aid the Party States in aligning their practices to the prescriptions of the treaty.⁹⁸ Relevant here, General

⁹³ Robin R. Runge, *Failing to Address Sexual and Domestic Violence at Work: the Case of Migrant Farmworker Women*, 20(4) AM. U. J. GENDER & SOC. POL’Y & L 871-897, 877 (2012). The silence of farmworker women experiencing abuse also extends to domestic life. When women are exposed to violence in the home, they are reluctant to report for fear of retaliation against members of their family. *see* MARY BAUER & MONICA RAMIREZ, S. POVERTY LAW CTR., *INJUSTICE ON OUR PLATES: IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY also* 42-45 (2010).

⁹⁴ Convention on the Elimination of All Forms of Discrimination Against Women *supra* n. 90 at Art. 6 and Art. 14.

⁹⁵ “States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families... and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.” *Id.* at Art. 14.

⁹⁶ *Id.* *See also* Lisa R. Pruitt, *Migration, Development, and the Promise of CEDAW for Rural Women* 30(3) MICH. J. INT’L L. 707-761, 731 (2009).

⁹⁷ Convention on the Elimination of All Forms of Discrimination Against Women *supra* n. 90 at Art. 17(1).

⁹⁸ *See generally* “General Recommendations Made by the Committee on the Elimination of Discrimination Against Women,” UNITED NATIONS WOMEN (2018), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom16>.

Comment 16 concerns the payment of female workers in rural and urban family enterprises.⁹⁹ The Comment notes that a high percentage of women across the world work “without payment, social security and social benefits in enterprises owned usually by a male member of the family.”¹⁰⁰ A large number of these women are farmworkers, laboring in rural areas with little governmental supervision of employment practices.¹⁰¹ Until 2009, over 47% of female farmworkers contributing to family farms received no direct pay, whereas only 22.7% of male farmworkers suffered this problem.¹⁰²

General Comment 26 expands directly on the rights of women migrant workers.¹⁰³ With regard to countries of destination, the Committee isolated especially regular practices of *de jure* and *de facto* discrimination including (but by no means limited to): legal and social bias against female migrant workers impairing job security and mobility; lack of legal recognition or regulation of female-dominated work; obstructed access to transmissions channels for savings; effective denial of healthcare; particularly stringent rules governing the terms of the migrant’s work and residence; and limited access to justice.¹⁰⁴ Undocumented migrant women are

⁹⁹ See generally Committee on the Elimination of All Forms of Discrimination Against Women, General Comment 16: Unpaid Women Workers in Rural and Urban Family Enterprises A/46/38 (2001).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* This phenomenon is especially prevalent in states that do not permit women to own or otherwise transfer land, nor conduct business on the basis of their gender. In these cases, female farmworkers often must rely on their male relatives to manage the farm and justly dispense wages. See, e.g. United States Agency of International Development (USAID), *Land Tenure, Property Rights, and Gender Challenges and Approaches for Strengthening Women’s Land Tenure and Property Rights: USAID Issue Brief 2-4* (June 2014), https://www.land-links.org/wp-content/uploads/2016/09/USAID_Land_Tenure_Gender_Brief_061214-1.pdf

¹⁰² Int’l Labour Organization (ILO), *Women in Labour Markets: Measuring Progress and Identifying Challenges* 35-36 (Mar. 2010), http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_elm/---trends/documents/publication/wcms_123835.pdf.

¹⁰³ See generally Committee on the Elimination of All Forms of Discrimination Against Women, General Comment 26: On Women Migrant Workers’ Rights, CEDAW/C/2009/WP.1/R (Dec. 5, 2008).

¹⁰⁴ *Id.* at ¶¶ 13-22.

particularly vulnerable to abuse, as they are unwilling (and often unable) to vindicate their rights at the national level.¹⁰⁵

The common responsibilities of State Parties, applicable to both origin and destination countries, are: first, to create rights-based migration policies that take into account the situation of female migrant workers; to actively include migrant women in the formation and implementation of these policies; and finally, to systematically investigate and collect data on the status of migrant workers throughout all stages of their residence in the destination country.¹⁰⁶ For their part, countries of origin are specially tasked with the obligation to lift discriminatory bans on inter-state travel; work to ensure remittances are processed in accordance with normal procedures; provide legal and administrative assistance in connection with employment; and ensure the right to return.¹⁰⁷ Finally, countries of destination are directed to provide legal protections of the rights of migrant women without regard to nationality, and must endeavor to facilitate equal access to justice.¹⁰⁸

With regard to its Concluding Observations, the CEDAW Committee has taken a comparative interest in promoting the rights of migrant women workers in 2017.¹⁰⁹ A common theme of these documents is the Committee's urging of its Party States to ratify the Migrant Workers Convention, and to establish procedures to create an efficient and standardized model of migration as it relates to employment.¹¹⁰ In several reports conducted in 2017, the Committee

¹⁰⁵ *Id.* at ¶ 22. If undocumented migrant workers come forward with the abuses perpetuated against them, they are often harassed by police officers and prosecuted for violating migration regulations. *Id.*

¹⁰⁶ *Id.* at ¶ 23.

¹⁰⁷ *Id.* at ¶ 24.

¹⁰⁸ *Id.* at ¶ 25.

¹⁰⁹ *E.g.*, see Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Combined Eighth and Ninth Periodic Reports of Guatemala ¶¶ 25, 42 & 43 CEDAW/C/GTM/CO/8-9 (Nov. 2017); Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Fifth Periodic Report of Kuwait ¶¶ 4, 28, 36-37, 44-45, 53 CEDAW/C/KWT/CO/5 (Nov. 2017).

¹¹⁰ *Id.* See also Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Seventh Periodic Report of Argentina ¶ 42 CEDAW/C/ARG/CO/7 (Nov. 2016);

has regularly included a particular section on “Women Migrant Workers”, detailing a set of recommendations based upon the particular State Party’s circumstances and needs.¹¹¹ This jurisprudential expansion is quite new— the earlier iterations of the Concluding Observations do not typically include this focused section.¹¹² Further, prior to 2015, the Committee was reticent to specially mention treaties other than its founding text.¹¹³ The gradual integration of women migrant workers as a primary subject of the Concluding Observations is indicative of the urgent nature of migration issues, and the rapidly developing interest of international bodies in the situation of migrant workers.¹¹⁴

B. *The International Labour Organization*

Since its inception, the ILO has produced an extensive body of jurisprudence dedicated to the protection of migrant farmworkers, as employees in the world’s principal economic sector. Compliance with basic human rights standards for migrants is a commonly referenced subject in the Direct Communications of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) with various sending and receiving state members.¹¹⁵ In detailing the extent of protections guaranteed by the ILO, this section will detail the pertinent legal instruments and interactions with the monitoring body. First, two of the eight Fundamental

¹¹¹ *Id.* See also Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Fifth Periodic Report of Singapore ¶¶ 34-35 CEDAW/C/SGP/CO/5 (Nov. 2017); Sometimes the Committee focuses on a particular subsection of migrant workers, like its reference to “Women Migrant Domestic Workers” in the Concluding Observations for Monaco. See Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding Observations on the Combined Initial to Third Periodic Reports of Monaco ¶¶ 39-40 CEDAW/C/MCO/CO/1-3 (Nov. 2017); Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) Concluding Observations on the Combined Second and Third Periodic Reports of Oman ¶¶ 39-40 CEDAW/C/OMN/CO/2-3 (Nov. 2017).

¹¹² Of the 2016 Observations, only the Philippines had a section on Women Migrant Workers. See Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), Concluding observations on the Combined Seventh and Eighth Periodic Reports of the Philippines CEDAW/C/PHL/CO/7-8 (July 2016).

Other Concluding Observations included references to migrant women workers, but typically under the “Employment” section. See *e.g.*,

¹¹³ Stefanie Grant and Beth Lyon, Indirect Success? The Impact and Use of the ICMW in other United Nations Fora at 10 (Jan. 25, 2017) (unpublished manuscript) (on file with author).

¹¹⁴ See *infra* n. 111.

¹¹⁵

Conventions must be evaluated; all states are bound to these Conventions by virtue of their membership in the ILO, regardless of their ratification status. Next, the most pertinent non-fundamental Conventions and their associated Recommendations will be briefly reviewed; because “agricultural workers” and “migrant workers” are considered separately under the jurisprudence of the ILO, these topics will be considered sequentially.

1. Fundamental Conventions

a. ILO C29: Forced Labour Convention

ILO Convention 29 is one of the foremost documents of the contemporary international law regime that is concerned with the preservation of basic human rights.¹¹⁶ Produced in 1930, nearly two decades before the Universal Declaration of Human Rights, the text mandates the immediate suspension and termination of all forms of forced labor in “the shortest possible period.”¹¹⁷ The various supervisory bodies of the ILO have found violations of Convention 29 in cases wherein a migrant worker has been “induced by deceit, false promises and retention of identity documents or force to remain at the disposal of an employer.”¹¹⁸ This includes those instances where consent was freely given initially, but restrictions were imposed later.¹¹⁹ Recent attention has been drawn to exploitative labor schemes designed to deceive migrants in the CEACR’s communications with ILO Member States.¹²⁰ For instance, in the most recent

¹¹⁶ *See generally* International Labour Organization, Convention 029: Convention concerning Forced or Compulsory Labour (May 1, 1932) [hereinafter “ILO Convention 29”]. For a detailed history on the ILO’s role in the development of international jurisprudence on the abolition of forced labor, *see* L. Thomann, *The Abolition of Forced and Compulsory Labour* in STEPS TO COMPLIANCE WITH INTERNATIONAL LABOUR STANDARDS 185-242, 187-191 (2012).

¹¹⁷ ILO Convention 29 *supra* n. 116 at art. 1.

¹¹⁸ The Abolition of Forced and Compulsory Labour *supra* n. 116 at 192.

¹¹⁹ *Id.*

¹²⁰ *See e.g.* Observation of the Committee of Experts on the Application of Conventions and Recommendations to Japan Under the Forced Labour Convention (2016); Direct Request of the Committee of Experts on the Application of Conventions and Recommendations to Japan Under the Forced Labour Convention (2016); Observation of the Committee of Experts on the Application of Conventions and Recommendations to India Under the Forced Labour Convention (2016).

Under the Discrimination (Employment and Occupation) Convention, 2015 ¶ 4.

Observation of Japan's compliance with C29, the CEACR drew attention to systematic deviation from labor legislation; wage retention, withholding identifying documents, excessive working hours in unsafe conditions, and an unusually high death rate for young and initially healthy migrant workers were widely reported.¹²¹ Italy has also been accused of a series of abuses, including permitting conditions "akin to slavery" for agricultural workers in the Apulia region.¹²²

The 2016 and 2017 reporting cycles also included reports citing violations of the convention against migrant workers in Malaysia, Spain, and Saudi Arabia.¹²³ The widespread coverage of migrant workers' protections is indicative of the ILO's advocacy for migrant farmworkers, and is not limited to the Forced Labor Convention.

b. ILO C182: Worst Forms of Child Labour Convention

The ILO's Worst Forms of Child Labour Convention focuses primarily on ending slavery and forced labor, prostitution, drug trafficking, and work that "is likely to harm the health, safety or morals of children."¹²⁴ This intentionally broad category is meant to encapsulate any employment that has the potential to harm the development of a child under 18 years of age, and leaves some degree of discretion to domestic law.¹²⁵ Member States of the ILO must prohibit and eliminate "as a matter of urgency" all forms of child labor that fall under this designation.¹²⁶ ILO Recommendation 190 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO R190) affirms this obligation and commands States to

¹²¹ Observation of the Committee of Experts on the Application of Conventions and Recommendations to Japan *supra* n. 120.

¹²² Observation of the Committee of Experts on the Application of Conventions and Recommendations to Japan Under the Forced Labour Convention (2017).

¹²³ Observation of the Committee of Experts on the Application of Conventions and Recommendations to Malaysia Under the Forced Labour Convention (2017); Observation of the Committee of Experts on the Application of Conventions and Recommendations to Spain Under the Forced Labour Convention (2017); Observation of the Committee of Experts on the Application of Conventions and Recommendations to Saudi Arabia Under the Forced Labour Convention (2017).

¹²⁴ International Labour Organization, Convention 182: Worst Forms of Child Labour Convention at art. 1 & art. 3 (June 17, 1999) [hereinafter "ILO Convention 182"].

¹²⁵ *Id.* at art. 2.

¹²⁶ *Id.* at art. 1.

draft and implement a “Programmes of Action” that devotes special consideration to minority groups, including children with “special vulnerabilities”, in situations of “hidden work”, or in communities where children are at a special risk.¹²⁷ The Recommendation further notes that states should prohibit the employment of children in:

(a) [W]ork which exposes children to physical, psychological or sexual abuse; (b) work underground, under water, at dangerous heights or in confined spaces; (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads; (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health; (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.¹²⁸

As migrant children working in agriculture are routinely exposed to these conditions listed above, it is then no surprise that the participation of children in farm work is a common subject of importance in the periodic reviews of the CEACR.¹²⁹ In particular, the absence of legislation that conforms with the requirements as outlined in C182 or non-implementation of conforming legislation are oft-cited violations of Member States’ obligations.¹³⁰ For example, the CEACR’s 2016 Observation of Malaysia noted that the children of the growing population of over 1 million migrants were routinely denied identification documents by government agencies, thus obstructing the child’s access to education.¹³¹ Without the option to attend school, many children have no other recourse than to work; a significant number of these children then begin

¹²⁷ Although the Recommendation itself is not a binding document, it nevertheless must be read in tandem with C182 and its mandates must be “applied in conjunction” with the Convention’s mandates. International Labour Organization, Recommendation 190: Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour at art. 1 and art. 2 (June 17, 1999) [hereinafter “ILO Recommendation 190”].

¹²⁸ *Id.* at art. 3.

¹²⁹ Giovanni Di Lieto, *Focus: Migrants’ Labour Rights – International Legal Realities of Migrant Labour Rights 9* IDENTITY AND MIGRATION STUD. J. 86, 90 (2015).

¹³⁰ *Id.* at 90.

¹³¹ Observation of the Committee of Experts on the Application of Conventions and Recommendations to Malaysia Under the Worst Forms of Child Labour Convention (2017).

working in agriculture.¹³² This recurring scenario can also be found in Peru, Thailand, and Kazakhstan, among others, where undocumented children, most often trafficked, work on farms.¹³³

2. Non-Fundamental Conventions

a. Agricultural Workers

1. ILO C184: Safety and Health in Agriculture Convention

ILO Convention 184 on the Safety and Health in Agriculture Convention, a non-fundamental Convention requiring the domestic implementation of its text, maintains one of the lowest ratification rates of ILO Conventions in force today.¹³⁴ At merely 16 ratifications, the treaty has been largely ignored by the majority of states despite its limited mandate.¹³⁵ At its core, C184 requires only that Member States enact the most fundamental measures to ensure the safety of agricultural workers; as farmworkers are routinely exposed to hazardous chemicals and dangerous machinery, training or preventative measures are usually necessary to prevent sickness, injuries, and in extreme cases, death.¹³⁶ The accompanying Recommendation 192, passed in 2001, calls for the participation of multinational enterprises (MNEs) in ensuring that their employees receive appropriate utilities for the completion of their tasks such that their

¹³² *Id.*

¹³³ Observation of the Committee of Experts on the Application of Conventions and Recommendations to Peru Under the Worst Forms of Child Labour Convention (2017); Observation of the Committee of Experts on the Application of Conventions and Recommendations to Thailand Under the Worst Forms of Child Labour Convention (2017); Observation of the Committee of Experts on the Application of Conventions and Recommendations to Kazakhstan Under the Worst Forms of Child Labour Convention (2016).

¹³⁴ ILO Convention 129 on Labour Inspection in Agriculture has received few ratifications as well, at only 53. International Labour Organization, “Ratifications of C129 - Labour Inspection (Agriculture) Convention, 1969 (No. 129)” (2018), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312274:NO. International Labour Organization, Convention 184: Safety and Health in Agriculture Convention (Sept. 20, 2003) [hereinafter “ILO Convention 184”]; International Labour Organization, “Ratifications of C184 - Safety and Health in Agriculture Convention, 2001 (No. 184)”, (2018), http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:1523199466723:::P11300_INSTRUMENT_SORT:1.

¹³⁵ International Labour Organization, “Ratifications of C184 - Safety and Health in Agriculture Convention, 2001 (No. 184) *supra* n. 134.

¹³⁶ *See generally* Convention 184: Safety and Health in Agriculture Convention *supra* n. 134.

welfare is not compromised.¹³⁷ Like the Migrant Workers' Convention, the reticence of states to append measures of protection for agricultural workers speaks to the world's orientation regarding these vulnerable communities.

b. Migrant Workers

2. ILO C97: Migration for Employment Convention

Like Convention 184, ILO Convention 97 has enjoyed very little state interest at 49 ratifications.¹³⁸ Its general provisions outline an obligation to provide similar guarantees to employment protections as between nationals and migrant workers, without discrimination as to “nationality, race, religion or sex, [or immigration status]”.¹³⁹ Despite the lack of ratification, the ILO has published two Recommendations on the matter, Recommendation 61, Recommendation 62, and Recommendation 86, which replaced both prior recommendations.¹⁴⁰ Recommendation 86 most significantly includes the following: the proposition that states should establish programs and awareness campaigns to ensure that migrant workers are aware of their rights under the law; to permit the migrant's family to accompany him or her; and, in the Annex, a “Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons” [the Model Agreement].¹⁴¹ The Model Agreement is a template to be used between two (or more) countries to enumerate the specificities of migrant work programs, including subjects like the transfer of funds, information

¹³⁷ International Labour Organization, Recommendation 192: Safety and Health in Agriculture Recommendation, (Jun. 21, 2001) [hereinafter “R192”].

¹³⁸ See generally International Labour Organization, Convention 97: Migration for Employment Convention, (Jan. 22, 1952) [hereinafter “ILO Convention 97”]. International Labour Organization, “Ratifications of C097 - Migration for Employment Convention (Revised), 1949 (No. 97),” (2018), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312242.

¹³⁹ ILO Convention 97 *supra* n. 138 at art. 6.

¹⁴⁰ International Labour Organization, Recommendation 86: Migration for Employment Convention Recommendation (Revised), (Jul. 1, 1949).

¹⁴¹ *Id.* at arts. 5 – 10; art. 15; Annex.

and assistance for migrants, and conditions and criteria of migration.¹⁴² In contrast to the unpopularity of ILO Convention 97, the Model Agreement has been used by a variety of Member States, majority sending and majority receiving.¹⁴³

C. Recent Developments

1. United Nations

Perhaps the most encouraging development published by the UN in recent years is the Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas.¹⁴⁴ This document is especially salient for farmworkers, as their work typically displaces them to rural areas often bereft of safety regulations or regular inspections by the government.¹⁴⁵ The Draft was presented by the Chair-Rapporteur of the designated intergovernmental working group in May 2017.¹⁴⁶ Although the initiative to create the intergovernmental working group was initially opposed by the United States and all European countries involved in the discussions, the representatives have now become active participants in the discourse as the text of the draft evolves.¹⁴⁷ As it stands today, the Draft has endeavored to specifically include the most vulnerable groups that have been excluded from other instruments; women, children, the elderly, and persons with disabilities must all receive special attention when drafting national programs in compliance with the Draft Declaration.¹⁴⁸

Although the Draft Declaration, by virtue of its status as a declaration, will not create binding legal obligations for State Parties that choose to sign the instrument, it will nevertheless

¹⁴² *Id.* at Annex.

¹⁴³ SUSAN F. MARTIN, INTERNATIONAL MIGRATION: EVOLVING TRENDS FROM THE EARLY TWENTIETH CENTURY TO THE PRESENT 100-101 (2014).

¹⁴⁴ See generally Human Rights Council Res. A/HRC/WG.15/4/2 (Mar. 6, 2017) [hereinafter “Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas” or “Draft Declaration”].

¹⁴⁵ See INTRODUCTION *infra*.

¹⁴⁶ Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas *supra* n. 144.

¹⁴⁷ Human Rights Council Res. A/HRC/WG.15/4/2 (Oct. 11, 2012). See also Human Rights Council Res. A/HRC/RES/33/59 (Jul. 20, 2016).

¹⁴⁸ Draft Declaration on the Rights of Peasants and Other People Working in Rural Areas *supra* n. 144 at .

act as a strong foundation for countering the modern lacuna in the law on the rights of farmworkers.¹⁴⁹

2. ILO Programs

The ILO also has been proactive in revealing harmful conditions of employment that impede the pursuit of decent work for farmworkers. For example, the “Ship to Shore Rights Project” is an initiative funded by the European Union that seeks to rectify practices that lead to child labor, forced labor, and the systematic exploitation of migrant workers in Thailand’s seafood and fishing industries.¹⁵⁰ Through participation in with the Thai government and civil society organizations, the ILO has been able to measure the progress and compliance as the state begins to shift its policies into compliance with international standards.¹⁵¹ This program has especially encouraged the Thai government’s efforts to register undocumented workers and ensure that working conditions are appropriate.¹⁵²

III. CONCLUSION

As demonstrated above, the situation of farmworkers throughout the world is dire. The absence of protections in domestic, regional, and international law must be remedied through collaboration between non-governmental organizations, civil society groups, governments, and the farmworkers themselves. The production of the Draft Declaration highlights what is so missed by the farmworker community – a legal foundation upon which farmworkers, both documented and irregular, can base claims of ill treatment and systematic abuse by their

¹⁴⁹ *See generally id.*

¹⁵⁰ International Labour Organization, “Measuring progress towards decent work in Thai fishing and seafood industry,” (Mar. 7, 2018), [http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_619724/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_619724/lang-en/index.htm).

¹⁵¹ *Id.*

¹⁵² *Id.*

employers. Without the provision of this basis, migrant farmworkers will continue to remain voiceless in their own communities.