

The Migration of Women Domestic Workers from Sri Lanka: Protecting the Rights of Children Left Behind

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Remittances that flow from low-skilled labor migration are critical to many developing countries, yet these economic benefits can come at a high price. Roughly half of all migrant workers are women, many of whom are mothers who migrate without their families to perform domestic work abroad. This Article examines the impact of the large-scale migration of women from the Global South on the rights and well-being of the “children left behind.” Sri Lanka is used as a case study because it is numerically significant in its own right (one million Sri Lankan children are directly affected by this migration phenomenon) and provides insights into the challenges posed by these labor migration streams. The possible harms experienced by children left behind include disruption to family relations, diversion from education as children are pressured into domestic roles formerly discharged by the absent parent, psychosocial effects of loneliness and abandonment, and heightened risk of child labor or abuse from alternative carers. This Article analyzes how legal and regulatory frameworks can be leveraged to support the children left behind and minimize their exposure to potential harms. International law provides a dense network of norms that speak to the protection of children left behind, but the system often fails to achieve this goal because of the unwillingness of States to ratify relevant treaties or to implement them when they have been ratified. On the other hand, several domestic laws, policies, and practices offer examples of best practices that address key concerns. Some of these practices are directed to sending States, and others to receiving States, but most aim to improve the prospects of communication, visitation, or permanent reunion that allow children to maintain familial ties that are so essential to their healthy development, despite the migration of their family members.

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"The prolonged absence of migrant domestic workers negatively affects the family unity . . . and also often results in violations of the rights of their children who have remained in the country of origin."¹

1. Comm. on Migrant Workers, General Comment No. 1: Migrant Domestic Workers, para. 15, U.N. Doc CMW/C/GC/1 (Feb. 23, 2011).

Introduction

It has been widely argued that the rise of the large-scale labor migration of domestic workers is creating an unprecedented economic opportunity for developing countries. Yet, governments are now beginning to realize that their economies have become dependent on a form of migration that can come at a high price for the children left behind after a parent has emigrated. This Article examines the rights of children who remain after a parent has moved abroad as a migrant domestic worker, and discusses the mechanisms available best to protect them. The arguments are developed in the context of a case study on Sri Lanka, but we begin with a description of the broader context of migrant domestic workers and the problems generated for children who remain.

A. The Global Context of Migrant Domestic Work

Migration has been part of the human experience since time immemorial, and international migration has been a significant dimension of that phenomenon since the advent of modern transportation significantly reduced the physical and economic barriers to human mobility by sea and air.² Much international migration is fueled by the huge differences in human development across countries because, for many people in developing countries, “moving away from their home town or village can be the best—sometimes the only—option open to improve their life chances.”³ It is estimated that 3.2 percent of the world’s population, or 232 million people, currently reside outside the country of their nationality, while many more migrate internally within the borders of their own country.⁴

One migration stream that has received considerable recent attention is the rise of large-scale labor migration of domestic workers.⁵ Migrant domestic workers (MDWs) lie at the intersection of two larger groups: “migrant workers,” who are persons engaged in a remunerated activity outside the State of their nationality;⁶ and “domestic workers,” who are persons who perform work within an employment relationship in other people’s private homes.⁷ A typical MDW—usually a woman—is thus someone who migrates from her country of nationality to work in a private

2. Rafis Abazov, *Globalization of Migration: What the Modern World Can Learn from Nomadic Cultures*, L. UN CHRONICLE (Sept. 2013), <http://unchronicle.un.org/article/globalization-migration-what-modern-world-can-learn-nomadic-cultures/>.

3. Dep’t. of Econ. & Soc. Affairs, Population Div., International Migration Report 2013, tbls. 1.1, 1.3, U.N. Doc. ST/ESA/SER.A/346 (Dec. 1, 2013).

4. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2009: OVERCOMING BARRIERS—HUMAN MOBILITY AND DEVELOPMENT 21 (2009) [hereinafter UNDP 2009].

5. Piyasiri Wickramasekera, *Asian Labour Migration: Issues and Challenges in an Era of Globalization*, 57 INT’L MIGRATION PAPERS 8, 14 (2002).

6. Int’l 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. 3 [hereinafter ICRMW].

7. See General Comment No. 1, *supra* note 1, at para. 5.

home in another country, performing various tasks such as cooking, cleaning, and caring for children or the elderly.

Estimating the scale of MDWs globally is challenging because of the need for common definitions, reliable national data, and acceptable methods for aggregating them.⁸ It is possible to get some insight into the issue by considering the larger phenomenon of domestic workers generally. Credible estimates by the International Labour Organization (ILO), based on data from 117 countries, suggest that the size of the domestic work sector is large and growing.⁹ The ILO conservatively estimates that at least 52.6 million men and women were employed as domestic workers across the world in 2010, accounting for 3.6 percent of global wage employment.¹⁰ This was a fifty-eight percent increase on the number of domestic workers fifteen years prior, reflecting not only an upward trend in population and employment, but also a growing share of domestic workers as a percentage of total employment.¹¹

Domestic work is heavily gendered. Although some men are employed in private households—mostly as gardeners, chauffeurs, and security guards—women account for eighty-three percent of global domestic workers.¹² This makes domestic work a significant source of employment for women, who often face greater obstacles than men in finding paid work.¹³ This is also true in the Middle East—a region of special importance to this study—where sixty-three percent of the 2.1 million domestic workers are women,¹⁴ and one-in-five employed females are engaged as domestic workers.¹⁵ While these figures relate to domestic workers as a whole and not the subset of MDWs, the ILO has observed that “domestic work is closely interlinked with international migration.”¹⁶ Its data do not permit reliable estimates of the share of migrants among domestic workers, but country-specific examples show that it can be substantial.¹⁷

One of the reasons for the size and growth of MDWs is the encouragement given to this migration stream by many developing countries. Remittances sent home by migrant workers lead to greater investment in health, education, and small business,¹⁸ which has macroeconomic benefits in

8. INT'L LABOUR ORG., DOMESTIC WORKERS ACROSS THE WORLD: GLOBAL AND REGIONAL STATISTICS AND THE EXTENT OF LEGAL PROTECTION 8 (2013), http://www.ilo.org/wcmsp5/groups/public/-/dgreports/-/dcomm/-/publ/documents/publication/wcms_173363.pdf.

9. *Id.* at 19-39.

10. *Id.* at 2.

11. *Id.* at 24.

12. *Id.* at 19.

13. *Id.*

14. *Id.* at 20, Panel B.

15. *Id.*

16. *Id.* at 21.

17. *Id.* at 19-25.

18. DILIP RATHA ET AL., THE WORLD BANK, MIGRATION AND DEVELOPMENT BRIEF 23: MIGRATION AND REMITTANCES: RECENT DEVELOPMENTS AND OUTLOOK SPECIAL TOPIC: FORCED MIGRATION 6 (2014), <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1288990760745/MigrationandDevelopmentBrief23.pdf>.

their home country beyond the advantages that accrue to them as individuals.¹⁹ In 2014, officially recorded remittance flows to developing countries were projected to reach US\$435 billion, three times larger than the total amount of official development assistance (in other words, foreign aid).²⁰ The most populous countries receive the largest remittance flows in absolute terms,²¹ but smaller countries are more dependent on these external funds.²² Many developing countries are, therefore, heavily invested in generating and sustaining a stream of MDWs to countries that demand this type of low-skilled labor.

B. Sri Lanka as a Case Study

Sri Lanka offers a useful context in which to understand the impact of this migration phenomenon and is used as a case study in this Article. Sri Lanka is one of the main source countries for MDWs in the Middle East,²³ where visa and employment conditions are some of the most restrictive in the world and significantly limit the right of children to family unity.²⁴ It thus serves as a microcosm of many of the problems that arise for children left behind after their mothers migrate for employment abroad. Sri Lanka, however, is not unique in this respect: a recent study has identified similar issues in Eastern Europe, where migrant parents have left behind 100,000 children in Moldova and 200,000 in Ukraine.²⁵

Sri Lanka is a country of some 20.7 million people in the Indian Ocean, southeast of India.²⁶ In 2014, the United Nations Development Programme assessed the country as one of “high human development,” with a human development index of 0.75 (in a range 0–1), giving it a global ranking of seventy-three of 187 countries.²⁷ This signals significant pro-

19. *Id.*

20. *Id.* at 3.

21. Soutik Biswas, *Why India Remains Top of Remittances League*, BBC NEWS (Feb. 26, 2013), <http://www.bbc.com/news/world-asia-india-21570622>.

22. In 2013, remittances accounted for twenty percent or more of GDP in nine countries. The countries are: Tajikistan (forty-two percent), Kyrgyz Republic (thirty-two percent), Nepal (twenty-nine percent), Moldova (twenty-five percent), Lesotho (twenty-four percent), Samoa (twenty-four percent), Haiti (twenty-one percent), Armenia (twenty-one percent), and The Gambia (twenty percent). MIGRATION AND DEVELOPMENT BRIEF 23, *supra* note 18, at 5.

23. Gwenann S. Manseau, *Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East*, 2 HUM. RTS. L. COMMENT. 25, 26 (2006).

24. Nasra Shah, U.N. Secretariat, Department of Economic and Social Affairs, Population Division, *Restrictive Labour Immigration Policies in the Oil-Rich Gulf: Effectiveness and Implications for Sending Asian Countries*, UN/POP/EGM/2006/03, at 2 (May 5, 2006).

25. Liza Yanovich, *Children Left Behind: The Impact of Labor Migration in Moldova and Ukraine*, MIGRATION POL'Y INST. (Jan. 23, 2015), <http://www.migrationpolicy.org/article/children-left-behind-impact-labor-migration-moldova-and-ukraine>.

26. POPULATION REFERENCE BUREAU, 2014 WORLD POPULATION DATA SHEET 10 (2014), <http://www.prb.org/publications/datasheets/2014/2014-world-population-data-sheet.aspx>.

27. UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 2014: SUSTAINING HUMAN PROGRESS: REDUCING VULNERABILITIES AND BUILDING RESILIENCE 160–63, tbl. 1 (2014), <http://hdr.undp.org/sites/default/files/hdr14-report-en-1.pdf>.

gress over the past decades, but Sri Lanka is still very much a developing country.²⁸ Although it ranks well on some specific population health measures, the country is marked by low public expenditures on health as a percentage of GDP (ranking 173 of 187 countries) and on education (151 of 157 countries).²⁹ Sri Lanka's population remains largely rural—only fifteen percent live in urban centers³⁰—and agriculture accounts for nearly one-third of its labor force.³¹

The Sri Lankan Government has long encouraged the migration of domestic workers, with large-scale migration to the Middle East steadily increasing since the 1980s, “as part of a deliberate strategy to alleviate poverty, reduce unemployment, and generate access to hard currency.”³² Migrant labor is now considered the principal source of foreign exchange in Sri Lanka.³³ The World Bank has estimated that in 2014 Sri Lanka received some US\$7,036 million in official remittances, reflecting an exponential growth since the early 2000s.³⁴ This is equivalent to 9.6 percent of the country's GDP, eighty-six percent of its foreign reserves, and fifty percent of its imports,³⁵ underpinning the claim that, financially, MDWs have been one of Sri Lanka's most successful exports.³⁶ When account is also taken of the large sums of money sent to Sri Lanka through informal channels, the significance of foreign employment to the Sri Lankan economy cannot be gainsaid.³⁷

It is estimated that the stock of Sri Lankans working abroad across all sectors exceeds 1.7 million people, with over 282,000 departing in 2012 alone—the highest number of annual departures on record since 1986.³⁸ There are clear demographic patterns to this migration stream.

- With respect to *gender*, for over two decades (1988-2007) the number of female departures for foreign employment greatly exceeded the number

28. *Id.* at 165 (tbl. 2). In 1980, Sri Lanka's HDI was 0.569.

29. *Id.* at 189 (tbl. 8); 193 (tbl. 9).

30. THE WORLD BANK, SRI LANKA: IMPROVING THE RURAL AND INVESTMENT CLIMATE EI (2005), <http://www.adb.org/sites/default/files/publication/30216/sri-lanka-rural-urban-investment-climate.pdf>.

31. *Id.* at 4.

32. Elizabeth Frantz, *Jordan's Unfree Workforce: State-Sponsored Bonded Labour in the Arab Region*, 49 J. DEV. STUD. 1072, 1075 (2013).

33. See SAMAN KELEGAMA, ECONOMIC POLICY IN SRI LANKA: ISSUES AND DEBATES 300 (2004); Message from Hon. Thalatha Atukorale, Minister of Foreign Employment, <http://www.foreignemploymin.gov.lk/about-us.php?lg=EN#mm>.

34. WORLD BANK, ANNUAL REMITTANCE DATA: INFLOWS, http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1288990760745/RemittanceData_Inflows_Apr2015.xls (last updated Apr. 2015).

35. *Id.* RATHA, *supra* note 18, at 10.

36. Frantz, *supra* note 32, at 1076.

37. Comm. on the Protection of the Rights of All Migrant Workers & Members of Their Families, Concluding Observations: Sri Lanka, 11th Sess., ¶¶ 35-36, U.N. Doc. CMW/C/LKA/CO/1 (Dec. 14, 2009).

38. SRI LANKA BUREAU OF FOREIGN EMPLOYMENT, ANNUAL STATISTICAL REPORT OF FOREIGN EMPLOYMENT 3 (2012), <http://www.slbfe.lk/page.php?LID=1&MID=54>; SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, MIGRATION PROFILE: SRI LANKA 13 (2013), http://www.ips.lk/ips_migration/publication/migration_profile/migration_profile_ips.pdf.

of male departures (in the early 1990s there were approximately three female departures for every male departure), giving Sri Lanka one of the highest rates of female migration per capita in the world.³⁹ Over the past few years, the gender composition of emigrants has returned to near-parity.⁴⁰

- With respect to *age*, fifty-nine percent of Sri Lankan women migrate before the age of thirty-five, and are thus of “reproductive, child bearing and child caring age.”⁴¹ As noted by the U.N. Committee on the Rights of the Child in 2010, most of the more than one million women migrants from Sri Lanka leave behind children, half of whom are under six years old.⁴²
- With respect to *occupation*, forty-two percent of all departing migrant workers in 2012 fell in the category of “housemaids” (119,052 of 282,331 departures).⁴³ This is a smaller proportion than previous years because there has been a steady rise over time in the number of male migrant workers, who are employed in other sectors.⁴⁴ Domestic work, however, still accounts for the lion’s share of women’s foreign employment. Of the 138,547 departing female migrants in 2012, eighty-six percent were housemaids, signaling the overwhelming domestic nature of the low-skilled work performed by female labor migrants from Sri Lanka.⁴⁵
- With respect to *destination*, ninety-three percent of Sri Lanka’s migrant workers are employed in the Middle East, primarily in four destination countries—Saudi Arabia, Qatar, Kuwait, and the United Arab Emirates (UAE).⁴⁶ This tight geographic locus is reflected in the origin of remittances, which come predominantly from the six Gulf Cooperation Council (GCC) countries (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE) and other countries in the Middle East.⁴⁷

As with all migrant workers, intersecting factors drive Sri Lankan women to leave their families for low-skilled jobs overseas. These include family poverty, unemployment and underemployment, a desire to access better healthcare and education for their families, and the need to repay debts.⁴⁸ Women in Sri Lanka have a significantly higher unemployment rate than

39. Frantz, *supra* note 32, at 1076.

40. For a detailed breakdown, see SRI LANKA BUREAU OF FOREIGN EMPLOYMENT, *supra* note 38, at tbl. 11.

41. INT’L LABOUR ORG., REINTEGRATION WITH HOME COMMUNITY: PERSPECTIVES OF RETURNEE MIGRANT WORKERS IN SRI LANKA 10 (2013) [hereinafter REINTEGRATION WITH HOME COMMUNITY], http://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/--ilo-colombo/documents/publication/wcms_233365.pdf.

42. Comm. on the Rights of the Child, Concluding Observations: Sri Lanka, ¶ 44, U.N. Doc. CRC/C/LKA/CO/3-4 (Oct. 19, 2010).

43. SRI LANKA BUREAU OF FOREIGN EMPLOYMENT, *supra* note 38, at 7, tbl. 3.

44. *Id.*

45. *Id.* at 3, tbl. 1.

46. *Id.* at 19, tbl. 10.

47. Andrzej Kapisewski, U.N. Secretariat, Dep’t of Econ. and Soc. Affairs, Population Div., *Arab Versus Asian Migrant Workers in the GCC Countries*, UN/POP/EGM/2006/02 (May 22, 2006).

48. Stuart Rosewarne, *Temporary International Labor Migration and Development in South and Southeast Asia*, 18 FEM. ECON. 63, 71 (2012); NICOLA PIPER, CONTRIBUTIONS OF MIGRANT DOMESTIC WORKERS TO SUSTAINABLE DEVELOPMENT 15 (2013), <http://asiapacific.unwomen.org/-/media/7148BD87A4F7412D8CBD10482146276F.ashx>.

men (6.4 percent compared to 2.8 percent) and labor force participation of women is less than half the rate of men (34.7 percent compared to 74.4 percent).⁴⁹ With a rising cost of living, many low-skilled women see no alternative but to migrate to support their families.⁵⁰ In a 2007 study of Sri Lankan MDWs in the Middle East, nearly all “cited financial necessity as a reason for their decision to migrate and said they had no option other than to migrate for work.”⁵¹ Having typically lower levels of education than men,⁵² these low-skilled women are not only hindered in their ability to source employment within Sri Lanka,⁵³ but are often ineligible for alternative migration streams such as skilled or student migration.

C. The Impact of Maternal Migration on Children Left Behind

The economic benefits of migration often come at a social price. The women who migrate for domestic work tend to be of childbearing age. Many already have children, but visa restrictions in the receiving country generally do not permit children to travel abroad with their mothers.⁵⁴ The rapid growth in low-skilled female labor migration thus has significant implications for families in developing countries, giving rise to a “deprived generation” of young people in all major source countries.⁵⁵

The harms experienced by children left behind include disruption to family relations, diversion from education as children are pressured into domestic roles formerly discharged by the absent parent, psychosocial effects of loneliness and abandonment, and a heightened risk of child labor or abuse from alternative carers.⁵⁶ A study commissioned by the Sri Lankan Government on the psychosocial issues arising from labor migration noted that a mother’s migration for two or more years seriously affected a child’s personality development.⁵⁷ Another study of 400 children found that “the love, attention and proximity of the mother were not replaced by even the best caregivers” in the estimation of the children, with seventy-seven percent experiencing loneliness due to the absence of the mother.⁵⁸

49. DEPARTMENT OF CENSUS AND STATISTICS, SRI LANKA LABOUR FORCE SURVEY: QUARTERLY REPORT 2013 FOURTH QUARTER 1-3 (2013), http://www.statistics.gov.lk/sample_survey/2013q4report.pdf.

50. HUMAN RIGHTS WATCH, EXPORTED AND EXPOSED: ABUSES AGAINST SRI LANKAN DOMESTIC WORKERS IN SAUDI ARABIA, KUWAIT, LEBANON, AND THE UNITED ARAB EMIRATES 12 (2007) (ebook).

51. *Id.* at 1, 12.

52. *Id.* at 14-15.

53. See PIPER, *supra* note 48, at 29.

54. *Id.*

55. *Id.*

56. *Id.* S. T. HETTIGE ET AL., UNDERSTANDING PSYCHOLOGICAL ISSUES FACED BY MIGRANT WORKERS AND THEIR FAMILIES 20 (2012) (ebook).

57. See HETTIGE, *supra* note 56, at 20.

58. SAVE THE CHILDREN IN SRI LANKA AND KISHALI PINTO-JAYAWARDENA, LEFT BEHIND, LEFT OUT: THE IMPACT ON CHILDREN AND FAMILIES OF MOTHERS MIGRATING FOR WORK ABROAD 16 (2006) (ebook) [hereinafter PINTO-JAYAWARDENA].

Similar views about the social costs of labor migration can be heard from both mothers and children. From the viewpoint of mothers, it is telling that in a Sri Lankan survey of 400 families of female MDWs in 2008, almost half the mothers said they would advise other Sri Lankan women against working overseas.⁵⁹ The reasons they gave were that the social costs outweighed the economic benefits, children needed their mothers, and family disruption was a big cost, as was the suffering experienced abroad because of separation from children.⁶⁰ From the viewpoint of children, consultations in high labor migration provinces in Sri Lanka in 2013 identified that one of the top seven priorities for children is not having their mothers migrate.⁶¹ As the report stated, “[m]any children expressed that being with their mother and enjoying her love and affection is far more important than the wealth from abroad.”⁶² In a similar vein, the study of 400 Sri Lankan households in 2008 found that despite recognizing that their mother’s sacrifice was for the collective interest of the family, and despite the efforts of their mothers to communicate with and visit their children regularly, children still wanted their mothers to return.⁶³

Undeniably, such issues can arise from *any* parental migration, but country studies suggest, on theoretical and empirical grounds, that children are more likely to be adversely impacted when their mothers migrate⁶⁴ and that maternal absence is more detrimental than paternal absence.⁶⁵ This is because, if the mother is present in the household, she will generally be the primary caregiver, which “closely reflects the general pattern of care giving of children across Sri Lanka and in most Asian countries.”⁶⁶ Despite the fact that the extended family structure in Sri Lanka offers “ample opportunities for a child to develop stable, warm relationships with other family members,” research also shows that “the child’s relationship with the mother remains a very special one and that long-term separations from the mother could result in some emotional deprivation.”⁶⁷ Studies from the Philippines demonstrate that the adverse impact of maternal migration on children is often associated with “distress migra-

59. See Swarna Ukwatta, *Sri Lankan Female Domestic Workers Overseas: Mothering their Children from a Distance*, 27 J. POP. RES. 102, 122 (2010) (ebook).

60. *Id.*

61. SAVE THE CHILDREN, ‘THE WORLD WE WANT’: CONSULTATIONS WITH SRI LANKAN CHILDREN ON THEIR PRIORITIES FOR POST 2015 5-10, 19-25 (2013) (ebook).

62. *Id.* at 20.

63. See Ukwatta, *supra* note 59, at 120.

64. See David Cox, *Children of Migrant Workers—A Family Relationship Issue*, in *CHILDREN AND MIGRATION: A NEW CHALLENGE FOR WORLD-WIDE SOCIAL SERVICES* 55, 57 (Graziano Battistella & Cecilia Conaco eds., 1990).

65. See generally Aree Jampaklay, *Parental Absence and Children’s School Enrolment: Evidence from a Longitudinal Study in Kanchanaburi, Thailand*, 2 *ASIAN POP. STUD.* 93 (2006).

66. KUSALA WETTASINGHE ET AL., *ALTERNATIVE CARE GIVING OF MIGRANT WORKERS’ CHILDREN* 32 (2012) (ebook). For similar social structures have been observed in Eastern Europe, see Yanovich, *supra* note 25.

67. Swarna Jayaweera & Malsiri Dias, *Sri Lanka: Gender Roles and Support Networks of Spouses of Migrant Workers*, in *GENDER AND LABOUR MIGRATION IN ASIA* 43, 48-49 (Int’l Org. for Migration ed., 2009).

tion,” namely, the migration of mothers from poorer households for employment abroad in the lower-paid and largely unprotected domestic work sector.⁶⁸ In consequence, government programs that encourage remittances by promoting the migration of women for low-skilled domestic work abroad challenge the human rights principle that, in actions concerning children, “the best interests of the child shall be a primary consideration.”⁶⁹

It needs to be acknowledged that maternal migration does not *necessarily* impact adversely on children left behind—in some instances the well-being of children may be enhanced by their mother’s employment abroad. Some studies have shown that financial resources from remittances can result in increased schooling, improved child health, and reduced child labor among poor families.⁷⁰ Nevertheless, children’s vulnerability generally stems from their age and their related stages of emotional, psychological, and physical development.⁷¹ For each child, the effect of separation from their mother, who is often their primary caregiver, will vary according to the presence or absence of protective factors that contribute to a child’s resilience, specific care arrangements, and the support given to their carers.⁷²

The need to consider individual circumstances when assessing risk to children left behind is reflected in the conceptual framework adopted in a UNICEF-commissioned study on the impact of labor migration on children in Tajikistan.⁷³ It recognizes characteristics of individuals (age, gender, and ability), households (size, structure, division of roles, education levels, labor capacity, income, and attitudes), and the broader social context (livelihood options, societal values, and service provision) as key factors affecting the impact of parental migration.⁷⁴ It also identifies elements of the migration experience that affect outcomes for the child, such as remittance levels, duration and frequency of migration, and level of communication

68. CHAMPSEA PHILIPPINES, *IN THE WAKE OF PARENTAL MIGRATION: HEALTH AND WELL-BEING IMPACTS ON FILIPINO CHILDREN* 37 (2011) (ebook).

69. Convention on the Rights of the Child art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

70. Graziano Battistella & Cecilia Conaco, *The Impact of Labour Migration on the Children Left Behind: A Study of Elementary School Children in the Philippines*, 13 SOJOURN: J. SOC. ISSUES IN SE. ASIA 220 (1998); OXFORD POLICY MANAGEMENT, *IMPACT OF LABOUR MIGRATION ON ‘CHILDREN LEFT BEHIND’ IN TAJIKISTAN* (2011) (ebook); PABLO ACOSTA, *LABOR SUPPLY, SCHOOL ATTENDANCE, AND REMITTANCES FROM INTERNATIONAL MIGRATION: THE CASE OF EL SALVADOR*, POLICY RESEARCH WORKING PAPER 3903 (2006) (ebook). See generally FRANCISCA ANTMAN, *THE IMPACT OF MIGRATION ON FAMILY LEFT BEHIND* 8 (2012) (ebook).

71. See generally Comm. on the Rights of the Child, General Comment No. 7: Implementing Child Rights in Early Childhood, ¶¶ 17–18, U.N. Doc CRC/C/GC/7/Rev.1 (Sept. 20, 2006) [hereinafter General Comment No. 7]; OXFORD POLICY MANAGEMENT, *supra* note 70.

72. See generally OXFORD POLICY MANAGEMENT, *supra* note 70. See generally WET-TASINGHE, *supra* note 66.

73. OXFORD POLICY MANAGEMENT, *supra* note 70.

74. *Id.* at ix.

with the parent abroad.⁷⁵ Similar factors were identified in the Child Health and Migrant Parents in South-East Asia (CHAMPSEA) study of children under twelve years of age conducted in the Philippines, Indonesia, Thailand, and Vietnam between 2008 and 2010.⁷⁶

A child's age at the time of a parent's migration is a significant consideration, given the different needs of infants, young children, and adolescents. The U.N. Committee on the Rights of the Child has defined young children as those under eight years of age and recognized that "[y]oung children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation."⁷⁷ Harvard University's Center on the Developing Child has found that significant adversity can impair development, particularly in the first three years, and can have a lifelong and "cumulative toll on an individual's physical and mental health."⁷⁸ Adversity can include prolonged separation from a mother (likely to be the child's primary source of attachment) during infancy and early childhood,⁷⁹ which are critically formative stages of development in which strong physical and emotional nurturing is necessary for a child's healthy growth and long-term well-being.⁸⁰

Another factor affecting the impact of maternal migration is the extent to which children are actively involved in discussions about the proposed migration. An ILO study of 2,000 returnee migrant workers in Sri Lanka, of whom seventy-six percent were women, found that only ten percent involved their children in discussions about employment abroad prior to migrating.⁸¹ The study noted that lack of communication can lead to children feeling neglected and abandoned, resulting in frustration and possible anti-social behavior.⁸² Other studies confirm that children are rarely consulted and sometimes not even informed when their mothers migrate for an extended period, which can leave children "bewildered, confused, and very distressed," with only their own interpretations as to why their mother left, which often focus on self-blame.⁸³ Child rights organizations have thus recommended that parents and alternative care givers in Sri Lanka be educated about involving children in decision-making about parental migration and care arrangements, enhancing their understanding and preparation for separation from their parent.⁸⁴

75. *Id.*

76. CHAMPSEA, *supra* note 68, at 2-4.

77. General Comment No. 7, *supra* note 71, ¶ 18.

78. CENTER ON THE DEVELOPING CHILD, IN BRIEF: THE IMPACT OF EARLY ADVERSITY ON CHILDREN'S DEVELOPMENT 2, <http://developingchild.harvard.edu/wp-content/uploads/2015/05/inbrief-adversity-1.pdf>.

79. WETTASINGHE, *supra* note 66, at 93.

80. PINTO-JAYAWARDENA, *supra* note 58, at 10.

81. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at 12.

82. *Id.* at 12.

83. HETTIGE, *supra* note 56, at 30-31.

84. WETTASINGHE, *supra* note 66, at 9. This type of involvement by children is in line with the principle established in Article 12(1) of the Convention on the Rights of the

Studies also recognize the important role of the extended family, with a study from the Philippines finding that the extent of disruption to the development of children left behind “depends mostly on the degree of involvement of the extended family in complementing what is lacking due to parental absence.”⁸⁵ A Sri Lankan study also found that extended families and grandparents protected children by helping them to cope with the effects of their mother’s migration.⁸⁶

In summary, the adverse impacts of maternal migration on children left behind have been corroborated by numerous studies in different localities, at different periods of time, and using different research methodologies. They confirm what seems self-evident to many, namely the vulnerability of children, particularly the young, to disruptions in their physical and emotional attachments to intimate caregivers. Harm, however, is not a universal experience of children left behind, and the nature and degree of any detriment will depend on the individual circumstances in which they are placed.

D. Structure of This Article

The principal purpose of this Article is to examine the human rights of children who have been left behind after their mothers have migrated to perform domestic work abroad, and to consider how legal and regulatory frameworks can be used best to protect those rights. As will be seen, some problems arise—and need to be solved—in sending States; others require action in receiving States; while still others necessitate change in both locations.

To this end, Part I examines the legal and policy frameworks that govern the rights of children left behind. International law provides a dense network of norms that speak to the protection of all children. At the domestic level, constitutional law, national legislation, and government policies provide additional contexts for protecting these rights. Part II considers the children’s rights that are most impacted by conduct occurring in the *sending* State. These include the rights to family unity, education, and health, and the right to be free from child labor and abuse. Part III examines the children’s rights that are most impacted by conduct occurring in *receiving* States, although the effects are felt in sending States where the children are left behind. In this context, the impact on the children left behind is derivative in the sense that it is the violation of the human rights of migrant workers themselves that may impact adversely on their children left behind. Examples include restrictions on the ability of migrant mothers to communicate, visit, or reunite with their sons and daughters.

Child, namely, that children who are capable of forming their own views have the right to express their views freely in matters that affect them, and that those views should be given due weight in accordance with their age and maturity.

85. Battistella & Conaco, *supra* note 70, at 237–38.

86. B.C.V. Senaratna, H. Perera & P. Fonseka, *Mental Health Status and Risk Factors for Mental Health Problems in Left-Behind Children of Women Migrant Workers in Sri Lanka*, 56 CEYLON MED. J. 153, 157 (2011).

The derivative nature of these claims arises from the circumstance that human rights generally operate on a territorial basis,⁸⁷ and the children relevant to this study are, by definition, outside the territory of the receiving State.

Part IV examines the ways in which international law and institutions can be utilized to advance the rights of children left behind by MDWs. The United Nations system often fails to achieve its proclaimed objectives because of the unwillingness of States to ratify relevant treaties or to implement them when they have been ratified. Nevertheless, a number of States have adopted domestic practices that address concerns raised in this Article, and these form best practice models that are addressed in Part V. Among the noteworthy practices of receiving States, we consider those that promote reunification of migrant families through permanent resettlement (such as Canada's Caregiver Program), and those that encourage circular migration as a means of balancing the labor demands of receiving States with the human needs of migrants and their families. Among the noteworthy practices of sending States, we consider the leverage exerted by States such as the Philippines in bilateral negotiations with receiving States; and longer-term measures to convert low-skilled migration streams (such as domestic work) into skilled streams (such as nursing), where the risks of human rights violations are much reduced. Promising sites for future developments are the regional consultative processes that include labor sending and receiving States.

I. The Legal and Policy Framework

A. International Law

1. *International Bill of Rights*

The fundamental position of the family is enshrined in international human rights law. What is commonly referred to as the International Bill of Rights—the Universal Declaration of Human Rights (1948) (UDHR), the International Covenant on Civil and Political Rights (1966) (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR)—identify the family as being “the natural and fundamental group unit of society.”⁸⁸ Article 16(3) of the UDHR and Article 23(1) of

87. Article 2(1) of the International Covenant on Civil and Political Rights stipulates that each State Party undertakes to respect and ensure the Covenant rights “to all individuals within its territory and subject to its jurisdiction.” The final words suggest that States must also respect human rights extraterritorially if a person is nevertheless subject to the State's effective control, but they do not create obligations for States where there is neither territoriality nor control. See DANIEL MOECKLI ET AL., *INTERNATIONAL HUMAN RIGHTS LAW* 129–38 (2nd ed. 2014); Ralph Wilde, *Legal ‘Black Hole’? Extraterritorial State Action and International Treaty Law on Civil and Political Rights*, 26 *MICH. J. INT'L L.* 739 (2005).

88. Int'l Covenant on Civil and Political Rights art. 23(1), Dec. 16, 1966, 999 U.N.T.S. 179 [hereinafter ICCPR]; Int'l Covenant on Economic, Social and Cultural Rights art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 7 [hereinafter ICESCR]; Universal Declaration of Human Rights art. 16(3), G.A. Res. 217 (III) A, UN Doc A/RES/217(III) (Dec. 10,

the ICCPR recognize that the family unit is "entitled to protection by society and the State,"⁸⁹ while Article 10(1) of the ICESCR states that the family should be accorded the widest possible protection and assistance, "particularly for its establishment and while it is responsible for the care and education of dependent children."⁹⁰ In explicating the rights of the family, the U.N. Human Rights Committee has stated that:

The right to found a family implies, in principle, the possibility to procreate and live together . . . the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.⁹¹

The special needs of children are also recognized in Article 25(2) of the UDHR, which specifies that "[m]otherhood and childhood are entitled to special care and assistance,"⁹² and in Article 24(1) of the ICCPR, which states that "[e]very child shall have . . . the right to such measures of protection as are required by his status as a minor."⁹³ In interpreting the rights of the child under the ICCPR, the U.N. Human Rights Committee has recognized that "[r]esponsibility for guaranteeing children the necessary protection lies with the family, society and the State," and while the Committee primarily allocates this responsibility to the family (particularly the parents), it indicates the importance of States being held accountable for "how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child."⁹⁴ Article 10(3) of the ICESCR also recognizes the need for special measures of protection and assistance to be taken on behalf of children and young people, which include being "protected from economic and social exploitation."⁹⁵ A child's right to education is embodied in Article 13 of this Covenant.⁹⁶ These specific rights are discussed further in Part II.

Not all States that are net receivers of labor from Sri Lanka are parties to the two International Covenants (see Table 1), but many of their core provisions are also found in the UDHR, which generally binds all States as a matter of customary international law.⁹⁷

1948) [hereinafter UDHR]. The two Covenants have been widely adopted, with 168 and 163 State parties, respectively.

89. UDHR, *supra* note 88; ICCPR, *supra* note 88.

90. ICESCR, *supra* note 88.

91. Human Rights Comm., General Comment No. 19: Protection of the Family, the Right to Marriage and the Equality of the Spouses (Art. 23), ¶ 5, U.N. Doc. HRI/GEN/1/Rev.1 (July 27, 1990).

92. UDHR, *supra* note 88, at art. 25(2).

93. ICCPR *supra* note 88, at art. 24(1).

94. Human Rights Comm., General Comment No 17: Rights of the Child (Art. 24), ¶ 6, U.N. Doc. HRI/GEN/1/Rev.6 (Apr. 7, 1989).

95. ICESCR, *supra* note 88, at art. 10(3).

96. *Id.* at art. 13.

97. John Humphrey, *The Universal Declaration of Human Rights: Its History, Impact, and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21 (B.G. Ramcharan ed., 1979).

2. *Specialized Conventions*

The International Bill of Rights is complemented by three specialized conventions of particular relevance to the children of MDWs: the Convention on the Elimination of All Forms of Discrimination against Women (1979) (CEDAW), the Convention on the Rights of the Child (1989) (CRC), and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) (ICRMW).⁹⁸ As explained by the U.N. Committee on the Rights of the Child, these specialized conventions operate in conjunction with the other major human rights treaties given the “indivisibility and interdependence” of the human rights specified in each instrument.⁹⁹ Together, they provide an internationally accepted set of norms to guide State practice in protecting the rights of children who are most at risk of harm. The ratification status of these specialized conventions is set out for relevant States in Table 1.

These norms include the principle that the best interests of the child must be a primary consideration in all actions and decision-making concerning children, that States should take “appropriate measures to ensure the protection of the unity of the families of migrant workers,” and (in recognizing the common responsibility of women and men in the upbringing and development of their children) that it be “understood that the interest of the children is the primordial consideration in all cases.”¹⁰⁰ Oftentimes, these specialized conventions do not establish new rights for the children of MDWs, but restate standards established in the International Bill of Rights, serving to “codify and elaborate on the specificities of application of international human rights law to these vulnerable categories”—children, women, and migrant workers.¹⁰¹

The specialized human rights treaties have attracted very different levels of support from States through ratification and implementation. CEDAW and the CRC have been ratified by nearly the entire international community (188 and 195 States Parties respectively),¹⁰² whereas the ICRMW has only forty-seven States Parties, most of which are source countries and thus not the States in which migrant protection is most keenly needed.¹⁰³ Thus, the U.N. Committee on Migrant Workers has commented that the fact that many countries employing Sri Lankan migrant

98. ICRMW, *supra* note 6, at art. 1(2); CRC, *supra* note 69, at art. 3(1); Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

99. Comm. on the Rights of the Child, General Comment No. 5: General Measures of Implementation of the Convention on the Rights of the Child, ¶ 17 & Annex 1, UN Doc CRC/GC/2003/5 (Nov. 27, 2003) [hereinafter General Comment No. 5].

100. ICRMW, *supra* note 6, at art. 44; CRC, *supra* note 69, at art. 3; CEDAW, *supra* note 98, at art. 5(b).

101. KRISTINA TOUZENIS & ALICE SIRONI, CURRENT CHALLENGES IN THE IMPLEMENTATION OF THE UN INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES 7 (2013), [http://www.euro.parl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROL_ET\(2013\)433715_EN.pdf](http://www.euro.parl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROL_ET(2013)433715_EN.pdf).

102. See CEDAW, *supra* note 98; CRC, *supra* note 69.

103. For a list of signatories, see ICRMW, *supra* note 6.

workers are not yet parties to the ICRMW is an obstacle to the enjoyment by those workers of their rights under the Convention.¹⁰⁴ The different attitudes of States towards the ICRMW highlight the imbalance between labor-sending and labor-receiving countries in the commitment to the rights of migrant workers.

Reasons for the failure of States to ratify the ICRMW include its breadth and complexity, the financial obligations it places on States, the view that it contradicts or adds no value to existing national migration laws, and concerns (not always justified) that it grants to migrants (particularly those with irregular status) rights that do not exist in other human rights treaties.¹⁰⁵ Additionally, some source countries fear their workers will become less attractive if they ratify or implement the ICRMW, and that they may thus lose labor markets to non-ratifying source countries.¹⁰⁶ Despite this, an increasing number of States Parties to the ICRMW are now transit or destination countries—such as Argentina, Azerbaijan, Egypt, Libya, Mauritania, Mexico, Morocco, Senegal, and Turkey—reflecting changing patterns of labor migration and treaty ratification.¹⁰⁷ The effectiveness of the ICRMW is further constrained by the circumstance that its individual complaints mechanism has not yet entered into force, although this mechanism, even when operative, is advisory only and not binding on States Parties.¹⁰⁸ This highlights the need to explore other legal, regulatory, and policy measures that could assist in protecting the rights of children left behind, as discussed in Part V below.

Limitations on the efficacy of the ICRMW underpin the continuing importance of the rights articulated in CEDAW and the CRC, and their difficult interrelationship. Importantly, Article 11(1)(c) of CEDAW specifies the right of women to free choice of employment, which includes migrating for work, highlighting that the interests and priorities of women and children are not always the same and that measures taken in compliance with the CRC and CEDAW may not always align.¹⁰⁹ Jacqueline Bhabha identifies the risk in grouping the needs of women and children together when they may differ or even compete, stating that “[w]hereas

104. Concluding Observations: Sri Lanka, *supra* note 37.

105. INT’L ORG. FOR MIGRATION, WORLD MIGRATION REPORT 2010: THE FUTURE OF MIGRATION—BUILDING CAPACITIES FOR CHANGE 22 (2010), http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf.

106. Nicola Piper, *Obstacles to, and Opportunities for, Ratification of the ICRMW in Asia*, in MIGRATION AND HUMAN RIGHTS: THE UNITED NATIONS CONVENTION ON MIGRANT WORKERS’ RIGHTS 171, 178 (Ryszard Cholewinski et al. eds., 2009).

107. See Office of the High Comm’r for Hum. Rts., *About the Campaign*, THE GLOBAL CAMPAIGN FOR RATIFICATION OF THE CONVENTION ON RIGHTS OF MIGRANTS, www.migrantsrights.org/campaign.htm (last visited Oct. 13, 2015).

108. The same is true of individual complaints mechanisms under other human rights treaties. See discussion *infra* Part IV and G.A. Res. 66/138, U.N. Doc. A/RES/66/138, Optional Protocol to the Convention on the Rights of the Child on Communications Procedure art. 11 ¶ 1 (Dec. 19, 2011) [hereinafter CRC Optional Protocol], which requires States Parties only to “give due consideration” to the “recommendations” of the Committee on the Rights of the Child.

109. Compare CEDAW, *supra* note 98, at art. 11(1)(c) with CRC, *supra* note 69.

children, particularly young children, need protection and the exercise of 'best interest' judgments by adult decision makers . . . women need an environment that enables them to act autonomously and independently."¹¹⁰ Yet governments frequently link the needs of the two groups, symbolized in Sri Lanka's Ministry of Child Development and Women's Empowerment, where responsibility for advancing women's and children's rights are vested in the one Ministry.¹¹¹

3. *International Labor Law*

International labor law provides an additional body of principles that regulate aspects of migrant domestic labor. Legally binding conventions promulgated by the ILO include those concerned with the protection of migrant workers (Nos. 97 and 143) and the Convention concerning Decent Work for Domestic Workers (No. 189).¹¹² For example, Article 13 of Convention No. 143 requires each member State to take all necessary measures to facilitate the reunification of the families of migrant workers legally residing in its territory.¹¹³ The ratification, however, of these ILO conventions is weak.¹¹⁴ Significantly, no GCC country has ratified any of the three conventions, nor has Sri Lanka.¹¹⁵

The three conventions are accompanied by non-binding recommendations (Nos. 86, 151, and 201 respectively).¹¹⁶ Recommendation No. 151

110. Jacqueline Bhabha, *Women, Children and other Marginalised Migrant Groups*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 205, 209 (Brian Opeskin, Richard Peruchoud & Jillyanne Redpath-Cross eds., 2012).

111. PINTO-JAYAWARDENA, *supra* note 58, at vii.

112. See Int'l Labour Org., Convention Concerning Decent Work for Domestic Workers, June 16, 2011, I.L.O. No. 189, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEX_PUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312288:NO; Int'l Labour Org., Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, I.L.O. No. 143, 1120 U.N.T.S. 323 [hereinafter Migrant Workers (Supplementary Provisions) Convention]; Int'l Labour Org., Convention Concerning Migration for Employment (Revised), July 1, 1949, I.L.O. No. 97, 120 U.N.T.S. 71.

113. Migrant Workers (Supplementary Provisions) Convention, *supra* note 112, at art. 13.

114. The numbers of ratifications are: forty-nine, twenty-three, and twenty-two, respectively. See *Ratifications of C097—Migration for Employment Convention (Revised), 1949 (No. 97)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (last visited Oct. 13, 2015); *Ratifications of C143—Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)*, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288 (last visited Oct. 13, 2015); *Ratifications of C189—Domestic Workers Convention, 2011 (No. 189)*, INT'L LABOUR ORG., [hereinafter Domestic Workers Recommendation] http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460 (last visited Oct. 13, 2015).

115. See *Ratifications of C097*, *supra* note 114; *Ratifications of C143*, *supra* note 114; Domestic Workers Recommendation, *supra* note 114.

116. *Migration for Employment Recommendation (Revised), Jul. 1, 1949*, I.L.O. No. R086, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312424:NO; *Recommendation Concerning Migrant Workers, June 28, 1975*, I.L.O. No. R151, INT'L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312489:NO; *Domestic Workers Recommendation, June 16, 2011*, I.L.O.

explicitly provides for the reunification of families, stating in Article 13(1) that “[a]ll possible measures should be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible.”¹¹⁷ It also states in Article 17 that a migrant worker who has been employed in another country for at least one year should be entitled to visit the country where his or her family resides without loss of rights, or to be visited by his or her family for an equivalent period.¹¹⁸ Article 5(2)(a) of Recommendation No. 201 provides that the working hours of domestic workers under the age of eighteen years should be strictly limited to ensure adequate time for family contact.¹¹⁹ More generally, Article 25(1)(c) of Recommendation No. 201 specifies that member States should establish policies and programs to ensure that the rights of domestic workers are taken into account in relation to “general efforts to reconcile work and family responsibilities.”

Beyond the conventions and recommendations, the ILO’s Multilateral Framework on Labour Migration provides a “soft-law” instrument and policy tool to guide States in developing measures to protect migrant workers.¹²⁰ While its principles are only hortatory, the Framework recognizes the importance of research on the impact of out-migration on source countries, and encourages States to facilitate the movement of migrant workers between their home country and the country of employment for the purpose of maintaining family and social ties.¹²¹

An ongoing concern of international labor law is the elimination of child labor, which has been regulated by treaty since the interwar years and has been bolstered more recently by the widely-ratified Worst Forms of Child Labour Convention (ILO No. 182).¹²² Child labor generally stems from poverty rather than the migration status of parents, and it is therefore not unique to the children of MDWs.¹²³ In the absence of their mothers, however, some children (particularly girls) are at risk of being required to take on “adult work,” including extensive domestic responsibilities, to the

No. R201, INT’L LABOUR ORG., http://www.ilo.org/dyn/normlex/en/?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:2551502:NO.

117. *Recommendation Concerning Migrant Workers*, *supra* note 116, ¶ 13(1).

118. *See id.* ¶ 17.

119. *Domestic Workers Recommendation*, *supra* note 114, ¶ 123.

120. Ryszard Cholewinski, *International Labour Migration*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 283, 284 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012). *See* INT’L LABOUR ORG., PROTECTING THE RIGHTS OF MIGRANT WORKERS: A SHARED RESPONSIBILITY ¶ iii (2009), http://www.ilo.org/wcmsp5/groups/public/--ed_protect/--protrav/--migrant/documents/publication/wcms_180060.pdf.

121. INT’L LABOUR ORG., ILO MULTILATERAL FRAMEWORK ON LABOUR MIGRATION: NON-BINDING PRINCIPLES AND GUIDELINES FOR A RIGHTS-BASED APPROACH TO LABOUR MIGRATION ¶ 3.3, ¶ 12.9 (2006) [hereinafter ILO MULTILATERAL FRAMEWORK], http://www.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/documents/publication/wcms_146243.pdf.

122. *See* Int’l Labour Org., *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* ¶ 2-3, June 17, 1999, I.L.O. No. 182, 2133 U.N.T.S. 161.

123. *Id.* ¶ 5.

detriment of their education and development.¹²⁴ This compounds the multiple disadvantages children experience from living in low socio-economic households. It also reflects the reality that “[a]n almost universal feature is that domestic work is predominantly carried out by women, many of whom are migrants or members of historically disadvantaged groups.”¹²⁵ Being “left behind” also increases the risk of a breach of Article 32 of the CRC and the ILO’s convention on a minimum working age, both of which recognize the detrimental effect of child labor on a child’s education, development, and well-being.¹²⁶

Table 1: Ratification Status of Principal Treaties by State, 2015, and Departures of Housemaids from Sri Lanka, 2012.

State	‘House-maids’ departing	ICCPR 1966	ICESCR 1966	CEDAW 1979	CRC 1989	ICRMW 1990	ILO
	Sri Lanka in 2012						No 97, 143, 189
Sri Lanka	119,052	1980	1980	1981	1991	1996	–
<i>Departing for:</i>							
Saudi Arabia *	58,299	–	–	2000	1996	–	–
Kuwait *	29,460	1996	1996	1994	1991	–	–
UAE *	8,294	–	–	2004	1997	–	–
Jordan	5,955	1975	1975	1992	1991	–	–
Qatar *	5,306	–	–	2009	1995	–	–
Lebanon	3,499	1972	1972	1997	1991	–	–
Bahrain *	2,249	2006	2007	2002	1992	–	–
Oman *	2,023	–	–	2006	1996	–	–
All Other	3,967						

Notes: (1) Treaty abbreviations as per text. (2) * = member State of the Gulf Cooperation Council (3) – = no ratification or accession. (4) Sources: United Nations, Treaty Collection, <https://treaties.un.org>; International Labour Organization, Normlex, www.ilo.org/normlex; Sri Lanka Bureau of Foreign Employment, *Annual Statistical Report 2012*, Table 10.

B. Constitutional Law

The Sri Lankan Constitution offers another potential avenue for safeguarding the rights of migrant workers and their children left behind. Fundamental rights and freedoms were first introduced in the 1972 Constitution, Sri Lanka’s first republican constitution,¹²⁷ but this constitution did not vest any court with jurisdiction to remedy breaches of these rights by the State.¹²⁸

124. DOMESTIC WORKERS ACROSS THE WORLD, *supra* note 8, at 23.

125. *Id.* at 39.

126. CRC, *supra* note 69, at art. 32. See Int’l Labour Org., Convention Concerning Minimum Age for Admission to Employment art. 1, 6-7, June 26, 1973, I.L.O. No. 138, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0:NO:12100:P12100_ILO_CODE:C138.

127. See V.K. Nanayakkara, *From Dominion to Republican Status: Dilemmas of Constitution Making in Sri Lanka*, 26 PUB. ADMIN. & DEV. 425, 430 (2006). The 1972 Constitution followed on from the “Soulbury” independence constitution of 1948, when Ceylon attained dominion status within the British Empire.

128. Jayampathy Wickramaratne, 1972 in *Retrospect*, in SIRIMAVO: HONOURING THE WORLD’S FIRST WOMAN PRIME MINISTER 62, 74 (Tissa Jayatilaka ed., 2010).

The 1978 Constitution, the second republican constitution and the one currently in force, also contains a number of fundamental rights.¹²⁹ These are largely civil and political rights, a simulacrum of those in the ICCPR.¹³⁰ The ambit of the provisions, however, is carefully circumscribed: while some rights apply to “all persons,” many others apply only to “citizens,” notably the non-discrimination provision in Article 12(2), and the freedom of speech, assembly, association, occupation, and movement in Article 14.¹³¹ Some of the civil and political rights may be viewed as having direct relevance to migrant workers and their families. One instance is the freedom of citizens to return to Sri Lanka;¹³² another is the authorization of affirmative action—or positive discrimination—“for the advancement of women, children or disabled persons.”¹³³ The 1978 Constitution goes further than its predecessor in establishing a remedy for the infringement of fundamental rights by executive or administrative action: an entitlement to apply for review to the Supreme Court, the highest court in Sri Lanka.¹³⁴

An additional feature of the 1978 Constitution is the inclusion of a number of Directive Principles of State Policy, which are intended to “guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.”¹³⁵ These Principles include the objectives that “[t]he State shall recognize and protect the family as the basic unit of society” and that “[t]he State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination.”¹³⁶ Although these principles are non-justiciable and thus cannot be challenged in any court,¹³⁷ the Constitution does articulate the intention that they guide the State in its lawmaking and governance.¹³⁸

In sum, Sri Lanka’s present constitution contains limited protections for the children of MDWs. A more robust constitution was drafted in 2000, which recognized the need to expand the fundamental rights and freedoms specified in the 1978 Constitution.¹³⁹ The draft included recognition of the special rights of children, such as the right of every child to “family care or parental care or to appropriate alternative care when removed from

129. See SRI LANKA CONST. art. 10–17 (revised 2011).

130. See *id.*; ICCPR, *supra* note 88.

131. See SRI LANKA CONST. art. 12(2), 14(2). These freedoms were temporarily granted, for a period of ten years, to stateless persons who were lawfully resident in Sri Lanka at the time the Constitution came into force. See *id.* at art. 14(2).

132. *Id.* at art. 14(1)(i).

133. *Id.* at art. 12(4).

134. *Id.* at art. 17, 118, 126.

135. *Id.* at art. 27(1).

136. *Id.* at art. 27(13).

137. *Id.* at art. 29.

138. *Id.* at art. 27(1).

139. For a history of reforms, see *Constitutional Reforms since Independence*, THE OFFICIAL WEBSITE OF THE GOV. OF SRI LANKA, www.priu.gov.lk/Cons/1978Constitution/ConstitutionalReforms.htm (last modified Nov. 20, 2003).

the family environment,” and the paramount of the child’s best interests, which speak directly to the issues raised in this Article.¹⁴⁰ Political opposition, however, has prevented its adoption.¹⁴¹

C. Domestic Law

The social cost of maternal migration on families and children left behind has “recently become one of the major concerns of policy makers and the public in Sri Lanka,”¹⁴² and domestic legislation has been called in aid of the rights of children left behind.¹⁴³ In light of concerns about the lack of adequate alternative care arrangements for children who remain in Sri Lanka after their mothers migrate for domestic work, the Government attempted to ban the labor migration of mothers with children under five years of age in a Cabinet decision on the eve of International Women’s Day in 2007.¹⁴⁴ Pursuant to this proposal, which failed to become law at the time, mothers with children over five years of age were required to obtain approval from a government committee to migrate, after showing that their children had access to appropriate caregivers.¹⁴⁵

Since then, the Government issued a series of Circulars (effective January 15, 2014) mandating that a family background report be completed by all women wanting to migrate as domestic workers.¹⁴⁶ This has been superseded by a more recent Circular (effective August 1, 2015), which extends these reporting requirements to all women migrating overseas for employment.¹⁴⁷ As outlined by the Government, a range of government officers—such as Women Development Officers, Child Rights Promotion Officers, and Social Service Officers—are involved in the preparation of the report.¹⁴⁸ If women are identified as having children under five years of age, the officers are required not to recommend them for migration.¹⁴⁹ The Circulars also stipulate that mothers with children over the age of five should be recommended only if satisfactory arrangements have been made for the children’s care and protection.¹⁵⁰ In addition to these measures, the Circulars establish a maximum age for women MDWs (fifty-five years) and set minimum ages for MDWs migrating to Saudi Arabia (twenty-five years),

140. *Draft Bill (No. 372) to repeal and replace the Constitution of the Democratic Socialist Republic of Sri Lanka*, THE OFFICIAL WEBSITE OF THE GOV. OF SRI LANKA, <http://www.priu.gov.lk/Cons/2000ConstitutionBill/Index2000ConstitutionBill.html> (last modified Nov. 20, 2003).

141. *Constitutional Reforms since Independence*, *supra* note 139.

142. Ukwatta, *supra* note 59, at 108.

143. *Id.* at 126.

144. Jayaweera & Dias, *supra* note 67, at 56.

145. *Id.*

146. See, e.g., Sri Lanka Bureau of Foreign Emp., Circular No. 13/2013. See also Letter from the Permanent Rep. of Sri Lanka to the U.N. to the Office of the High Comm’r for Hum. Rts., 6 (May 27, 2014), https://spdb.ohchr.org/hrdb/27th/Sri_Lanka_27.05.14_%281.2014%29.pdf.

147. Sri Lanka Bureau of Foreign Emp., Circular No. MFE/RAD/10/13.

148. Letter from the Permanent Rep of Sri Lanka, *supra* note 146, at 6.

149. *Id.*

150. *Id.*

other Middle Eastern Countries (twenty-three years), and other countries (twenty-one years).¹⁵¹

As noted in a recent study commissioned by the United Nations in Sri Lanka, the Circulars have been met with mixed reactions, much like the failed proposal of 2007.¹⁵² Many see them as a valid effort to safeguard children and families, while others argue they are discriminatory towards women—as they do not apply to men—and hence breach both the constitutional commitment to gender equality and a number of women’s rights under international law.¹⁵³ Such measures have been regularly opposed because of the restrictions they place on women’s right to work, including the right to choose employment under Article 11(1)(c) of CEDAW,¹⁵⁴ and their restriction on freedom of movement, including a person’s freedom “to leave any country, including his own” under Article 12(2) of the ICCPR.¹⁵⁵ As the Human Rights Committee has observed, the freedom to leave is not dependent on the purpose or duration of the absence, and any restriction on the freedom must be exceptional and satisfy the stringent conditions of Article 12(3).¹⁵⁶ The measures are also considered to be a breach of Article 12(2) of the Sri Lankan Constitution, which states that no citizen shall be discriminated against on the grounds of sex.¹⁵⁷

It has been argued that the government should instead be investing in employment and educational opportunities for low-skilled women to avert the pressure on them to migrate.¹⁵⁸ In his visit to Sri Lanka in May 2014, the United Nations Special Rapporteur on the Human Rights of Migrants stated, in relation to the Circulars, that:

I regret this discrimination against Sri Lankan women in relation to the right to migrate. The fact that they have small children . . . cannot be used as a reason to deny them the right to leave their country, provided for in the International Covenant on Civil and Political Rights, ratified by Sri Lanka. Women’s rights organizations in Sri Lanka are protesting against the Circular of January 2014, which they claim leads to irregular migration . . . I urge the Government to focus on other means, such as creating more income-generating opportunities for women in Sri Lanka, including in rural areas, diversifying child-care support measures, and enhancing gender equality and men’s participation in their children’s upbringing.¹⁵⁹

151. See *id.* See Sri Lanka Ministry of Foreign Emp., Circular No. 2015/1, MFE/RAD/10/13 1-2.

152. R. JAYASUNDERE ET AL., DECIDING FOR SRI LANKA’S WOMEN MIGRANT WORKERS: PROTECTION OR DENIAL OF RIGHTS? 2 (2015), http://www.academia.edu/13567250/Deciding_for_Sri_Lanka_s_women_migrant_workers_Protection_or_Denial_of_Rights.

153. *Id.*

154. Sri Lanka became a signatory to CEDAW in 1980, and a party in 1981. See CEDAW, *supra* note 98.

155. Sri Lanka ratified the ICCPR in 1980. For a list of signatories, see ICCPR, *supra* note 88.

156. Human Rights Comm., General Comment No. 27, Freedom of Movement (Article 12), ¶¶ 8-18, CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999).

157. SRI LANKA CONST. art. 12(2).

158. HUMAN RIGHTS WATCH, *supra* note 50, at 101.

159. Press Release, Office of the High Commissioner for Human Rights, U.N. Special Rapporteur on the Human Rights of Migrants Concludes Country Visit to Sri Lanka

The Sri Lankan Government, however, has argued that these state interventions have been developed in response to the growing evidence about the negative impact of maternal migration for domestic work on young children, and they are an effort to balance the multiple interests and rights involved in a mother's decision to migrate as a domestic worker.¹⁶⁰ As stated by the Ministry of Foreign Employment Promotion and Welfare, "[i]n a situation needing to mitigate between the rights of children and those of parents/adults, the rights of children should take precedence."¹⁶¹

Other South Asian countries, such as Bangladesh, Nepal, and India, have attempted similar restrictions. A number of problems arise from constraints on women's mobility, including the problem that over-regulation may push women into irregular migration channels, which detracts from protective measures that do exist.¹⁶² For example, in August 2012 the Government of Nepal banned women under thirty years of age from working in GCC countries, although it has been reported that this restriction is bypassed by women travelling to Qatar for domestic work via India.¹⁶³ While India permits its female nationals under thirty years of age to engage in domestic work in Qatar, they must first obtain approval from the Ministry of Overseas Indian Affairs.¹⁶⁴ Bans on women's migration also ignore findings that, for many women, the experience of working abroad increases their self-reliance, which can help build their autonomy once they return.¹⁶⁵

D. Domestic Policy

During the 1990s, the positive international climate created momentum for policies that promoted equal opportunities for Sri Lankan children and women.¹⁶⁶ In 1991–1992, the Sri Lankan Government adopted a Plan of Action for Children and a Charter on the Rights of the Child—the latter substantively adopting the provisions of the CRC, which Sri Lanka had ratified the previous year.¹⁶⁷ Several of the Charter's provisions are relevant to the children of MDWs, such as a child's right to maintain direct and regular contact with both parents, including through family reunification (discussed in Part II.B below).¹⁶⁸ Although the Charter is not legally bind-

(May 26, 2014), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14645.

160. See Bureau of Foreign Emp., Circular No. 13/2013, *supra* note 146, at 4.

161. Letter from the Permanent Rep. of Sri Lanka, *supra* note 146, at 10.

162. PIPER, *supra* note 48, at 20–21.

163. AMNESTY INT'L, MY SLEEP IS MY BREAK: EXPLOITATION OF MIGRANT DOMESTIC WORKERS IN QATAR 10 (2014).

164. *Id.*

165. PIPER, *supra* note 48, at 4.

166. Swarna Jayaweera, *Gender, Education, Development: Sri Lanka*, in *GENDER, EDUCATION & DEVELOPMENT: BEYOND ACCESS TO EMPOWERMENT* 173, 174–75 (Christine Heward & Sheila Bunwaree eds., 1999).

167. Comm. on the Rights of the Child, Initial Reports of States Parties due in 1993: Sri Lanka, ¶ 159, U.N. Doc. CRC/C/8/Add.13 (May 5, 1994).

168. Sri Lanka, The Charter on the Rights of the Child, art. 40 (1992), <http://hrcls.lk/PFF/The%20Charter%20on%20the%20Rights%20of%20the%20Child.pdf>.

ing, it is used by the Human Rights Commission and the National Child Protection Authority as guidance for their own activities and the activities of other agencies they monitor.¹⁶⁹ Implementation of the Charter is supervised by a government committee whose functions are to render advice, generate awareness, promote legislative reforms, and monitor implementation of the Charter.¹⁷⁰

The other important area of policy development in Sri Lanka is the 2009 National Labour Migration Policy. This policy recognizes the inherent risks of low-skilled labor migration for workers and their children, and it emphasizes the need to reduce the migration of MDWs in favor of skilled migration.¹⁷¹ The Government, however, is also driven by the conflicting policy goal of pursuing growth in remittances generated by foreign employment, which is critical to its strategy for poverty and trade deficit reduction.¹⁷² At present, Sri Lanka cannot sustain growth in remittances without low-skilled migration, highlighting the tension that many labor-sending countries face between “promoting” and “protecting” labor migrants.¹⁷³

Sri Lanka’s labor migration policy was guided by the ILO’s Multilateral Framework and recognizes the “social costs of migration, in terms of impact on families and children left behind.”¹⁷⁴ Within the policy, the Government commits to safeguarding the “vulnerable children of migrant workers”¹⁷⁵ through measures that include developing and implementing a policy framework specifically for the protection and welfare of the children of migrant workers.¹⁷⁶ A feature of the policy is cross-portfolio responsibility involving the judiciary, National Child Protection Authority, Department of Probation and Childcare, and other state and civil society institutions active in the protection and welfare of children. It makes the registration of children a prerequisite for the departure of a migrant worker, allowing these children to be monitored (for example, through house visits) to enhance the identification of children at risk and provide support services for children or caregivers in distress. This aligns with Article 27 of the CRC, which imposes an obligation on the State to assist parents and others responsible for the child in implementing the child’s right to a standard of living adequate for his or her physical, mental, spiritual, moral, and social development. The policy also provides for educational and health benefits, as well as access to counseling, for the children

169. UNICEF INNOCENTI RESEARCH CENTRE, LAW REFORM AND IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD 19 (2007), http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf.

170. The Charter on the Rights of the Child, *supra* note 168, at art. 40.

171. SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, *supra* note 38, at 2.

172. HUMAN RIGHTS WATCH, *supra* note 50, at 3.

173. Yara Jarallah, *Domestic Labor in the Gulf Countries*, 7 J. IMMIGR. & REFUGEE STUD. 3, 11 (2009).

174. SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, *supra* note 38, at 2.

175. *Id.* at 19.

176. *Id.*

of migrant workers.¹⁷⁷ Sri Lanka's formal commitment to the CRC, which it ratified in 1991, is also reflected in its Charter on the Rights of the Child (developed in 1992) and National Plan of Action (2004–2008), which included ensuring adequate care and a safe, healthy environment for the children of migrant mothers.¹⁷⁸

Significant concerns, however, have been raised about slow implementation of these policy commitments, with civil society organizations arguing that, in practice, the Government's efforts fall short of the State's duties, obligations, and commitments to migrant workers and their families under international law.¹⁷⁹ A 2012 study commissioned by the Sri Lankan Government on the psychosocial issues faced by migrant workers and their families found that the National Labour Migration Policy "does not provide adequate safeguards to minimize or ameliorate various psychosocial problems emanating from migration."¹⁸⁰ In its submission to the U.N. Committee on Migrant Workers in 2013, "Migrant Forum Lanka" identified practices that were leading to the "commodification" of the country's migrant labor force in preference to the State's duty to protect their rights as Sri Lankan citizens and migrant workers.¹⁸¹ These practices include failure to implement existing policies, such as the Sri Lankan Bureau of Foreign Employment's reintegration policy for returnee migrant workers and their families; inadequate development of alternative livelihood options, which forces many MDWs to re-migrate; and failure to assess comprehensively the causes of high female labor migration, and the impact on the rights and well-being of women and their families left behind.¹⁸²

II. Problems Arising in Sending States

Labor-sending States have key responsibilities to protect the rights of children of the migrant workers who are in their territory and subject to their jurisdiction. This Part considers the principal children's rights implicated by the migration of mothers for domestic work abroad, namely the overarching right that the best interests of the child shall be a primary consideration in actions concerning children, and the specific rights to education, health, and freedom from child labor and abuse.

177. *Id.* at 30–31.

178. PINTO-JAYAWARDENA, *supra* note 58, at 4.

179. MIGRANT FORUM LANKA, SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS ON THE SITUATION OF INTERNATIONAL OUTBOUND LABOUR MIGRATION IN SRI LANKA 1, 7 (2013), http://www2.ohchr.org/english/bodies/cmw/docs/ngos/CHRD_LST_SUM_WH_SriLanka18.pdf.

180. HETTIGE, *supra* note 56, at 6.

181. MIGRANT FORUM LANKA, *supra* note 179, at 1–2. Migrant Forum Lanka is a network of Sri Lankan civil society organizations, activists, lawyers, and researchers working for the promotion and protection of the rights of migrant workers and their families.

182. *Id.*; ICRMW, *supra* note 6.

A. Failure to Give Primacy to the Child's Best Interests

Article 3(1) of the CRC states that “[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”¹⁸³ The “best interests” principle is one of four general principles that underpin the interpretation and implementation of all children’s rights under the CRC.¹⁸⁴ It is important, therefore, to ask to what extent the principle is honored by States that operate international labor migration programs that encourage the migration of mothers, with the concomitant challenges for children left behind. This question stands apart from the more specific consideration of a child’s right to education and health, discussed below. As the U.N. Committee on the Rights of the Child has commented, all rights in the CRC are in “the child’s best interests”¹⁸⁵—the best interests principle is thus a right on its own account and a fundamental value that informs our understanding of other specific rights.

The legal conception of the best interest of the child has several dimensions relevant to the present context. First, consideration of best interests is required not only when actions are taken with respect to an *individual* child, but also when actions are taken with respect to a group of children, or children in general.¹⁸⁶ “Best interests” is thus both an individual right and a collective right.¹⁸⁷ Second, the term “in all actions” is not confined to *decisions* made about children but encompasses “all acts, conduct, proposals, services, procedures and other measures,” as well as omissions.¹⁸⁸ Third, actions “concerning” children are not merely those that affect them *directly*, but include other measures that have an effect on children, even if they are not the direct targets of the measure.¹⁸⁹ As the U.N. Committee on the Rights of the Child acknowledges, however, all actions taken by a State can affect children in one way or another, yet States need only make a full assessment of the impact of their actions on children where that impact is “major.”¹⁹⁰ Fourth, a “best interests” assessment affects all implementation measures by governments, including the development of policies and the allocation of national resources.¹⁹¹ Finally, the requirement that the child’s best interests “shall be a primary consideration” requires those interests to be considered on a higher plane than other interests.¹⁹² It does

183. CRC, *supra* note 69, at art. 3(1).

184. The other general principles are non-discrimination, maximizing survival and development, and the right to be heard. See General Comment No. 5, *supra* note 99, ¶ 12.

185. Comm. on the Rights of the Children, General Comment No. 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (art. 3, para. 1), ¶¶ 1-4, U.N. Doc. CRC/C/GC/14 (May 29, 2013).

186. *Id.* ¶ 6.

187. *Id.* ¶¶ 6, 23.

188. *Id.* ¶ 17.

189. *Id.*

190. *Id.* ¶ 20.

191. *Id.* ¶¶ 12, 15.

192. *Id.*

not require that a child's best interests trump all other considerations,¹⁹³ but it does require more weight to be attached to those matters that best serve the child when assessing conflicting rights and interests.¹⁹⁴

These legal principles have important implications for labor sending countries. States must have regard for the best interests of the children of migrant workers, considered individually and as a group. That regard must extend to all government actions affecting children, such as the development of migration policies and the allocation of resources. This is all the more important because government migration policies clearly have a "major" impact on children left behind, even if that impact is indirect.¹⁹⁵ Moreover, while it is entirely appropriate for governments to weigh competing interests in formulating migration policy including the developmental benefits derived from remittances of MDWs, the special situation of children—their dependency, level of maturity, legal status, and voicelessness—requires that additional weight be given to their best interests.¹⁹⁶ Those interests include preserving family unity and preventing family separation. In the context of migration, the Committee on the Rights of the Child has remarked:

When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.¹⁹⁷

The discussion thus far has focused on the actions of the State and its organs, but the Committee on the Rights of the Child has purported to give the "best interests" principle a wider application. Specifically, it claims the principle has implications for decisions made by civil society entities and private sector organizations that provide services concerning children, and for actions undertaken by persons working with and for children, including parents and caregivers.¹⁹⁸ At first glance, this claim appears at odds with the terms of the Convention. Article 3(1) does not explicitly require private actors, such as parents, to consider the best interests of the child in actions concerning children because human rights obligations are primarily directed to the acts or omissions of States.¹⁹⁹ Nevertheless, in its recognition in Article 18(1) that parents "have the primary responsibility for the upbringing and development of the child," the CRC does state that "[t]he best interests of the child will be their basic concern."²⁰⁰ International legal obligations of the State may be engaged because the State must

193. By contrast, paramountcy is required by the CRC in actions regarding the adoption of children. *Id.* ¶ 36.

194. *Id.* ¶¶ 36-40.

195. *Id.* ¶ 20.

196. *Id.* ¶ 39.

197. *Id.* ¶ 66.

198. *Id.* ¶ 12.

199. CRC, *supra* note 69, at art. 3(1).

200. *Id.* at art. 18(1).

take active measures “to support and assist parents and others who have day-to-day responsibility for realizing children’s rights.”²⁰¹ This accords with the requirement that States provide parents with appropriate assistance “in the performance of their child-rearing responsibilities” specified in Article 18(2) of the CRC.²⁰² A failure to do so can enliven a State’s international responsibility for breaching the obligations under the Convention.²⁰³

B. Disruption to Family Relations

International law proclaims the right of a child to family life and the principle of family unity. In addition to specific provisions in the UDHR, ICCPR, and ICESCR discussed above, Article 8 of the CRC requires States to respect the right of the child to preserve “family relations” without unlawful interference, and Article 9 goes further to state that a child shall not be separated from his or her parents against their will unless it is determined by a competent authority to be necessary for the child’s best interests.²⁰⁴ Additionally, Article 5(b) of CEDAW recognizes the common responsibility of men and women in the upbringing and development of their children.²⁰⁵

The legal and regulatory structure of most labor migration programs for MDWs significantly stifles a child’s ability to maintain a direct and ongoing relationship with his or her mother. For example, receiving States generally prohibit children from accompanying mothers who migrate for domestic work.²⁰⁶ This issue, and others that arise in receiving States, are discussed in Part III below. Family unity, however, is also an issue from the perspective of sending States. Article 44 of the ICRMW requires States Parties, including Sri Lanka, to take appropriate measures to protect the unity of the families of migrant workers.²⁰⁷ To this end, States are required to take appropriate measures that fall within their competence to facilitate the reunification of migrant workers with their “minor dependent unmarried children.”²⁰⁸ Despite this, governments of source countries continue to agree to visa conditions and working standards that are well below those espoused in international human rights and labor law conventions.²⁰⁹

In relation to Sri Lanka, standard contracts that govern the employment of MDWs in GCC states contain only two obligations relating to fam-

201. General Comment No. 7, *supra* note 71, ¶ 13.

202. CRC, *supra* note 69, at art. 18(2).

203. *Id.*

204. *Id.* at art. 8-9.

205. CEDAW, *supra* note 98, at art. 5(b).

206. JULIA O’CONNELL DAVIDSON & CAITLIN FARROW, CHILD MIGRATION AND THE CONSTRUCTION OF VULNERABILITY 51 (2007), http://www.childtrafficking.com/Docs/save_child_07_cmcv_0108.pdf.

207. ICRMW, *supra* note 6, at art. 44.

208. *Id.*

209. See, e.g., MIGRANT FORUM LANKA, *supra* note 179, at 2, and accompanying text.

ily contact and unity.²¹⁰ The first is that the domestic worker is entitled to one month's paid vacation after contract completion (which is two years).²¹¹ The second is that the employer should "facilitate the incoming and outgoing mail and other communications of the employee," with some contracts stipulating that the employer is not required to assist with postage expenses.²¹² Even these limited provisions are frequently ignored. In a Human Rights Watch study of Sri Lankan domestic workers in Saudi Arabia, Kuwait, Lebanon, and the UAE, many MDWs claimed to have experienced restrictions on communicating with their families, including a limited ability to write and receive letters through their employer.²¹³

Sri Lanka's failure to demand stronger contractual provisions for its workers when negotiating standard contracts, and failure to take action against receiving States and recruitment agencies when existing contractual obligations are systematically flouted, may amount to a breach by the sending State of Articles 9 and 10 of the CRC.²¹⁴ These Articles state that children who are separated from their parents must be allowed to maintain personal relations and direct contact with both parents on a regular basis.²¹⁵ While the CRC does not define "regular" opportunity for family contact, it is difficult to accept that reunification between a mother and her child on a two-year basis satisfies that requirement.²¹⁶ Article 4 of the CRC also requires States to undertake "measures to the maximum extent of their available resources," including seeking international cooperation if needed to implement the economic, social, and cultural rights in the Convention.²¹⁷ The U.N. Committee on the Rights of the Child has gone further, stating that "[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."²¹⁸

The Sri Lankan Government has recognized a child's right to maintain direct and regular contact with both parents, including through family reunification, in Articles 9 and 10 of its own Charter on the Rights of the Child.²¹⁹ Despite the stated Charter principles, however, the Sri Lankan Government continues to agree to weak contractual terms for its MDWs for fear of becoming an unattractive labor source for receiving countries.²²⁰ This tolerance of "disadvantageous labor relations for its citizens working

210. See, e.g., Standard Contract from Sri Lankan Embassy, <http://www.srilankaembassyuae.com/test/HmPvt.pdf>; Employment Agreement for Sponsors and Domestic Workers in the City of Dubai (on file with authors) [hereinafter Dubai Employment Agreement].

211. Dubai Employment Agreement, *supra* note 210.

212. *Id.*

213. HUMAN RIGHTS WATCH, *supra* note 50, at 3, 72.

214. See CRC, *supra* note 69, at art. 9-10.

215. General Comment No. 1, *supra* note 1, ¶ 54.

216. See generally CRC, *supra* note 69 (failing to define "regular").

217. See *id.* at art. 4.

218. General Comment No. 5, *supra* note 99, ¶ 8.

219. See The Charter on the Rights of the Child, *supra* note 168, at art. 9-10.

220. See *supra* note 210 and accompanying text.

abroad”²²¹ hinders the ability of children left behind to realize their rights.²²² In contrast, and as discussed in Part V.C below, the Filipino Government’s stronger negotiations have resulted in the Standard Employment Contract for Filipino Household Workers, requiring an employer to sign an undertaking that, inter alia, the worker “be allowed to freely communicate with her family in the Philippines.”²²³

C. Impact on Children’s Education

International human rights law recognizes the right of everyone to education, which shall be directed “to the full development of the human personality” and to strengthening respect for human rights and fundamental freedoms.²²⁴ This right was articulated in the UDHR in 1948, and finds further expression in the ICESCR and the CRC.²²⁵ In relation to the migration of domestic workers, the obligation to provide education falls primarily on the State in which the children of MDWs reside—namely, the sending State.²²⁶ How does the migration of MDWs affect the realization of the right to education?

On the one hand, research has shown that migration and the accompanying remittances can help families invest in their children’s education, with a World Bank study in El Salvador showing that girls aged eleven to seventeen and boys aged eleven to fourteen were more likely to stay in school if their families were receiving remittances.²²⁷ This study, however, does not elaborate on whether the mother or father had migrated for employment. Other studies have shown that when the father is absent and the mother gains control over decision-making for her children, there can be positive educational outcomes due to women’s tendency to invest in education, particularly for their daughters.²²⁸

In the same vein, studies have shown that a mother’s absence can negatively affect a child’s school attendance and participation if the father (or another primary caregiver) does not step into the caregiver’s role traditionally played by the mother.²²⁹ A study of children in Thailand found that “[t]he long-term absence of the mother appears to reduce the educational chances of children left behind, whereas the long-term absence of fathers

221. See MICHELE GAMBURD, *THE KITCHEN SPOON’S HANDLE: TRANSNATIONALISM AND SRI LANKA’S MIGRANT HOUSEMAIDS* 234 (2000).

222. See discussion *supra* Introduction.

223. See *Employment Contract for Household Service Workers (Direct), Undertaking of the Employer for the Employment of a Household Service Worker (HSW)*, EMBASSY OF THE PHILIPPINES, ¶ 7 [hereinafter *Filipino Employment Contract*], <http://www.philippine-embassy.org.sg/wp-content/uploads/SECD.pdf> (last visited Sept. 3, 2015).

224. See UDHR, *supra* note 88, at art. 26(2).

225. *Id.*

226. See General Comment No. 17, *supra* note 94, ¶ 6.

227. ACOSTA, *supra* note 70, at 4.

228. See Leela Gulati, *The Impact on the Family of Male Migration to the Middle East: Some Evidence from Kerala, India*, in *ASIAN LABOR MIGRATION: PIPELINE TO THE MIDDLE EAST* 194, 208-09 (Fred Arnold & Nasra Shah eds., 1986); OXFORD POLICY MANAGEMENT, *supra* note 70, at xii.

229. PIPER, *supra* note 48, at 29.

does not.”²³⁰ A study in the Philippines also found that children of absent mothers performed the least well at school.²³¹

Research in Sri Lanka also confirms that labor migration may have negative educational outcomes for children left behind. A study in Sri Lanka’s Eastern Province (Ampara and Batticaloa) found that 6.1 percent of children between eleven to fifteen years of age in migrant worker households had dropped out of school, compared with only 3.1 percent for the total sample of children surveyed.²³² Similarly, a 2012 study of teachers, primary caregivers, and religious leaders in the country’s highest labor migration areas (Gampaha, Kurunegala, and Colombo), which targeted schools attended by children of MDWs, found that school absenteeism was common largely because of a lack of encouragement by primary caregivers, or children having other commitments such as caring for younger siblings.²³³ Moreover, educational outcomes may vary according to the gender of the migrating parent. A 2013 study of the effects of parental migration on children’s education showed that maternal migration lowered both the children’s enrollment rates (by fifteen to sixteen percentage points) and the probability of receiving private tuition (by fourteen to sixteen percentage points), while paternal migration improved these variables.²³⁴

The impact of migration on a child’s education will vary according to individual circumstances, including the household’s socio-economic characteristics, the number and position of children in the household, and parental education levels and attitudes. The education level of mothers is one of the most important factors in a child’s school attendance and achievement,²³⁵ rather than parental migration status. This does not bode well for Sri Lanka because the female migrant population falls at the lower end of educational standards.²³⁶ For example, of the 784,500 domestic workers in Saudi Arabia in 2009, the ILO estimates that 38.4 percent had no formal educational qualifications, 25.9 percent had completed only primary school, and only 10.7 percent had secondary education or above.²³⁷ The ILO has also found that eighty-five percent of Sri Lankan women migrating for employment have “dropped out from formal education without passing their GCE Ordinary Level”²³⁸ – an examination undertaken by

230. Jampaklay, *supra* note 65, at 93.

231. Battistella & Conaco, *supra* note 70, at 232.

232. WETTASINGHE, *supra* note 66, at 18.

233. See B.C.V. Senaratna, *Left-Behind Children of Migrant Women: Difficulties Encountered and Strengths Demonstrated*, 41 SRI LANKA J. CHILD HEALTH 71, 72 (2012).

234. See Vengadeshvaran Sarma & Rasyad Parinduri, *What Happens to Children’s Education When Their Parents Emigrate? Evidence from Sri Lanka* 14 (Munich Personal RePEc Archive, MPRA Paper No. 52278, 2013).

235. OXFORD POLICY MANAGEMENT, *supra* note 70, at xv.

236. See Michele Gamburd, ‘Lentils There, Lentils Here!’ *Sri Lankan Domestic Labour in the Middle East*, in ASIAN WOMEN AS TRANSNATIONAL DOMESTIC WORKERS 92, 96 (Shirlena Huang, Brenda Yeoh & Noof Abdul Rahman eds., 2005).

237. DOMESTIC WORKERS ACROSS THE WORLD, *supra* note 8, at 32.

238. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at vi.

students in the final two years of high school—at ages fifteen to sixteen.²³⁹

Whatever the direction and strength of the social impact of female labor migration on the educational outcomes for their children, it must still be asked how the legal obligations of labor-sending States, such as Sri Lanka, are implicated. Does a State fail to provide the “right to education” to children within its territory if their parents and caregivers make private decisions that are adverse to the educational advancement of those children? The answer lies in part in the obligation of States under Article 2(1) of the ICESCR “to take steps” toward “the full realization” of the right to education, which are “deliberate, concrete and targeted,” as well as expeditious and effective.²⁴⁰ Moreover, the right to education imposes three levels of obligation on State Parties—to *respect* the right by avoiding State measures that might hinder enjoyment of the right; to *protect* the right from interference by third parties; and to *fulfill* the right by facilitating or providing it.²⁴¹ The U.N. Committee on Economic, Social and Cultural Rights has explained that the obligation to *protect* requires a State to protect accessibility of education by ensuring that third parties—including parents—do not stop girls from going to school.²⁴² The obligation to *fulfill* has a facilitative dimension insofar as it “requires the State to take positive measures that enable and assist individuals and communities to enjoy the right to education.”²⁴³ It is evident, therefore, that the right to education requires concerted State action to mitigate any adverse effects of labor migration on the education of children left behind.

In fact, the Sri Lankan Government does provide financial support for the continued education of the children of MDWs, but government scholarships are granted only to those children who pass Grade 5, and again if they reach O-level and A-level examinations.²⁴⁴ Support is therefore limited to higher achieving students, rather than targeting those most at risk of non-attendance, and support is also not available to children whose mothers migrate through unofficial channels. UNICEF Sri Lanka has identified the lack of policies targeting the educational vulnerabilities of children of MDWs as “an obvious policy gap” at present.²⁴⁵ International experience could offer models for more effective support in the Sri Lankan context—such as the El Salvador government’s practice of matching the value of remittances made by Salvadorian migrant workers with government-funded educational scholarships that focus on early and basic educa-

239. See Nick Clark, *Education in Sri Lanka*, WORLD EDUC. NEWS & REV. (May 1, 2011), <http://wenr.wes.org/2011/05/wenr-may-2011-feature/>.

240. See Comm. on Econ., Soc. & Cultural Rights, Implementation of the International Covenant on Economic, Social and Cultural Rights, ¶¶ 43-44, U.N. Doc. E/C.12/1999/10 (Dec. 8, 1999).

241. *Id.* ¶ 46.

242. *Id.* ¶ 50.

243. *Id.* ¶ 47.

244. Frantz, *supra* note 32, at 1076.

245. See U.N. CHILDREN’S FUND (UNICEF) SRI LANKA, COUNTRY STUDY: OUT-OF-SCHOOL CHILDREN IN SRI LANKA SUMMARY REPORT 6 (2013), http://www.unicef.org/education/files/Sri_Lanka_OSS_Summery.pdf.

tion in poor rural communities, especially for young children who do not attend school.²⁴⁶

D. Impact on Children's Health

International human rights law recognizes the right of everyone "to the enjoyment of the highest attainable standard of physical and mental health."²⁴⁷ This right is articulated in the ICESCR and expressed again in greater detail in the CRC with respect to children.²⁴⁸ In 2013, the U.N. Committee on the Rights of the Child recognized that migration is one factor among many that contributes to death, disease, and disability in children, and is therefore important in the fulfillment of the right to health.²⁴⁹ But the connection between health and migration has long been acknowledged, as in the World Declaration on the Survival, Protection and Development of Children (1990), whose ten-point program of action accepted that children of migrant workers are among the "millions of children who live under especially difficult conditions."²⁵⁰

As with education, empirical studies are ambivalent about the impact of migration on the health of children left behind, highlighting both positive and negative effects.²⁵¹ Improved household income can lead to better nutrition and access to health services, enhancing physical health.²⁵² A study in the Philippines found that children whose mothers had migrated had a lower prevalence of stunted growth.²⁵³ A study in Mexico found that the migration of at least one household member improved birth weights and lowered infant mortality rates in children left behind.²⁵⁴ This study, however, did not identify which family member had migrated, and also found that these children had reduced rates of breastfeeding and vaccination.²⁵⁵

In contrast, studies have demonstrated adverse effects of maternal migration on the mental and emotional health and well-being of children left behind.²⁵⁶ Children frequently reveal a sense of loneliness and sadness due to separation from their mothers, even when they have an under-

246. ILO MULTILATERAL FRAMEWORK, *supra* note 121, at 79.

247. See ICESCR, *supra* note 88, at art. 12(1).

248. *Id.*; CRC, *supra* note 69, at art. 24.

249. See Comm. on the Rights of the Child, General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24), ¶ 6, UN Doc CRC/C/GC/15 (Apr. 17, 2013).

250. See *World Declaration on the Survival, Protection and Development of Children*, art. 20(7), UNICEF (Sept. 30, 1990), www.unicef.org/wsc/declare.htm. On the right to health in the context of migration generally, see Int'l Org. for Migration, *Migration and the Right to Health: A Review of International Law*, 19 INT'L MIGRATION L. 1 (2009).

251. See ANTMAN, *supra* note 70, at 10-11.

252. *Id.* at 11.

253. CHAMPSEA PHILIPPINES, *supra* note 68, at 3.

254. See Nicole Hildebrandt et al., *The Effects of Migration on Child Health in Mexico*, 6 ECONOMIA 257, 259 (2005).

255. *Id.*

256. See PIPER, *supra* note 48, at 30.

standing of the reasons for their mothers' migration.²⁵⁷ Children can also find it difficult to reconnect with their mothers after long periods of separation,²⁵⁸ and often need support to re-establish a strong parental relationship.²⁵⁹ The International Organization for Migration (IOM) has highlighted the importance of reintegration policies that support the families of migrants, particularly as "the reintegration of migrants is among the most overlooked policy interventions in the migration cycle."²⁶⁰

In relation to the health of children in Sri Lanka specifically, a national study of 1,990 people conducted in 2013, which compared migrant and non-migrant families, found that:

Forty-four percent of left-behind children had some form of psychopathology, with over a quarter of those under 5-years being underweight or severely underweight (29%). Association of emotional, hyperactivity, conduct problems and having any psychiatric diagnosis was strongest in children from migrant family households [Odds ratio 1.62(CI: 1.16-2.27)], and was exacerbated in families where the sole parent was the overseas based migrant worker.²⁶¹

The study also found high levels of depression in caregivers and spouses left-behind, which is concerning given that the mental health of a child's caregiver directly affects the well-being of a child.²⁶² In another Sri Lankan study of 2,000 households of returnee migrant workers, women raised concerns that "children were not taken to clinics for periodic health examinations" and "were not immunized on time."²⁶³ A comparative study of 253 children aged five to ten years in the capital, Colombo, found that the mother's absence was a singular factor causing a two-fold increase in mental health problems for children.²⁶⁴

As with the right to education, States have three levels of obligations regarding children's right to health—to respect, to protect, and to fulfill.²⁶⁵ States thus have an obligation to develop, implement, monitor, and evaluate policies that constitute a human rights-based approach to fulfilling children's right to health.²⁶⁶ As a consequence, the "best interests" principle should be placed at the center of all decisions affecting the health and development of children, not only where these decisions are made for spe-

257. *Id.*; Battistella & Conaco, *supra* note 70, at 231; OXFORD POLICY MANAGEMENT, *supra* note 70; PINTO-JAYAWARDENA, *supra* note 58, at 14-15.

258. PIPER, *supra* note 48, at 30.

259. *See id.* at 30.

260. INT'L ORG. FOR MIGRATION, *supra* note 105, at 25.

261. *See* Koliitha Wickramage & Chesmal Siriwardhana, *How Far Are the 'Left Behind' Left Behind? The Psychological and Physical Wellbeing of Family Members of International Labour Migrants*, GENEVA HEALTH FORUM (Feb. 25, 2014), <http://ghf.g2hp.net/2014/02/25/>.

262. *Id.*

263. *See* Malsiri Dias & Ramani Jayasundere, *Sri Lanka: The Anxieties and Opportunities of Out-Migration*, in *MIGRANT WORKERS AND HUMAN RIGHTS: OUT-MIGRATION FROM SOUTH ASIA* 153, 175 (Pong-Sul Ahn ed., 2004).

264. Senaratna, *supra* note 86, at 157.

265. *See* Comm. on the Rights of the Child, *supra* note 249, ¶ 71.

266. *Id.* ¶ 73.

cific individuals, but also where they are made for children as a group. In the view of the Committee on the Rights of the Child, this means that best interests should guide the allocation of resources and the development and implementation of policies that affect the underlying determinants of child health.²⁶⁷

Connected to this obligation, the Sri Lankan Government has recognized the importance of providing psychosocial support to the children left behind in its National Labour Migration Policy, committing to making counseling and psychological support available to migrant workers and their families at all stages of the migration process.²⁶⁸ Studies from as recently as 2013, however, have found that “[t]here is no effective counseling support available for children to cope with any chronic psychological trauma they could experience during the absence of a migrant parent.”²⁶⁹ There is clearly some distance to go in “achieving progressively the full realization” of a child’s right to health in the context of MDWs in Sri Lanka.

E. Child Labor and Child Abuse

Maternal migration can also be associated with an increased incidence of child labor and child abuse. As to child labor, a mother’s absence can increase the risk that a child will be burdened with greater responsibility for domestic work within a household.²⁷⁰ This is especially true for girls and older siblings who may be given the care of younger children if the father or extended family does not assume additional caregiving roles.²⁷¹ If both parents are absent and there is no extended family (possibly due to the family’s earlier internal migration), an older sibling may be required to assume responsibilities as the head of a household, withdrawing from education and taking on additional paid and unpaid labor to support the family.²⁷² Numerous studies on children left behind in Sri Lanka have found that older children, particularly girls, drop out of school primarily to take on household chores and care for younger siblings.²⁷³ Children of MDWs may also drop out of school to enter the labor market.²⁷⁴

These conditions increase the risk that a State will contravene Article 32(1) of the CRC, which recognizes the right of children to be protected from any work that is likely to interfere with their education or be harmful

267. *Id.* ¶ 13–14.

268. SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, *supra* note 38, at 25.

269. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at 40.

270. See Sarma & Parinduri, *supra* note 234, at 16.

271. *Id.*

272. Battistella & Conaco, *supra* note 70, at 237.

273. WETTASINGHE, *supra* note 66, at 42. See Sarma & Parinduri, *supra* note 234, at 16; NIRASHA PERERA & MADHUNHASHINI RATHNAYAKA, SRI LANKA’S MISSING MOTHERS: A WORKING PAPER ON THE EFFECTS OF MOTHER MIGRATION ON CHILDREN 18 (Nov. 2013), <https://srilanka.savethechildren.net/sites/srilanka.savethechildren.net/files/library/Annexe%201-Missing%20Mothers.pdf>.

274. See Gamburd, *supra* note 236, at 102.

to their health or development.²⁷⁵ Depending on a child's age, some additional domestic duties may not be inimical to their health or development, but these bounds may be exceeded if the child has to take on all the responsibilities of an absent mother.²⁷⁶ While child labor is more closely linked with poverty than parental migration status, the State has a positive obligation to monitor children of MDWs, particularly those identified as being at risk, to ensure that this situation does not arise.²⁷⁷

With respect to child abuse, studies also demonstrate that the children of MDWs face a heightened risk of physical and sexual abuse. In 2013, the Sri Lankan Bureau of Foreign Employment reported on the abuse of children left behind, based on records from the police's Women's and Children's Bureau. While the mother's migration could not be established definitively as the cause of abuse, the study found a correlation between the number of reported abuses and the districts with the highest numbers of female labor emigrants.²⁷⁸

There are two common circumstances in which children left behind may be subject to a heightened risk of abuse. First, children may be left in the care of abusive fathers or other relatives.²⁷⁹ Organizations working with survivors of sexual abuse in Sri Lanka have found that many girls who are survivors of incest have mothers who work abroad and have left them in the care of alcoholic fathers or stepfathers.²⁸⁰ These findings are repeated in numerous qualitative and quantitative studies,²⁸¹ with one study of twenty-two reported incest cases showing that in half the cases the mother was in the Middle East.²⁸²

The second circumstance is that children may be left with new caregivers who, although not abusive in their own right, do not exercise the same level of supervision and control as the child's mother. For example, a study from China (where there are an estimated 58 million children left behind) linked a rise in sexual abuse among these children to the fact that seventy percent were left in the care of grandparents, who were reportedly less watchful over the children and more reluctant to give them sex education, leaving the children uninformed and vulnerable to abuse.²⁸³ In Sri

275. See CRC, *supra* note 69, at art. 32(1).

276. PERERA & RATHNAYAKA, *supra* note 273, at 18.

277. *Id.*

278. *Id.* at 13.

279. Anjani Trivedi, *Sri Lanka Struggles to Contain a Growing Epidemic of Child Abuse*, TIME (Aug. 13, 2013), <http://world.time.com/2013/08/13/sri-lanka-struggles-to-contain-a-growing-epidemic-of-child-abuse/>. Findings from other studies, however, challenge the perception that fathers are abusive and neglect children in the absence of the mother. Although women generally adopt the role of primary carer, fathers remaining behind are often attentive and caring towards their children. PINTO-JAYAWARDENA, *supra* note 58, at 20; WETTASINGHE, *supra* note 66, at 4.

280. Trivedi, *supra* note 279.

281. See PERERA & RATHNAYAKA, *supra* note 273, at 12; Senaratna, *supra* note 233, at 71; REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at 40.

282. See PERERA & RATHNAYAKA, *supra* note 273, at 12.

283. Trivedi, *supra* note 279. A similar phenomenon has been observed in Eastern Europe. See Yanovich, *supra* note 25.

Lanka, studies have shown that children left behind are generally cared for by grandmothers who are often “too feeble to play the part of a caregiver and attend to the children’s needs.”²⁸⁴ The ILO’s national study in 2013 found that thirty-two percent of issues faced by the children of migrant parents—including exposure to accidents, teenage marriage, and lack of emotional support—were due to negligence by the primary caregiver.²⁸⁵ Similarly, a comparative study of children aged five to ten years in Colombo found that “[n]eglect is the commonest adversity faced by children [of MDWs] with or without emotional and physical abuse, but incidents of sexual abuse by fathers or other male relatives are also reported.”²⁸⁶

What are the legal obligations of a State faced with situations of child abuse or neglect within the households of the children left behind by MDWs? Under international law, the State has a positive obligation to protect the rights of individuals from breaches by the acts or omissions of government officials or organs of the State,²⁸⁷ but it also has an obligation to adopt measures to prevent breaches by private actors.²⁸⁸ This principle of due diligence has been used by regional human rights courts, U.N. treaty bodies, and U.N. special rapporteurs “as a measurement of state responsibility for the acts of private individuals in the field of human rights law.”²⁸⁹ It requires States to have taken reasonable preventative measures if they are to avoid attribution of responsibility for the conduct of private actors.²⁹⁰ Thus, a State could be held accountable if it systematically fails to prevent human rights violations by non-state actors; while the “actual violence stems from private individuals . . . passivity on the part of the state can amount to acquiescence.”²⁹¹

States Parties to the CRC are required to protect children from sexual abuse and exploitation (Article 34), and from all forms of abuse (physical, mental, and sexual) and negligent treatment by those responsible for their care (Article 19).²⁹² The obligation requires governments to adopt measures to identify, monitor, and address cases where a child left behind is at risk of abuse.²⁹³ Studies suggest that strategies used to identify and protect vulnerable people in general should be employed when children are left

284. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at 13.

285. *Id.* at 39.

286. Senaratna, *supra* note 86, at 154.

287. *See, e.g.*, ICCPR, *supra* note 88, at art. 2.

288. JOHN RUGGIE, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE CORPORATE ACTIVITIES UNDER THE UNITED NATION’S CORE HUMAN RIGHTS TREATIES: INDIVIDUAL REPORT ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS ¶¶ 22, 41, 51 (2007), <http://198.170.85.29/State-Responsibilities-to-Regulate-Corporate-Activities-under-UN-Core-Treaties-12-Feb-2007.pdf>.

289. Marika Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, 2 ÖREBRO STUD. IN L. 232 (2010).

290. *Id.* at 232.

291. *Id.* at 231.

292. CRC, *supra* note 69, at art. 19, 34.

293. *Id.* at art. 34.

behind by migrating parents,²⁹⁴ including legislative and administrative measures; support programs for children and carers; prevention strategies; and pathways for the identification, assessment, referral, investigation, treatment, and review of cases where a child is maltreated.²⁹⁵ The U.N. Committee on the Rights of the Child has also stated that, as required by Article 39 of the CRC, if rights are breached, “there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration.”²⁹⁶

The Sri Lankan Government has acknowledged the need for measures to support caregivers in delivering more effectively on their child-rearing responsibilities.²⁹⁷ It has also identified the provision of “effective protection and services to migrant workers and their families left behind” as one of the key objectives of its National Labour Migration Policy.²⁹⁸

III. Problems Arising in Receiving States

Restrictive immigration practices and poor employment conditions in receiving countries affect the ability of children to realize a number of rights, including their right to family unity.²⁹⁹ The difficulties stem from the structure of employer-based visas, the practice of confiscating passports, the restrictions on communication with family, and the effects of abusive and traumatic experiences on the ongoing capacity of MDWs to parent effectively.³⁰⁰ It is relevant to note that, of the most popular destination countries for Sri Lankan MDWs in the Middle East, two (Saudi Arabia and Lebanon) have been ranked in the top quartile for vulnerability to enslavement, while a third (Kuwait) is close at heel.³⁰¹ The U.N. Committee on Migrant Workers has noted that “hundreds of thousands of Sri Lankan women [are] working abroad as domestic helpers and many of them [are] underpaid and treated as virtual slaves.”³⁰² This signals the heightened risk of human rights violations facing many MDWs in the Middle East, with consequences for their children.

294. OXFORD POLICY MANAGEMENT, *supra* note 70, at xvi–xvii.

295. CRC, *supra* note 69, at art. 19.

296. General Comment No. 5, *supra* note 99, ¶ 24.

297. SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, *supra* note 38, at 5.

298. *Id.* at 4.

299. HETTIGE, *supra* note 56, at 7, 51–54; PIPER, *supra* note 48, at 29. See THE GLOBAL SLAVERY INDEX 2014, WALK FREE FOUNDATION 88 (2014), http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/Global_Slavery_Index_2014_final_lowres.pdf.

300. See WALK FREE FOUNDATION, *supra* note 299, at 88.

301. See *id.* at 140–43 (tbl. 2).

302. Comm. on Migrant Workers, Concluding Observations: Sri Lanka, ¶ 27, U.N. Doc. CMW/C/LKA/CO/1 (Dec. 14, 2009) (echoing concerns expressed by the U.N. Committee on Economic, Social and Cultural Rights in 1998).

A. Dependency on Employer-Based Visas

The “kafala” (sponsorship) system operates in GCC states and ties MDWs to their employers for the duration of their contract, usually two years. Of the four visas available under the kafala system, MDWs are granted a “house visa.”³⁰³ The employer assumes all economic and legal responsibility for the worker, who cannot change jobs or leave the country (sometimes even the house) without employer permission, which is often denied.³⁰⁴ The system essentially “absolves the state of its responsibility”³⁰⁵ towards migrant workers and gives rise to exploitative conditions that make it nearly impossible for MDWs to demand their rights to communicate with or visit their children during the two year contract.³⁰⁶ The failure of States to take appropriate measures to protect family unity by ensuring opportunities for family-related mobility breaches Article 10 of the CRC, which expresses the right of children whose parents reside in different countries, and their parents, to move between those countries to enable them to maintain contact or be reunited as a family.³⁰⁷

An exit visa is required to leave a number of host States, including Saudi Arabia and Qatar.³⁰⁸ This in itself can be considered a breach of Article 12(2) of the ICCPR, which states that “[e]veryone shall be free to leave any country.”³⁰⁹ This breach is heightened within the kafala system, under which an exit visa is not granted without the consent of the worker’s employer.³¹⁰ Moreover, employers can have MDWs deported at any time, which further restricts their ability to demand basic rights,³¹¹ such as maintaining a direct relationship with their children in their home countries. Even if an MDW could break her contract to return home, the cost usually exceeds US \$2,000, which is more than a year’s salary and thus unaffordable for most MDWs.³¹² Hence, the realization of the right to family reunion becomes arbitrary and solely dependent on the goodwill of the individual employer.

303. Rooja Bajracharya & Bandita Sijapati, *The Kafala System and Its Implications for Nepali Domestic Workers*, MARCH POL. BRIEF: CENTRE FOR STUD. LAB. AND MOBILITY 1, 11 (2012); Jarallah, *supra* note 173, at 9.

304. Bajracharya & Sijapati, *supra* note 303, at 3, 6–7.

305. Amrita Pande, *The Paper that You Have in Your Hand is My Freedom’: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon*, 47 INT’L MIGRATION REV. 414, 414–15 (2013).

306. *Id.* at 428.

307. CRC, *supra* note 69, at art. 10.

308. HARRY COOK & JANE SAIL, INT’L ORG. FOR MIGRATION, MIGRANT WELL-BEING IN THE MIDDLE EAST AND NORTH AFRICA: A FOCUS ON GENDER IN CAIRO 13 (2013), https://www.iom.int/files/live/sites/iom/files/What-We-Do/wmr2013/en/Working-Paper_Cairo_final.pdf; Gulf Countries: Increase Migrant Worker Protection, INT’L TRADE UNION CONFEDERATION (Nov. 23, 2014), <http://www.ituc-csi.org/gulf-countries-increase-migrant-policy-brief-no-2-reform-of-the-kafala-sponsorship-system-migrant-forum-in-asia>, <http://www.ilo.org/dyn/migpractice/docs/132/PB2.pdf>.

309. ICCPR, *supra* note 88, at art. 12(2).

310. Frantz, *supra* note 32, at 1083.

311. *Id.* at 1072.

312. *Id.* at 1077–78.

B. Confiscation of Passports

The withholding of passports by employers is extremely common and well-documented in the Middle East,³¹³ but the practice is contrary to Article 21 of the ICRMW, which proclaims such confiscation unlawful for anyone other than a public official duly authorized by law to confiscate a person's identity documents.³¹⁴ While none of the GCC States is party to the ICRMW (see Table 1), the practice is illegal under domestic law in the UAE and under civil regulations in Lebanon, which is another common destination country for Sri Lankan MDWs.³¹⁵ Confiscation also violates Article 18 of the Jordanian passport law, although research has found that the practice remains routine in Jordan.³¹⁶ Similarly, studies in Qatar have found that many employers hold the passports of MDWs for the duration of their employment, despite being required to return passports once residence procedures are completed.³¹⁷ This impacts the right to family reunification, restricting the ability of MDWs to reunite with their children, yet it continues to be overlooked by authorities in receiving countries, and is acquiesced in (although not endorsed) by governments in source countries.

C. Restricted Communication with Families

As previously discussed, the employer-based visa system and the weak provisions in standard contracts give employers in receiving States the power to limit an MDW's ability to communicate freely and regularly with her children.³¹⁸ Studies have found that these restrictions are very much the norm³¹⁹ and clearly deny children the right to have regular contact with their mothers, as required by international law.³²⁰ Even where receiving States have formally granted greater protections to migrant workers, such as Jordan's extension of its labor laws to domestic workers in 2008,³²¹ enforcement is often limited by the unwillingness of all parties to extend regulatory scrutiny to the "inviolable space" of the private home.³²²

Studies from Sri Lanka have identified "[f]requent and regular communication with the migrant parent" as essential to a child's mental well-being,³²³ and also confirm that "being able to speak to a mother or father over the phone [is] beneficial for the children left behind."³²⁴ As Amnesty

313. HUMAN RIGHTS WATCH, SLOW REFORM: PROTECTION OF MIGRANT DOMESTIC WORKERS IN ASIA AND THE MIDDLE EAST 2 (2010), <http://www.hrw.org/sites/default/files/reports/wrd0410webwcover.pdf>.

314. ICRMW, *supra* note 6, at art. 21.

315. HUMAN RIGHTS WATCH, *supra* note 50, at 70.

316. Frantz, *supra* note 32, at 1083.

317. MY SLEEP IS MY BREAK, *supra* note 163, at 12.

318. See Standard Contract from Sri Lankan Embassy, *supra* note 210; Dubai Employment Agreement, *supra* note 210.

319. Frantz, *supra* note 32, at 1078.

320. CRC, *supra* note 69, at art. 9(2), 10(1).

321. Frantz, *supra* note 32, at 1078.

322. *Id.* at 1078-79.

323. WETTASINGHE, *supra* note 66, at 5.

324. Jayaweera & Dias, *supra* note 67, at 88.

International reports, however, Sri Lankan MDWs in Middle Eastern countries such as Qatar often face severe restrictions on communication, including their ability to make mobile phone calls.³²⁵ Amnesty International's study found that mobile phones were regularly confiscated or denied, with recruitment agents reporting that they take women's mobile phones on arrival.³²⁶ Furthermore, as found in a 2009 study by the IOM, even with access to mobile phones and email, contact between MDWs and their families generally took place only about once a month.³²⁷ Another study of 400 households in Sri Lanka found that domestic workers kept in touch mainly by land phone and post, having limited access to modern forms of electronic communication, including the internet;³²⁸ in fact, none of the respondents in that survey kept in touch with their family by email.³²⁹ Human Rights Watch has also documented cases of Sri Lankan women who were not allowed to contact their families after the 2004 Indian Ocean tsunami (killing around 230,000 people, including 35,000 Sri Lankans),³³⁰ nor permitted to receive phone calls from their children or have their letters posted.³³¹ As one Sri Lankan MDW in Saudi Arabia was told, "[f]or two years, you will have no contact with your family."³³²

Amnesty International's report on Qatar also highlights the frequent restrictions placed on MDWs' freedom of movement, among other violations.³³³ Studies have reported that women were not permitted by their employers to return to Sri Lanka after learning of their own children's deaths during the 2004 tsunami.³³⁴ A 2013 ILO survey of 2,000 Sri Lankan migrant worker returnees, three-quarters of whom were women, found that seventy-four percent had their passports withheld by their employer and seventy-two percent were prevented from leaving their workplace altogether.³³⁵

D. Continuing Effects of Abuse and Trauma

Abuse and trauma experienced by MDWs in receiving States can have a lasting impact on the capacity of those women to parent their children on their return.³³⁶ Insofar as the immigration policies of receiving States facilitate such abuse, or acquiesce in it, there is a potential breach by the State of its human rights obligations to the MDWs.³³⁷

325. MY SLEEP IS MY BREAK, *supra* note 163, at 6.

326. *Id.* at 32-33.

327. Jayaweera and Dias, *supra* note 67, at 88.

328. Ukwatta, *supra* note 59, at 123.

329. *Id.* at 123, 128.

330. Thomas Holzer and James Savage, *Global Earthquake Fatalities and Population*, 29 EARTHQUAKE SPECTRA 155, 159 (2013).

331. HUMAN RIGHTS WATCH, *supra* note 50, at 72, 74.

332. *Id.* at 72.

333. MY SLEEP IS MY BREAK, *supra* note 163, at 6.

334. HUMAN RIGHTS WATCH, *supra* note 50, at 72, 74.

335. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at vi.

336. *Id.* at 63.

337. Whether there is also a breach by receiving States of their obligation under the CRC to make the best interests of the child a primary consideration is more difficult to

MDWs are largely unprotected under domestic law in many receiving States. A study by the ILO in 2005 revealed that, of sixty-five countries surveyed, only nineteen had laws governing work in private households, and even then domestic workers were often afforded lower protection than other categories of workers.³³⁸ The abusive conditions in which MDWs work are well-documented, particularly in the Middle East.³³⁹ Weak protection mechanisms in labor migration policies and programs allow these abuses to continue in this predominantly informal and unregulated sector.³⁴⁰ A particular concern, identified by the U.N. Committee for Migrant Workers, is the psychological, physical, and sexual abuse and harassment experienced by many women MDWs at the hands of employers, recruitment agents, and intermediaries.³⁴¹ Being trapped in abusive conditions has frequently led to instances of suicide or suicide attempts, with obvious ramifications for the mental health and well-being of children at home.³⁴²

The Sri Lankan Government reports that fifty MDWs return to Sri Lanka “in distress” daily,³⁴³ and unofficial figures are likely to be significantly higher.³⁴⁴ The effects of traumatic experiences can have significant long-term consequences for an MDW’s mental and physical health, seriously affecting her capacity to resume a parenting role upon return.³⁴⁵ An ILO study of Sri Lankan returnees found that exploitative experiences of migrant workers in host countries leave physical and emotional scars, which are then brought home by the returnees.³⁴⁶ The study emphasized the necessity of counseling for migrant workers and their families upon return,³⁴⁷ with such support likely to assist an MDW to manage the effects of trauma and resume a care-giving role.³⁴⁸ Mental health professionals, however, have indicated that it is likely that, at present, most MDWs who

assess. The children in question are not within the territory or subject to the jurisdiction of the receiving State. See discussion *supra* Part II.A.

338. INT’L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK 50 (2005) [hereinafter GLOBAL ALLIANCE], http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—declaration/documents/publication/wcms_081882.pdf.

339. AMNESTY INT’L, ABUSIVE LABOUR MIGRATION POLICIES: SUBMISSION TO THE UN COMMITTEE ON MIGRANT WORKERS’ DAY OF GENERAL DISCUSSION ON WORKPLACE EXPLOITATION AND WORKPLACE PROTECTION 8 (2014), <https://www.amnesty.org/en/documents/document/?indexNumber=IOr42%2F002%2F2014&language=EN>.

340. *Id.* at 5-6. See GLOBAL ALLIANCE, *supra* note 338.

341. Comm. on Migrant Workers, *supra* note 1, ¶ 13(g).

342. HETTIGE, *supra* note 56, at 51, 54; NASRA M. SHAH ET AL., FOREIGN DOMESTIC WORKERS IN KUWAIT: WHO EMPLOYS HOW MANY 250 (2002), http://www.smc.org.ph/administrator/uploads/apmj_pdf/APMJ2002N2ART4.pdf. See generally HUMAN RIGHTS WATCH, MAID TO ORDER (2005), <https://www.hrw.org/report/2005/12/06/maid-order/ending-abuses-against-migrant-domestic-workers-singapore>.

343. HUMAN RIGHTS WATCH, *supra* note 50, at 2.

344. *Id.* at 2, 110.

345. HETTIGE, *supra* note 56, at 51, 54.

346. REINTEGRATION WITH HOME COMMUNITY, *supra* note 41, at 63.

347. *Id.*

348. *Id.*

suffer trauma and other acute stress related symptoms do not access main-stream mental health services.³⁴⁹

IV. United Nations Supervision

Having discussed many of the threats faced by the children of MDWs as a result of the policies and practices of sending and receiving States, this Part examines the mechanisms available under the United Nations system for promoting compliance with human rights norms. The five principal mechanisms are periodic review by the U.N.'s Human Rights Council; State reporting required under specific human rights treaties; the determination of complaints by individuals against States for alleged breaches of those treaties; treaty-based inquiry procedures; and the work of special rapporteurs appointed by the U.N. Secretary-General.³⁵⁰ Something will be said briefly about each mechanism insofar as it is relevant to the situation of the children left behind.

A. Universal Periodic Review by the Human Rights Council

The Human Rights Council is a subsidiary organ of the United Nations General Assembly, responsible for the promotion and protection of human rights around the globe. Its mandate extends to all 193 Member States of the United Nations, and it fulfills its responsibilities in part through the conduct of universal periodic review of the fulfillment by each State of its human rights obligations and commitments.³⁵¹ Most States have now been subjected to two such reviews³⁵²—for example, Sri Lanka underwent review in 2008 and 2013.³⁵³ The outcome report for each country provides an assessment of its human rights record, incorporating the views of diverse stakeholders.³⁵⁴

Universal periodic review has brought attention to human right abuses against migrant workers in labor-receiving countries. In 2012–2013, issues raised through the process included discrimination against and exploitation of migrant workers, including abuse and denial of salaries, in Saudi Arabia;³⁵⁵ risks under the visa sponsorship system, including confiscation

349. HETTIGE, *supra* note 56, at 51.

350. *United Nations Supervisory Bodies*, SOCIAL PROTECTION HUMAN RIGHTS, <http://socialprotection-humanrights.org/united-nations-supervisory-bodies-about/> (last visited Dec. 11, 2015); Office of the High Comm'r for Hum. Rts., *Human Rights Bodies*, U.N. HUM. RTS. <http://www.ohchr.org/EN/HRBODIES/Pages/HumanRightsBodies.aspx> (last visited Dec. 11, 2015).

351. G.A. Res. 60/251, Human Rights Council, U.N. Doc. A/RES/60/251 (Apr. 3, 2006).

352. INT'L SERVICE FOR HUMAN RIGHTS, UNIVERSAL PERIODIC REVIEW 27 (2014), <http://www.ishr.ch/sites/default/files/article/files/upr.pdf>.

353. *Id.*

354. *Id.* at 29.

355. Human Rights Council, Working Group on the Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights, Saudi Arabia*, ¶ 61, U.N. Doc. A/HRC/WG.6/17/SAU/2 (Aug. 6, 2013).

of passports, in the UAE;³⁵⁶ and the abuse of women migrant domestic workers (the majority from South and Southeast Asia) in Jordan.³⁵⁷ Similarly, the universal periodic review of labor-sending countries has facilitated the public recording of concerns about the treatment of MDWs. In 2012, the Human Rights Council heard from human rights treaty bodies about “reported abuses faced by Sri Lankans who migrate for work, especially women”;³⁵⁸ and from Filipino human rights NGOs about concerns that “the Philippines was complicit in the violations of the rights of Filipino women migrant workers in light of its promotion of labour migration in employment sectors in countries with inadequate legal protection.”³⁵⁹

Yet, strikingly, the impact of the migration of domestic workers on the children left behind has been consistently overlooked as a human rights issue. An examination of the outcomes of the universal periodic reviews of relevant labor-sending and labor-receiving States reveals no instance of the issue being raised by any of the State troikas responsible for the reviews. In addition to this shortfall, the efficacy of the process is limited by the fact that the Human Rights Council only reviews each State’s practice against its existing legal obligations (such as the U.N. Charter, UDHR, and human rights instruments)³⁶⁰—it cannot mandate observance of human rights norms to which the State has not consented. As seen in Table 1, this is a serious limitation for labor-receiving States that have eschewed many core human rights treaties.³⁶¹

If universal periodic review is to have traction in the present context, it is perhaps best achieved through suasion. There are numerous examples of the process being used successfully in child’s rights advocacy.³⁶² An example is Save the Children’s successful promotion of child-focused recommendations, which were adopted by the Nepalese Government following its universal periodic review in 2011.³⁶³

356. Human Rights Council, Working Group on the Universal Periodic Review, Compilation Prepared by the Office of the High Commissioner for Human Rights, United Arab Emirates, ¶ 41, U.N. Doc. A/HRC/WG.6/15/ARE/2 (Nov. 9, 2012).

357. Human Rights Council, Working Group on the Universal Periodic Review, Compilation Prepared by the Office of the High Commissioner for Human Rights, Jordan, ¶ 44, U.N. Doc. A/HRC/WG.6/17/JOR/2 (July 31, 2013).

358. Human Rights Council, Working Group on the Universal Periodic Review, Compilation Prepared by the Office of the High Commissioner for Human Rights, Sri Lanka, ¶ 54, U.N. Doc. A/HRC/WG.6/14/LKA/2 (Aug. 13, 2012).

359. Human Rights Council, Working Group on the Universal Periodic Review, Summary Prepared by the Office of the High Commissioner for Human Rights, Philippines, ¶ 91, U.N. Doc. A/HRC/WG.6/13/PHL/3 (Mar. 12, 2012).

360. *Basic Facts about the UPR*, OFFICE OF THE HIGH COMM’R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited Oct. 15, 2015).

361. See *supra* Table 1.

362. See generally DIARRA DIOP, CHILD RIGHTS GOVERNANCE: UNIVERSAL PERIODIC REVIEW, SUCCESSFUL EXAMPLES OF CHILD RIGHTS ADVOCACY (2014), http://www.upr-info.org/sites/default/files/general-document/pdf/savethechildren_upr_successful_examples_childrights_advocacy_2014_en.pdf.

363. *Id.* at 8-9.

B. Review of State Reporting by Treaty Bodies

A second monitoring mechanism arises from the obligation in each human rights treaty to submit a periodic report to the body established by that treaty to monitor compliance. For example, Article 44 of the CRC provides that States Parties must submit a report on measures adopted in compliance with convention rights within two years of becoming bound by the convention, and every five years thereafter, to the Committee on the Rights of the Child.³⁶⁴ Following a process of review, the “concluding observations” of the treaty body summarize each State’s compliance with the treaty and note areas of concern. This material is itself an input (along with the reports of similar treaty bodies) into the Human Rights Council’s universal periodic review.³⁶⁵

One example of the dialogue that can ensue between stakeholders arose from Sri Lanka’s State report to the U.N. Committee on the Rights of the Child in 2010.³⁶⁶ The Committee asked whether the government had taken steps to assess the “physical, psychological and social impact that large-scale female labor migration has on children” and whether it had a strategy to prevent children separating from their mothers and to establish safety net programs for children of migrant workers.³⁶⁷ The Government responded that it lacked the necessary resources to assess comprehensively the impact on children, that children are generally cared for by the woman’s extended family, and that safety net programs are implemented only in areas of high migration.³⁶⁸ The Committee considered this response to be unsatisfactory and reiterated several concerns: the impact that “massive labour migrations of women have on the rights and well-being of their children,” insufficient efforts to create alternative employment opportunities, inconsistent safety net program implementation, and insufficient coordination of childcare authorities to monitor the well-being of these children.³⁶⁹

Another example concerns Sri Lanka’s first State report to the U.N. Committee on Migrant Workers in 2008.³⁷⁰ The Committee’s concluding observations expressed regret that Sri Lanka provided no information on the impact of migration on Sri Lankan children,³⁷¹ and encouraged the State to conduct new studies on the subject.³⁷² Four years later, in antici-

364. CRC, *supra* note 69, at art. 44.

365. *Documentation*, Office of the High Comm’r for Hum. Rts., <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> (last visited Oct. 15, 2015).

366. Comm. on the Rights of the Child, List of Issues Concerning Additional and Updated Information related to the Combined Third and Fourth Periodic Reports of Sri Lanka, ¶ 6, U.N. Doc. CRC/C/LKA/Q/3-4 (July 19, 2010).

367. *Id.*

368. Comm. on the Rights of the Child, Written Replies by the Government of Sri Lanka to the List of Issues, ¶ 23, U.N. Doc. CRC/C/LKA/Q/3-4/Add.1 (Sept. 7, 2010).

369. Comm. on the Rights of the Child, Concluding Observations: Sri Lanka, ¶ 44, U.N. Doc. CRC/C/LKA/CO/3-4 (Oct. 19, 2010).

370. Comm. on Migrant Workers, Concluding Observations: Sri Lanka, ¶ 49, U.N. Doc. CMW/C/LKA/CO/1 (Dec. 14, 2009).

371. *Id.*

372. *Id.*

pation of Sri Lanka's second State report, the Committee sought information about whether the State "has carried out a comprehensive assessment to identify the causes of high female labour migration and the physical, psychological and social impact of migration on the rights and well-being of children and families left behind."³⁷³ The second report has not yet been submitted.³⁷⁴

The treaty monitoring mechanisms, however, are not necessarily robust.³⁷⁵ Their weaknesses have included late or superficial State reporting, a backlog of reviews, underfunding, and questionable expertise of committee members.³⁷⁶ For example, on the first of these criticisms, Sri Lanka ratified the CRC in 1991.³⁷⁷ Its initial report, due by 1993, was submitted in 1994, and of the four reports subsequently due every five years, only two have been submitted—one in 2002 and another in 2010.³⁷⁸

A further limitation is that a committee's recommendations are only advisory and do not bind States Parties.³⁷⁹ Nevertheless, it is important not to underestimate the process's significance. A treaty body's recommendations have moral force within the international community, and States often work to improve their human rights practices because of the concluding observations. Moreover, periodic monitoring provides NGOs with an opportunity to submit a "shadow" report, offering an alternative view of a State's compliance with its treaty obligations, and NGOs have been able to use this process successfully to advocate for policy reforms, as illustrated in Part V.A below.³⁸⁰ As Louis Brandeis famously remarked, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."³⁸¹

373. Comm. on Migrant Workers, List of Issues Prior to the Submission of the Second Periodic Report of Sri Lanka, ¶ 21, UN Doc CMW/C/LKA/QPR/2 (July 29, 2013).

374. See *Treaty Body Database*, U.N. HUM. RTS., http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=7&DocTypeID=45&DocTypeID=29 (last visited Sept. 26, 2015).

375. See James Crawford, *The UN Human Rights Treaty System: A System in Crisis?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 1, 3-9 (Phillip Alston & James Crawford eds., 2000).

376. *Id.*

377. *Convention on the Rights of the Child*, U.N. TREATY COLLECTION (Sept. 26, 2015), https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11&chapter=4&lang=en&title=UNTC-publisher.

378. See *Treaty Body Database*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=EN&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4; http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4 (last visited Oct. 15, 2015).

379. See CRC, *supra* note 69, at art. 45.

380. *Enforcement Mechanisms in the United Nations*, THE ADVOCATES FOR HUM. RTS., www1.umn.edu/humanrts/svaw/law/un/unenforce.htm (last visited Sept. 26, 2015).

381. LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

C. Determination of Individual Complaints by Treaty Bodies

The third mechanism for review of human rights compliance is the individual complaints process to which States may voluntarily subject themselves, either by ratifying a separate international instrument, such as an Optional Protocol, or by lodging a declaration accepting such jurisdiction under a particular human rights treaty.³⁸² These mechanisms allow individuals to make complaints against a State, alleging human rights violations by a State that has accepted the complaint mechanism.³⁸³ Not only can this bring redress to an aggrieved individual, but it can draw the international community's attention to the breach, thus exerting moral pressure on States to reform their practices.

For example, the ICCPR's First Optional Protocol and the ICESCR's Optional Protocol allow individual complaints about alleged violations of the Covenants to be heard, respectively, by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.³⁸⁴ This provides an avenue for drawing attention to MDWs' rights violations that impact their children left behind. Two instances are the exit visas required under the kafala system, and the employers' routine confiscation of passports.³⁸⁵ Such restrictions not only interfere with an MDW's right to freedom of movement, but also limit the left-behind children's ability to realize their right to family unity.³⁸⁶

The individual complaints mechanisms' capacity to protect the rights of children left behind, however, is limited. While all core human rights treaties allow for the possibility of making individual complaints, in the case of the ICRMW, the mechanism has not yet entered into force.³⁸⁷ Even where complaints mechanisms are in force, they may not be widely ratified or may not be ratified by States relevant to the issue in question.³⁸⁸ For example, only twenty States have accepted the complaints mechanism under the CRC,³⁸⁹ and no GCC or other Middle Eastern labor-receiving country has ratified the complaints mechanism under the ICCPR or the ICESCR.³⁹⁰ Where complaints are heard and upheld, the committee's

382. Office of the High Comm'r for Hum. Rts., *Human Rights Bodies—Complaints Procedures*, <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx> (last visited Sept. 26, 2015).

383. *Id.*

384. *Id.*

385. See discussion *supra* Part III.

386. *Id.*

387. Only three of the required ten State Parties have made the declaration needed under Article 77(1) to bring this mechanism into operation. Office of the High Comm'r for Hum. Rts., *supra* note 382.

388. See *Enforcement Mechanisms in the United Nations*, *supra* note 380.

389. CRC Optional Protocol, *supra* note 108. These States are Albania, Andorra, Argentina, Belgium, Bolivia, Chile, Costa Rica, El Salvador, Gabon, Germany, Ireland, Monaco, Montenegro, Portugal, Slovakia, Spain, and Thailand.

390. *Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. TREATY COLLECTION (Sept. 27, 2015), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en; United Nations Treaty Collection, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, U.N. TREATY COLLECTION (Sept. 27, 2015) [hereinafter ICESCR Optional Protocol],

“communication” to the State is only advisory, and the response is ultimately up to the concerned State’s discretion.³⁹¹ The big picture, however, suggests that the jurisprudence of all U.N. human rights treaty bodies combined is substantial and growing,³⁹² and can enhance the moral force of a treaty body’s findings.

D. Inquiries by Treaty Bodies into Systematic Violations

Another mechanism for reviewing human rights violations is the inquiry procedure established under some human rights treaties. The CRC’s “CRC OP3” Optional Protocol establishing the complaints mechanism enables the Committee on the Rights of the Child to initiate its own inquiry into serious or systematic violations of the CRC.³⁹³ This mechanism is also available under the ICESCR’s Optional Protocol.³⁹⁴ These mechanisms’ effectiveness, however, is again limited in impacting labor migration effects on children left behind, due to the relevant States’ failure to ratify the core instruments and their protocols.³⁹⁵ The need for States to recognize the Committee’s competence further limits inquiries procedures.³⁹⁶ States can opt out of the process upon signing, ratifying, or acceding to CRC OP3, or at any time under ICESCR Optional Protocol.³⁹⁷

E. Special Rapporteurs of the Human Rights Council

Because of these difficulties, the Human Rights Council “special procedures” have been used considerably.³⁹⁸ Through this process, independent experts are mandated to report and advise on human rights, with respect to a particular theme or a particular country.³⁹⁹ Most relevant in the present context is the Special Rapporteur on the Human Rights of Migrants, first established in 1999, who can analyze specific issues affecting the rights of migrant workers and their families.⁴⁰⁰ The Special Rap-

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=EN.

391. *Stop Violence Against Women: Complaint Mechanisms*, THE ADVOCATES FOR HUMAN RIGHTS (May 28, 2013), http://www.stopvaw.org/Complaint_Mechanisms.

392. Across all human rights treaty bodies, 325 decisions were made over the five-year period of 2010–2014. See Office of the High Comm’r for Hum. Rts., *Jurisprudence Database*, juris.ohchr.org (last visited Oct. 15, 2015).

393. CRC Optional Protocol, *supra* note 108, at art. 13.

394. *Id.* In relation to the ICESCR, see ICESCR Optional Protocol, *supra* note 390, at art. 11.

395. See *supra* Table 1.

396. See CRC Optional Protocol, *supra* note 108, at art. 13(7); ICESCR Optional Protocol, *supra* note 390, at art. 11(8).

397. CRC Optional Protocol, *supra* note 108, at art. 13(7); ICESCR Optional Protocol, *supra* note 390, at art. 11(8).

398. See Office of the High Comm’r for Hum. Rts., *Special Procedures of the Human Rights Council*, <http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx> (last visited Oct. 15, 2015).

399. *Id.*

400. Office of the High Comm’r for Hum. Rts., *Special Rapporteur on the Human Rights of Migrants*, <http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/SRMigrantsIndex.aspx> (last visited Oct. 15, 2015).

porteur is mandated separately from the ICRMW treaty body and is able to deal with “human rights obligations for all States, independently of whether or not they are parties to specific human rights treaties.”⁴⁰¹ The recommendations arising from this type of scrutiny are not binding on States.⁴⁰²

For example, Special Rapporteur François Crépeau conducted a mission in 2013 to Qatar to review its laws, policies, and practices for migrant workers. The report contains reform recommendations, including some with respect to MDW-receiving countries and the private sector.⁴⁰³ The previous incumbent (Jorge Bustamante) reported in 2009 on protecting children left behind after one or both parents migrate.⁴⁰⁴ The first holder of the office (Gabriela Rodríguez Pizarro) reported in 2004 on migrant domestic workers’ human rights, noting many concerns that remain alive today.⁴⁰⁵ Her recommendations stressed:

the importance of ensuring that every migrant domestic worker has the possibility and the right to visit his or her family . . . [and] that contracts should provide for the right to vacations and that agreements regulating workers’ entry and stay in the country of destination should allow them to leave the country and return to it through the issuance of multiple-entry visas.⁴⁰⁶

V. State-Based Labor Migration Laws, Policies, and Practices

As the foregoing discussion demonstrates, although human rights treaties offer a legal framework for understanding the rights of migrant workers and their families, enforcing these rights through existing U.N. mechanisms can be challenging. Therefore, there is value in examining examples from domestic laws, policies, and practices that offer sound prospects for better protecting the children of migrant workers.

Programs in labor-receiving States include those that facilitate family reunion through permanently migrating family members to the host State, and those that encourage circular migration, which ensures that domestic workers are not separated from their families for excessive periods. Programs in labor-sending States include ones where governments negotiate better communication and travel conditions for migrant workers; those that enable a progressive shift from low-skilled to skilled labor migration, where the risks for children are ameliorated; and those that engage in

401. WORLD HEALTH ORG., HEALTH AND HUMAN RIGHTS: PROTECTION OF THE RIGHTS OF MIGRANT WORKERS 4 (2014), <http://who.int/hhr/Migrants.pdf>.

402. See *Special Rapporteur*, *supra* note 400.

403. François Crépeau (Special Rapporteur on the Human Rights of Migrants), *Report of the Special Rapporteur on the Human Rights of Migrants, Addendum, Mission to Qatar*, ¶¶ 78–148, U.N. Doc. A/HRC/26/35/Add.1 (Apr. 23, 2014).

404. Jorge Bustamante (Special Rapporteur on the Human Rights of Migrants), *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, ¶¶ 42–54, U.N. Doc. A/HRC/11/7 (May 14, 2009).

405. See generally Gabriela Rodríguez Pizarro (Special Rapporteur on the Human Rights of Migrants), *Specific Groups and Individuals, Migrant Workers*, U.N. Doc. E/CN.4/2004/76 (Jan. 12, 2004).

406. *Id.* ¶ 84.

regional dialogues to improve the situation for children left behind. Each example is discussed below.

A. Reunification and Permanent Settlement: Canada's Caregiver Program

Canada's Caregiver Program seeks to acknowledge the need for permanent migration when attempting to fill permanent labor shortages.⁴⁰⁷ It does this by developing pathways to permanent residence, which target workers in caregiving occupations that the government anticipates will experience future labor shortages.⁴⁰⁸ These include skilled and semi-skilled positions in childcare and a range of healthcare occupations, such as registered nurses, nurse aides, and home support workers.⁴⁰⁹

Those migrating to Canada through the Caregiver Program are eligible to apply for permanent residence after working in Canada for two years.⁴¹⁰ Until recently, however, it could take more than three years to process permanent residence applications made by caregivers, and only after processing were caregivers able to apply for family reunification.⁴¹¹ This created a lengthy period of separation between caregivers and their family members left behind.⁴¹² To facilitate speedier family reunification, the government announced significant reforms in October 2014, including a commitment to process caregivers' permanent residence applications within a six month period.⁴¹³ To achieve this, applications for permanent visas under the Caregiver Program are capped at 5,500 annually (not including spouses and dependents),⁴¹⁴ which "is consistent with the number of caregivers coming to Canada in recent years."⁴¹⁵ The reforms also include a commitment to admit 30,000 caregivers and their family members as permanent residents in 2015 to reduce the backlog of 60,000 caregivers waiting for permanent residence status.⁴¹⁶ Significantly, in an effort to improve "protection against potential workplace vulnerability and abuse," the reforms removed the previous requirement that caregivers provide live-in care to qualify for permanent residency.⁴¹⁷

The Caregiver Program offers a best practice model for labor migra-

407. News Release, *Improving Canada's Caregiver Program: Government of Canada Announces Reforms to End the Live-In Requirement, Reduce Family Separation and Provide More Options to Caregivers in Canada*, GOV'T OF CANADA (Oct. 31, 2014), <http://news.gc.ca/web/article-en.do?nid=898729>.

408. *Id.*

409. *Id.*

410. *Major Reforms to Caregiver Program Announced by Canadian Government*, CIC NEWS: CANADA IMMIGR. NEWSLETTER (Nov. 2014), www.cicnews.com/2014/11/major-reforms-caregiver-program-announced-canadian-government-114044.html.

411. *Id.*

412. *Id.*

413. *Improving Canada's Caregiver Program*, *supra* note 407.

414. *Id.*

415. *Id.*

416. *Major Reforms to Caregiver Program Announced by Canadian Government*, *supra* note 410.

417. *Id.*; *Improving Canada's Caregiver Program*, *supra* note 407.

tion, which has been lauded by the IOM.⁴¹⁸ It illustrates the importance of labor-receiving States recognizing family reunification, and the role of host States in averting family separation for long periods.⁴¹⁹ Nevertheless, it is very much the exception. Most destination countries do not have an easy pathway to permanent residency for domestic workers. Furthermore, the Canadian program's scale is minute in comparison to the streams of low-skilled labor migration from Asia to the Middle East.⁴²⁰ The sheer size of MDW migration to the Middle East makes the prospect of systematic pathways for family reunification remote. Permanent family reunion would require wholesale reform of migration laws to allow the integration of MDWs and their families into GCC States. There is also the assumption that families of low-skilled workers would want to relocate to countries in the Middle East. This assumption should not go unchallenged given the differences in language and culture, and the possibility that these families would be marginalized or discriminated against in their new home.

B. Circular Migration: Lessons from Seasonal Labor Programs

Circular migration has been described as “the fluid movement of people between countries,” voluntarily undertaken and linked to the labor needs of countries of origin and destination.⁴²¹ In Europe, it is a means of meeting labor needs and fighting irregular migration in destination countries, while simultaneously responding to the need for developing transferable skills and mitigating brain drain in origin countries.⁴²²

Seasonal labor migration programs—which are a prominent example of circular migration—have been used for many years to fill local labor shortages, especially in agriculture and horticulture where seasonal harvesting creates discrete periods of peak labor demand.⁴²³ Seasonal migrants have moved from North Africa to France, from Poland to Germany, from the Caribbean to Canada, and from Pacific Islands to Australia

418. INT'L ORG. FOR MIGRATION, *supra* note 105, at 16.

419. See *Backgrounder: Improving Canada's Caregiver Program*, GOV'T OF CANADA (Oct. 31, 2014), http://news.gc.ca/web/article-en.do?nid=898719&_ga=1.197941162.469949620.1443399439.

420. In 2015, the Canadian Government planned to admit an all-time high of thirty thousand caregivers and their families—including spouses and dependents. Caregivers eligible for permanent residence in subsequent years will be capped at 5,500 (not including family members). This reflects numbers of arrivals through the Caregiver Program in years prior to the 2014 reforms. For example, 5,882 workers arrived through the Live-in Caregiver Programs in 2011. See *Archived: Improving Canada's Caregiver Program*, GOV'T OF CANADA, http://news.gc.ca/web/article-en.do?Nid=898719&_ga=1.14790452.324796711.1418872111. See generally ASIA PAC. FOUND. OF CANADA, <http://www.asiapacific.ca/blog/nurses-nannies-philipina-women-and-canadas-livecaregiver>.

421. INT'L ORG. FOR MIGRATION, GLOSSARY ON MIGRATION 19 (2d ed. 2011), http://www.iomvienna.at/sites/default/files/IML_1_EN.pdf.

422. Comm. from the Comm'n to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Circular Migration and Mobility Partnerships between the European Union and Third Countries, COM(2007) 248 final (May 16, 2007).

423. Piotr Plewa, *The Politics of Seasonal Foreign Worker Admissions to France, 1974-2010*, 51 INT'L MIGRATION 101, 101 (2013).

and New Zealand.⁴²⁴ A key feature of seasonal labor migration programs is the required return of the worker to his or her country of origin for a significant period each year.⁴²⁵ While these programs can still give rise to concerns about the social impact of migration on children left behind, the opportunity they provide for more frequent and more extended family reunion makes them qualitatively different from the migration of MDWs from Sri Lanka to the Middle East.

Consider a study of the impact of seasonal migration on the early childhood development of preschool children in Nicaragua, where nearly half of all sampled households relied on seasonal migration to complement and diversify their incomes.⁴²⁶ The study recognized that seasonal migration can have human and social costs due to lack of parenting and the potential to disrupt the development of children left behind.⁴²⁷ Nevertheless, it found there was generally no adverse effect from the seasonal migration of fathers, and that when the mother migrated there was a positive effect on early childhood development, possibly because the income benefits from the mother's migration outweighed any negative effects of separation.⁴²⁸ In this particular study, the adults migrated to other areas in Nicaragua or Central America, and so were in relatively close proximity to their children, with an average period of separation of only three months.⁴²⁹ Elsewhere, researchers have suggested that the period of separation is a factor in explaining the contrasting negative effects of circular migration found in studies from the Philippines.⁴³⁰ In the study by Battistella and Conaco, Filipino children of primary school age had been separated from their mothers for long periods, averaging more than four years.⁴³¹

Although domestic work is not seasonal, the structure of seasonal worker programs offers one way of ensuring continuity of family life while accepting the reality of migration. Anticipating the creation of a seasonal worker program in Australia in 2006, Maclellan and Mares stated that:

It is also worth considering whether a maximum length of absence should be imposed on the scheme to ensure that workers are not separated from their families for extended periods of time—for example, visas to work in Australia could be capped at six months within any 12-month period so that

424. See generally *id.*; Marek Okólski, *Seasonal Labour Migration in the Light of the German-Polish Bilateral Agreement*, in *MIGRATION FOR EMPLOYMENT: BILATERAL AGREEMENTS AT A CROSSROADS* 203 (2004); Christopher Worrick, *Temporary Foreign Workers: An Introduction*, *CANADIAN ISSUES* (Spring 2010); Therese MacDermott & Brian Opeskin, *Regulating Pacific Seasonal Labour in Australia*, 83 *PAC. AFFAIRS* 283 (2010).

425. Karen Macours & Renos Vakis, *Seasonal Migration and Early Childhood Development*, 38 *WORLD DEV.* 857, 858 (2010).

426. See also Halahingano Rohorua et al., *How do Pacific Island Households and Communities Cope with Seasonally Absent Members?*, 24 *PAC. ECON. BULL.* 19, 21 (2009).

427. Macours & Vakis, *supra* note 425, at 858.

428. *Id.* at 866. See Rohorua, *supra* note 426, at 21.

429. Macours & Vakis, *supra* note 425, at 858-59.

430. Rohorua, *supra* note 426, at 21-22.

431. Battistella & Conaco, *supra* note 70.

workers would be sure to spend at least half the year in their home communities.⁴³²

That rule was adopted when Australia's seasonal worker program was introduced for Pacific workers in 2009—the visa underpinning the program grants an entitlement to work for up to six months, and permits total stays of up to seven months, in any year.⁴³³

In the case of MDWs from Sri Lanka, the introduction of a limited stay abroad would require employers or governments to subsidize workers' travel expenses heavily, given the significant costs involved in travelling home relative to the wages earned abroad.⁴³⁴ Recruitment agencies would also have to provide MDWs to employers in receiving States on a rotational basis to meet the on-going, non-seasonal demand for domestic labor. This may indeed be a constraint on the feasibility of this solution because, from an employer's perspective, continuity of employment is an important attribute of domestic work if it involves a large component of childcare.⁴³⁵

This type of arrangement, however, could be offered in appropriate cases as an option to MDWs who have significant family commitments in their home country, rather than imposed as a mandatory condition for participating in the scheme. In either case, both the positive and negative impacts of circular migration programs may take years to materialize, given the long-term nature of the development process, including "potential longer-term negative effects of continual absence of family members on family and community relations."⁴³⁶

C. Communication and Visitation: Government Leverage in the Philippines

The Philippines has gone further than most source countries in translating policy commitments to migrant workers and their families into binding legislation, such as the Migrant Workers and Overseas Filipinos Act 1995.⁴³⁷ That Act, as amended, incorporates rights for Filipino migrant workers into domestic law, including a provision in § 4 that the government will only deploy Filipino workers to countries in which their rights are protected.⁴³⁸ The legislation stipulates the guarantees that a receiving country is required to make for the purpose of protecting the rights of over-

432. Nic Maclellan & Peter Mares, *Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia*, in *GLOBALISATION AND GOVERNANCE IN THE PACIFIC ISLANDS: STATE, SOCIETY AND GOVERNANCE IN MELANESIA* 137, 159 (Stewart Firth ed., 2006).

433. *Special Program visa (subclass 416) for the Seasonal Worker Program*, Department of Immigration and Border Protection, AUSTRALIAN GOV'T, <https://www.border.gov.au/Trav/Visa-1/416->.

434. Maclellan & Mares, *supra* note 432, at 152.

435. Travel costs could amount to anywhere between four months' to one year's salary for a MDW. See Frantz, *supra* note 32; HUMAN RIGHTS WATCH, *supra* note 50, at 79.

436. DAVID MCKENZIE AND JOHN GIBSON, *THE DEVELOPMENT IMPACT OF A BEST PRACTICE SEASONAL WORKER POLICY: POLICY RESEARCH WORKING PAPER* 5488, 21 (2010).

437. An Act Amending Republic Act No. 8042, Otherwise Known as the Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 10022, § 1(g), (July 27, 2009) (Phil.) [hereinafter Migrant Workers Act Amendment].

438. *Id.* § 3.

seas Filipino workers⁴³⁹: that the receiving country (a) has existing labor and social laws protecting the rights of workers, including migrant workers; (b) is a signatory to or a ratifier of multilateral conventions, declarations, or resolutions relating to the protection of workers, including migrant workers; and (c) has concluded a bilateral agreement or arrangement with the Philippines government on the protection of the rights of overseas Filipino workers.⁴⁴⁰ In addition, the receiving country must show that it is taking “positive, concrete measures to protect the rights of migrant workers in furtherance of any of the guarantees.”⁴⁴¹ If a receiving country cannot show clearly that these guarantees exist, no permit can be issued to deploy workers to that country.⁴⁴²

The Philippines continues to send its workers to GCC countries, but stronger negotiations by the Philippines than other labor-sending countries have resulted in better employment outcomes for its workers in the Middle East, including significantly higher wages for domestic workers in some destination countries.⁴⁴³ It has also been reported that efforts to increase the skills of migrant workers in order to move away from low-skilled labor migration led to “a 15 percent decrease in the share of low-skilled workers going to the UAE, and a sharp increase in the deployment of newly hired professionals and semi-skilled workers, such as in sales” between 1997 and 2008, according to the Philippine Overseas Employment Administration.⁴⁴⁴

The Philippines has also taken strong measures to facilitate connections between families and migrant workers, recognizing that frequent communication between children and migrant parents improves the well-being of children. In migrant families, sound family relationships are maintained “not by presence but by constant communication.”⁴⁴⁵ In one study of Filipino children under twelve years of age with one or both parents working overseas, predominantly in the Middle East, it was found that ties between the parents and their children “were maintained through regular communication, mostly through the use of mobile phones and . . . text messaging.”⁴⁴⁶ It found that regular communication greatly assisted transnational households to adjust to family separation, and that access to tech-

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. In 2008, Filipino domestic workers earned \$200–400 per month in Lebanon, while Bangladeshis earned \$125 and Sri Lankans between \$120 and \$150. See RAKKEE THIMOTHY & S.K. SASIKUMAR, MIGRATION OF WOMEN WORKERS FROM SOUTH ASIA TO THE GULF 39 (2012), http://www.ucis.pitt.edu/global/sites/www.ucis.pitt.edu/global/files/migration_women_southasia_gulf.pdf.

444. Froilan Malit & Ali Al Youha, *Labor Migration in the United Arab Emirates: Challenges and Responses*, MIGRATION POL. INST. (Sept. 18, 2013), <http://www.migrationpolicy.org/article/labor-migration-united-arab-emirates-challenges-and-responses>.

445. EPISCOPAL COMMISSION FOR THE PASTORAL CARE OF MIGRANTS AND ITINERANT PEOPLE, SCALABRINI MIGRATION CENTER AND OVERSEAS WORKERS WELFARE ADMINISTRATION, HEARTS APART: MIGRATION IN THE EYES OF FILIPINO CHILDREN 64 (2004).

446. CHAMPSEA PHILIPPINES, *supra* note 68, at 2.

nology such as mobile phones and the internet helped migrant workers to continue parenting from abroad.⁴⁴⁷ The study also found that forty-seven percent of overseas migrant workers from the Philippines contacted their families daily, and twenty-five percent weekly, but that mothers who were in domestic work had less regular communication with their families because of restrictions imposed by employers.⁴⁴⁸ Another study identified that “feelings of abandonment expressed by left-behind children of migrant mothers have been found to decrease when mothers continue to show their care through frequent intimate communication and close supervision over their left-behind offspring.”⁴⁴⁹

To support communication between MDWs and their families, the Philippines Government has demanded that overseas employers allow MDWs to communicate freely with their families in the Philippines, enforced through undertakings in the Standard Employment Contract for Filipino Household Service Workers.⁴⁵⁰ Similarly, in its negotiations with the UAE, the Philippine Overseas Employment Administration (a government agency that seeks to protect Filipino migrant workers) has demanded that its domestic workers have the right to use and own a mobile phone.⁴⁵¹ Likewise, the Overseas Workers Welfare Administration (a government agency that attends to the welfare of Filipino migrant workers) has initiated the Tulay Program, which provides information and communication technology training to overseas Filipino workers and their families to facilitate communications and ensure that families remain in contact, particularly by utilizing the internet.⁴⁵²

Another noteworthy feature of the regulatory environment in the Philippines is the exemption from travel taxes that has been granted by Presidential Decree to migrant workers, their spouses, and dependents aged twenty-one years or below.⁴⁵³ Such measures can facilitate family reunion by reducing the cost of travel for transnational families.⁴⁵⁴ The cost of airfare may still be prohibitive, however, and States should therefore consider subsidizing MDW airfare to encourage more frequent family reunion,

447. *Id.* at 6.

448. *Id.* at 18.

449. Theodora Lam et al., *Securing a Better Living Environment for Left-Behind Children: Implications and Challenges for Policies*, 22 *ASIAN PAC. MIGRATION J.* 421, 426 (2013).

450. Filipino Employment Contract, *supra* note 223, at cl. 8.

451. Ramona Ruiz, *UAE Recruiters Warned to Pay Minimum Wage for Filipino Domestic Workers*, *THE NATIONAL (ABU DHABI)* (Dec. 17, 2012), www.thenational.ae/news/uae-news/uae-recruiters-warned-to-pay-minimum-wage-for-filipino-domestic-workers.

452. CHAMPSEA PHILIPPINES, *supra* note 68, at 7; INT’L HUMAN RIGHTS CLINIC, *THE PROTECTION OF RIGHTS OF MIGRANT DOMESTIC WORKERS IN A COUNTRY OF ORIGIN AND A COUNTRY OF DESTINATION: CASE STUDIES OF THE PHILIPPINES AND KUWAIT 107-08* (2013), https://www.saisjhu.edu/sites/default/files/Domestic-Workers-Report-2013_ElectronicVersion.pdf.

453. Presidential Decree No. 1183 (1977) (Phil.), http://www.lawphil.net/statutes/presdecs/pd1977/pd_1183_1977.html.

454. *See id.*

or alternatively require employers to pay the return airfare of MDWs at more frequent intervals than once every two years.

D. Switching Streams: Enhancing Skilled Migration

A number of source countries have recognized that the protection of the rights of migrant workers and their families is improved significantly when the nature of the migration flow changes from unskilled to skilled labor. In its National Labour Migration Policy, the Sri Lankan Government acknowledged that the possession of skills is a key element in protecting migrant workers.⁴⁵⁵ Yet its migrant worker labor force remains largely unskilled—sixty-four percent of departing migrant workers fell in that category in 2012, which is a small improvement on the seventy percent of unskilled workers in 2007.⁴⁵⁶ As the IOM recommends, “[i]n the Sri Lankan context it is necessary to provide opportunities for high levels of skills training for women migrant workers such as care of children, the elderly and the sick, as well as in ‘non-traditional’ skills that will ensure better remunerative employment and less economic exploitation.”⁴⁵⁷ Having higher skills is also likely to improve a migrant worker’s prospects of securing employment upon return but, at present, most Sri Lankan MDWs do not acquire marketable skills abroad.⁴⁵⁸ Without professional experience and development while overseas they “cannot secure reasonably well paid employment back in the country.”⁴⁵⁹

The Philippines has gone beyond executive statements of policy to make a legislative declaration to enhance the skills of its migrant workers in recognition that “the most effective tool for empowerment is the possession of skills by migrant workers.”⁴⁶⁰ Yet the legislative undertaking that “as soon as practicable, the government shall deploy and/or allow the deployment only of skilled Filipino workers” was made in 1995,⁴⁶¹ and two decades later a significant portion of Filipino migrant workers remain low-skilled.⁴⁶²

455. SRI LANKA MINISTRY FOR FOREIGN EMPLOYMENT PROMOTION AND WELFARE, *supra* note 38, at 8.

456. SRI LANKA BUREAU OF FOREIGN EMPLOYMENT, *supra* note 38, at tbl. 84.

457. Jayaweera & Dias, *supra* note 67, at 109.

458. Gamburd, *supra* note 236, at 106.

459. S. T. Hettige, *Globalization, Labour Migration and Social Protection in Sri Lanka* 13 (Paper presented at the RC19 2009 Conference: Social Policies: Local Experiments, Travelling Ideas, Montreal, Aug. 20–22, 2009).

460. Migrant Workers Act Amendment, *supra* note 437.

461. Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 2(g) (June 7, 1995) (Phil.).

462. GRAZIANO BATTISTELLA & MARUJA ASIS, INT’L ORG. FOR MIGRATION AND SCALABRINI MIGRATION CENTER, COUNTRY MIGRATION REPORT: THE PHILIPPINES 51 (2013), <https://www.iom.int/files/live/sites/iom/files/Country/docs/CMReport-Philippines-2013.pdf>.

The Government of the Philippines’ 2014 Survey on Overseas Filipinos indicates that laborers and unskilled workers were still the largest group of overseas Filipino workers at thirty-three percent; and more than half of the Philippines’ female overseas workers were laborers and unskilled workers at fifty-four percent. Press Release, Philippine Statistics Authority, Total Number of OFWs Estimates at 2.3 Million (Results from 2014

Nonetheless, the Philippines and other countries such as Tonga have strong out-migration streams that focus on providing skilled nurses, carers, and healthcare workers to developed countries, responding to energetic international recruitment campaigns to fill critical shortages in industrialized countries.⁴⁶³ Governments in source countries invest in training female nurses and allied professionals, who are then able to attract skilled jobs overseas.⁴⁶⁴ This improves outcomes for the migrants' children when compared to low-skilled migration, such as domestic workers, because better wages and employment conditions improve opportunities for communication and family reunion.⁴⁶⁵

A concomitant problem that arises for source countries that promote skilled migration is that skilled workers may choose not to return because of higher wages and standards of living in the host country,⁴⁶⁶ contributing to the "brain drain" that is experienced in many developing countries.⁴⁶⁷ An example of a best practice model of temporary skilled labor migration, which attempts to address the issue of brain drain, is the labor agreement between the Philippines and Germany signed in March 2013.⁴⁶⁸ The Agreement Concerning the Placement of Filipino Health Care Professionals in Employment Positions in the Federal Republic of Germany establishes bilateral arrangements for the "government-to-government placement of Filipino health professionals for temporary employment in Germany," reflecting what the Filipino Government states is a "firm commitment to provide for an orderly system for the recruitment of Filipino health care professionals to Germany" and one which demonstrates its "commitment to promote their welfare and protection."⁴⁶⁹ One key area covered in the agreement is cooperation between the two countries in preserving, promoting, and developing the welfare of Filipino workers; another is the commitment by both States to support the sustainability of human resource development in the Philippines.⁴⁷⁰ The Filipino Labor

Survey on Overseas Filipinos) (Apr. 24, 2015), <https://psa.gov.ph/content/total-number-ofws-estimated-23-million-results-2014-survey-overseas-filipinos%C2%B9>.

463. Mireille Kingma, *Nurses on the Move: A Global Overview*, 42 HEALTH SERV. RES. 1281 (2007).

464. See generally *id.*

465. Studies from the Philippines have found that employment in skilled and protected sectors not only enables migrant workers to gain higher wages, but also reduces restrictions on maintaining regular contacts with their families in the Philippines. CHAMPSEA PHILIPPINES, *supra* note 68, at 4.

466. See 10 Countries Facing the Biggest Brain Drain, ONLINE UNIVERSITIES.COM (July 6, 2011), <http://www.onlineuniversities.com/blog/2011/07/10-countries-facing-the-biggest-brain-drain/>.

467. See *id.*

468. Agreement Concerning the Placement of Filipino Health Professionals in Employment Positions in the Federal Republic of Germany, Phil.-Ger. (Mar. 19, 2013), http://www.poea.gov.ph/docs/Agreement_Ph_Germany%20Nurses.pdf.

469. News Release, Philippines, Department of Labor and Employment, DOLE Welcomes Labor Agreement with Germany on Health Care Professionals (Mar. 19, 2013), <http://www.poea.gov.ph/news/2013/DOLE%20welcomes%20labor%20agreement%20with%20Germany%20on%20health%20care%20professionals.pdf>.

470. *Id.*

and Employment Secretary has stated that “mechanisms to ensure the sustainability of trained and qualified health care professionals in the Philippines through [human resource development] cooperation are very important given the concerns of the Philippine health sector on their active migration.”⁴⁷¹

The deployment of skilled workers to meet labor demands in professional industries places source governments in a stronger position to demand better conditions for their workers because the governments of receiving countries require foreign workers to meet their commitments to provide social services to their own populations. For example, the agreement between the Philippines and Germany stipulates that Filipino health-care professionals in Germany must not be employed under less favorable working conditions than those for comparable German workers.⁴⁷² This illustration shows the potential benefits of careful bilateral negotiations with labor-receiving States. The U.N. Committee on Migrant Workers has urged Sri Lanka to continue its efforts to negotiate more secure employment opportunities and terms and conditions for women in vulnerable sectors through bilateral agreements in countries where discriminatory treatment and abuse are more frequent.⁴⁷³

E. Regional Cooperation

Most international migration takes place within regions that are linked by geographical, historical, linguistic, cultural, or economic ties.⁴⁷⁴ This is true of Asian migration, where 72.4 percent of the 59.3 million people who immigrated to an Asian country (including a Middle Eastern country) in 2000–2002 moved there from another Asian country.⁴⁷⁵ The practical importance of regional migration has underpinned the growth, since the 1980s, of collaborative arrangements among States for addressing migration issues through regional consultative processes.⁴⁷⁶

Two regional consultative processes that specifically address labor migration from Asia are the Colombo Process established in 2003 (formally known as the Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia),⁴⁷⁷ and the Abu Dhabi

471. *Id.*

472. Agreement Concerning the Placement of Filipino Health Professionals in Employment Positions in the Federal Republic of Germany, *supra* note 468.

473. List of Issues, *supra* note 373, ¶¶ 28, 40.

474. UNDP 2009, *supra* note 4, at 21–22 (2009).

475. Richard Bedford, *Contemporary Patterns of International Migration*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 17, 30 (Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross eds., 2012). See UNDP 2009, *supra* note 4, at 21–24.

476. Karoline Popp, *Regional Processes, Law and Institutional Developments on Migration*, in FOUNDATIONS OF INTERNATIONAL MIGRATION LAW 366, 366–67 (Brian Opeskin, Richard Perruchoud & Jillyanne Redpath-Cross eds., 2012).

477. It comprises eleven members from labor-sending countries and eight observers from labor receiving countries (including five in the Middle East). See generally COLOMBO PROCESS, INTERNATIONAL ORG. FOR MIGRATION, www.colomboprocess.org (last visited Nov. 11, 2015).

Dialogue established in 2008.⁴⁷⁸ Sri Lanka is a member of both processes.⁴⁷⁹

There is significant potential for regional consultative processes to improve labor migration practices for the benefit of the children left behind. For example, in 2011 the Fourth Ministerial Consultation of the Colombo Process recommended that Member States promote increased opportunities for family reunion.⁴⁸⁰ It also highlighted the role of international agencies in supporting studies on “the impact on families of migrants left behind in countries of origin.”⁴⁸¹ In addition, in 2014 the Third Ministerial Consultation of the Abu Dhabi Dialogue committed Member States to significant improvements for migrant workers, which can have consequential benefits for children left behind.⁴⁸² These measures included expanding the pool of skilled migrants, enhancing information and orientation programs for migrant workers, protecting workers’ rights, and strengthening oversight of private recruitment agencies.⁴⁸³

To date, however, the regional consultative processes have not borne enough fruit for the children of MDWs. The regional dialogues remain focused on measures that promote the migration of domestic workers to the economic benefit of sending and receiving States. The concluding statement of a recent meeting of senior officers under the Colombo Process emphasized prosperity and “adding value” to regional labor migration through cost-effective recruitment, promoting standard employment contracts, and promoting cheaper and faster remittances.⁴⁸⁴ Although progress on these issues is not inimical to the interests of children left behind, it reinforces the need for regional consultative processes to make a broader assessment of the social impact of the MDW phenomenon on children, families, and communities in labor-sending countries, and to make those concerns central to their deliberations.

478. Its members comprise the eleven labour-sending members of the Colombo Process and seven destination countries. See ABU DHABI DIALOGUE, INTERNATIONAL ORG. FOR MIGRATION, <https://www.iom.int/abu-dhabi-dialogue> (last visited Nov. 11, 2015).

479. See *id.*; COLOMBO PROCESS, *supra* note 477.

480. INT’L ORG. FOR MIGRATION, REPORT OF THE FOURTH CONSULTATION ON OVERSEAS EMPLOYMENT AND CONTRACTUAL LABOUR FOR COUNTRIES OF ORIGIN IN ASIA, MIGRATION WITH DIGNITY 53 (2011), <https://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/rcps/colombo/Report-of-the-Fourth-Ministerial-Conference-Colombo-Process-2011.pdf>.

481. *Id.* at 50, 53.

482. See also *Gulf, Asia Approve Steps to Protect Foreign Workers*, THE DAILY STAR (LEBANON) (Nov. 28, 2014), <http://apmigration.ilo.org/news/ulf-asia-approve-steps-to-protect-foreign-workers>.

483. See *id.*

484. COLOMBO PROCESS, INT’L LABOUR MIGRATION FOR PROSPERITY: ADDING VALUE BY WORKING TOGETHER—CONCLUDING STATEMENT OF THE SENIOR OFFICIALS’ MEETING (2014), <https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Concluding-statement-International-Labour-Migration-for-Prospersity-Adding-Value-by-Working-Together.pdf>.

Conclusion

The rights of the children of MDWs most at risk of violation are those associated with family life, education, health, well-being, and freedom from abuse. Existing international instruments and national policies provide comprehensive legal and policy frameworks for understanding these rights. As Jacqueline Bhabha states, however, the main problem is not a normative vacuum or a doctrinal impasse but “a failure of political will to provide the tools necessary for implementation on the ground of the sound policy measures in force primarily on the books.”⁴⁸⁵

It is imperative that receiving States reform the restrictive employer-based visa system and that sending States demand improved contractual provisions to protect the rights of their MDWs, including the right to maintain direct and regular communication with their children. While governments continue to encourage the migration of their women nationals as domestic workers, it is essential that they implement effective support measures for children and their carers left behind, as well as protective mechanisms for children identified as being at risk of abuse or neglect. As summed up by the Global Commission on International Migration:

migration policies have little chance of producing positive outcomes unless they are complemented by appropriate policies in the many other areas that have an impact on, and which are impacted by, international migration. In short, the issue of human mobility cannot be dealt with in isolation.⁴⁸⁶

Labor-sending countries require support from the international community to enhance the training capacity of institutions to meet the goal of reducing women’s low-skilled migration and to research and analyze comprehensively the social impact on their societies of large-scale labor migration programs. This knowledge, combined with the experience gained from comparative labor migration practices, can help inform structural reforms of labor migration programs. These reforms should be based on an understanding of the social costs of migration relative to the potential economic gains, and provide a greater opportunity to realize development goals in a long-term and sustainable way that reduces, rather than exacerbates, negative impacts on those children affected by the migration process.

485. Bhabha, *supra* note 110, at 231.

486. GLOBAL COMM’N ON INT’L MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 9 (2005), <http://www.queensu.ca/samp/migration/resources/reports/gcim-complete-report-2005.pdf>.