

**Human Rights Policy Lab  
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*Human Rights Policy Lab*

# **THE HUMAN RIGHTS OF MEXICAN MIGRANTS: A CASE STUDY ON THE UNITED STATES, CANADA & SPAIN**

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## **Executive Summary**

In 2015, there were 244 million international migrants, of which 12 million come from Mexico.<sup>1</sup> The United States alone hosts the vast majority of these Mexican-born migrants, while Canada and Spain follow as the second and third largest receiving countries respectively.<sup>2</sup> The Mexican diaspora raises an important question: *what human rights obligations do countries, sending and receiving, owe to this immigrant population and to what degree are these obligations being met?* The Policy Report will attempt to answer this question by examining the human rights of Mexican migrants in the United States, Canada and Spain.

First, the Policy Report provides an overview of the consular establishment. This is the central means by which migrants maintain a connection with their sending countries. This section will summarize the development, operation and expansion of the institution with a focus on the Mexican consulate in the United States. It will also provide insights into the ways in which sending countries meet their human rights obligations through the provision of consular services, namely legal services.

Second, the Policy Report will summarize the specific international and regional human rights treaties that apply to migrants. This will include a textual analysis of the ways in which the treaties directly or indirectly articulate signatory obligations to migrant

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<sup>1</sup> United Nations, Dept. of Economic and Social Affairs: Population Division, *Trends in International Migration, 2015*, 2015/4 (Dec. 2015), available at <http://www.un.org/en/development/desa/population/migration/publications/populationfacts/docs/MigrationPopFacts20154.pdf>; *International Migrant Population by Country of Origin and Destination*, MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/programs/data-hub/charts/international-migrant-population-country-origin-and-destination> (last visited April 9, 2016) (citing *Trends in International Migrant Stock: Migrants by Origin and Destination*, UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (2013), available at <http://esa.un.org/unmigration/TIMSO2013/migrantstocks2013.htm>).

<sup>2</sup> *Id.*

populations. The international treaties include: the International Covenant on Civil and Political Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, the Covenant on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of Children, the International Covenant of Protection of the Rights of All Migrant Workers and Members of Their Families, and directives from the International Labour Organization. The regional treaties discussed draw from those signed through the Organization of European States and the Organization of American States.

The Third, Fourth and Fifth sections examine migrant human rights on a country-specific basis. It will focus on the three largest receiving countries of Mexican migrants – the United States, Canada, and Spain. These sections provide an overview of each country's performance under the aforementioned treaties that affect migrant rights. Each section will also evaluate the labor, family and civil/human rights protections available to migrants in that country. Finally, each section will conclude with a discussion on migrant access to civil legal services to evaluate each country's fulfillment of the human rights obligation to provide the right to a remedy.

Section Six provides a tabular summary of the international and regional human rights treaties to which the United States, Canada and Spain are bound.

The Policy Report will conclude by revisiting the overarching question, and providing a brief answer. It will also offer opportunities for further research.

## **Introduction**

This project aims to identify the human rights treaties that pertain to the rights of migrants, and assess how human rights norms in a legal climate affect the ability of Consulates to assist their foreign nationals. The number of migrants globally has expanded dramatically as travel became more accessible, communications technology improved, mass media developed, and foreign economic opportunities became more robust. As a result, a government's ability to protect nationals outside their borders has never been more important than it is today.

This paper will look at the role of the consulate in protecting its citizens, and then focus specifically on the Mexican government. The Mexican Consular System is in a unique position to provide services to migrants because of the sheer number of Mexicans living outside national borders. It is estimated that over 10% of Mexican citizens live outside of Mexico. The three most populous countries for Mexican migrants are the United States, Canada, and Spain. This analysis will look at the human rights treaties and climate in each of countries, to assess the opportunities and limitations the Mexican consulate faces in protecting the human rights of their citizens. The paper will explore various civil legal issues faced by migrants, especially those issues concerning labor law. It will examine each country's history of migrant services, as well as the effect of diversity within migrant populations, and how the human rights are affected by the country's economic climate.

### **I. Introduction to the Consular Establishment**

The concept of a consulate existed since long before most countries in today's world even existed. As far back as the 6<sup>th</sup> century BC, the Egyptians allowed one of their

trading cities, Naucratis, to be governed by Greeks, in order to promote trade between the countries and allow Greek citizens to live in Egypt.<sup>3</sup> This outpost for the Greek government allowed Greece to exert political and economic control over their foreign citizens to the benefit of both countries. In more recent years, there has been an expansion in priorities, with consulates providing services beyond those that serve the government's purely economic and political interests.

Today, consulates help fulfill the functions outlined in the 1961 Vienna Convention on Diplomatic Relations. This Convention defined the role of diplomatic missions in foreign countries in five parts.<sup>4</sup> First, representing the sending state in the receiving state; second, protecting the interests of the sending state and its nationals to the extent authorized by international law; third, negotiating with the government of the receiving state; fourth, investigating and reporting on the conditions and developments in the receiving state; and fifth, promoting friendly relations between the sending and receiving state, and developing economic, cultural, and scientific relations.<sup>5</sup> Although sending states have many interests that they are able to promote through consulates, this paper will focus less on diplomatic and economic interests, and instead focus on the interest a country has in protecting the rights and well-being of its national's abroad.

The impetus behind the expansion of consular services is primarily the sheer growth in numbers of migrants living abroad, as well as the increasing global recognition that countries have a responsibility to citizens outside their borders. As of 2016, an

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<sup>3</sup> Charles Stuart Kennedy, A Brief History of the Consular Service Association for Diplomatic Studies and Training, <http://adst.org/a-brief-history-of-the-consular-service/> (last visited Apr 2, 2016).

<sup>4</sup> Ralph Feltham, *Diplomatic Handbook* (2004), [https://books.google.com/books?id=orquhgdx28c&printsec=frontcover&source=gbs\\_viewapi#v=onepage&q&f=false](https://books.google.com/books?id=orquhgdx28c&printsec=frontcover&source=gbs_viewapi#v=onepage&q&f=false).

<sup>5</sup> United Nations, *Vienna Convention on Consular Relations*, 24 April 1963.

estimated 3.15% of the world's population resides outside the country where they have citizenship.<sup>6</sup> This reflects a growth of 57 million global migrants since 2000.<sup>7</sup> In the context of changing needs of nationals, as well as a changing environment in which services are delivered, the focus of consulates has shifted from representing businessmen's interests to representing the interests of the general public.<sup>8</sup> Fulfilling consular responsibilities is made all the easier by technological advances that improve data collection and mass communication. For example, the widespread use of mobile phones made it easier for consulates to communicate with citizens abroad. The UK now sends "welcome SMS messages" to citizens who use UK phones in foreign countries.<sup>9</sup>

Additionally, migrants face challenges that did not exist until relatively recently, creating circumstances which require consulates to handle more complex issues. For example, as international travel becomes more accessible, there are increasing numbers of "citizens in distress" due to child abduction, medical tourism, and cross-border crime.<sup>10</sup> Also notably, as the number of people migrating for labor rises, the job of monitoring labor conditions has become both more challenging and also more necessary.

Finally, access to media and demand for transparency has served to hold governments more accountable. Citizens have higher expectations of what their government should do for them abroad, and have more resources to learn about their

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<sup>6</sup> People Movin, *Migration Flows Across the World*, <http://peoplemov.in/> (last visited Apr 1, 2016).

<sup>7</sup> The World Bank, Migration and Remittances Team, Development Prospects Group, *Migration and Development Brief 22* (2014), <https://siteresources.worldbank.org/intprospects/resources/334934-1288990760745/migrationanddevelopmentbrief22.pdf>.

<sup>8</sup> Maaïke Okano-Heijmans, *Changes in Consular Assistance and the Emergence of Consular Diplomacy*, 7 *in* Consular Affairs and Diplomacy 21–41 (Jan Melissen & Ana Mar Fernandez eds., 2010).

<sup>9</sup> George Haynal et al., *The Consular Function in the 21st Century: A Report for Foreign Affairs and International Trade Canada* (2013), <http://munkschool.utoronto.ca/wp-content/uploads/2013/06/The-Consular-Function-in-the-21st-Century-.pdf>.

<sup>10</sup> Id.

rights.<sup>11</sup> The media creates high expectations as well, associating a government's ability to protect its citizens, even those outside its borders, as a reflection on the legitimacy and effectiveness of that government.<sup>12</sup> Further, the public, now more than ever, know how to use the media to make their voices heard.<sup>13</sup> Now, rather than solely using the consulate for positive media coverage when it is expedient, governments have to be concerned about avoiding negative media coverage at all times.<sup>14</sup> Consular services have expanded as the potential diplomatic impact of those services expanded.

Labor protections for citizens working in other countries are one of the primary protections provided by consulates. Labor mobility has increased dramatically as the costs of travel have decreased, as economic situations in some developing countries have deteriorated, and as opportunities for migrant work in developing countries have become more available and lucrative. In 2008, the average moderately skilled worker who moved from a developing country to the United States earned \$10,000 more per year than if they had stayed in their home country. The average per capita income among developing countries is roughly \$5,000 per year.<sup>15</sup>

Migrant workers are incredibly vulnerable to labor exploitation for an ever-expanding list of reasons. Their lack of access to the same resources enjoyed by non-migrant workers contributes to their vulnerability. Language and cultural barriers (discomfort with or distrust of local service providers, and lack of a support community), legal barriers (lack of documentation and limited legal protections), and economic

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<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> Maaïke Okano-Heijmans, *Changes in Consular Assistance and the Emergence of Consular Diplomacy*, 7 *in* Consular Affairs and Diplomacy 21–41 (Jan Melissen & Ana Mar Fernandez eds., 2010).

<sup>14</sup> Id.

<sup>15</sup> Leeson, P. and Gochenour, Z. *The Economic Effects of International Labor Mobility* (2015), [http://www.depts.ttu.edu/freemarketinstitute/research/immigration\\_papers/TheEconomicEffectsofInternationalLaborMobility.pdf](http://www.depts.ttu.edu/freemarketinstitute/research/immigration_papers/TheEconomicEffectsofInternationalLaborMobility.pdf).

barriers (not being able to afford assistance and fear of losing employment) contribute to a migrant worker's inability to protect her labor-related rights.

Consulates employ different tools depending on the specific needs of the region to assist their migrant citizens. For example, in the United Arab Emirates, the Indian consulate has a hotline for “women and housemaids in distress” and the Philippines consulate runs a safe house for migrants escaping abusive employers.<sup>16</sup> In the United States, many Mexican migrants work in agriculture in rural areas, and do not have access to transportation to the nearest consulate. The Mexican consular network now has “consulates on wheels” that visit rural areas on evenings and weekends to provide consular services.<sup>17</sup>

Consulates have also been criticized for their role in labor protections, however, because consulates play a dual role in migrant labor. In addition to protecting labor conditions, they also work to expand the number of jobs available to migrants. This desire for more employment opportunities has been challenged as sometimes directly at odds with a consulate advocating for better labor conditions, and resulting in a compromise on labor conditions in exchange for increased job availability.<sup>18</sup>

While consulates cannot provide legal representation within the receiving country, they can still play an important role in access to legal services. They can provide legal information, advocate on behalf of their citizens, and connect migrants with people and organizations authorized to provide legal services. In the United States, over 30% of

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<sup>16</sup> George Haynal et al., *The Consular Function in the 21st Century: A Report for Foreign Affairs and International Trade Canada* (2013), <http://munkschool.utoronto.ca/wp-content/uploads/2013/06/The-Consular-Function-in-the-21st-Century-.pdf>.

<sup>17</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 *The Hague Journal of Diplomacy* 227–236, 227-236 (2012).

<sup>18</sup> *Migrant Forum in Asia, The Role of Missions in Protecting and Promoting the Rights of Migrant Workers* (2014), <http://www.ilo.org/dyn/migpractice/docs/138/PB8.pdf>.

people applying for a program known as Deferred Action for Childhood Arrivals (DACA) in order to obtain a legal authorization to remain in the country complete their applications without the help of a nonprofit organization or private attorney.<sup>19</sup> As a result, many are reliant on the consulate to assist with the DACA process. The Mexican consulates provide specific information about the application process and further assist DACA applicants in obtaining necessary documentation.<sup>20</sup>

Additionally, many consulates, most notably the Mexican Consulate through their PALE program, provide referrals to lawyers who specialize in issues affecting migrants. The Programa de Asistencia Jurídica a Mexicanos a través de Asesorías Legales Externas (PALE) was created in 1998 and began operation in 2000. Since then, 5,300 cases were assisted by PALE lawyers.<sup>21</sup>

The Consulate's role in facilitating access to legal services is especially crucial in countries that legally prevent migrants from accessing the same legal services as citizens. For example, in 1980 the United States Congress prohibited the Legal Services Corporation, the main civil legal services provider for low-income people, from providing services to non-citizens using federal funding.<sup>22</sup> In 1996 Congress further restricted the actions of Legal Services Corp by preventing them from providing services to undocumented people, even if those services were provided with other funding.<sup>23</sup> Since

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<sup>19</sup> Stephanie Costa, *Executive Actions on Immigration: The Critical Role of Consulates in Protecting and Preparing their Nationals*, Catholic Legal Immigration Network, Inc., <https://cliniclegal.org/news/consulate-legalization-advocacy/executive-actions-immigration-critical-role-consulates> (last visited Mar 20, 2016).

<sup>20</sup> Id.

<sup>21</sup> Programa de Asistencia Jurídica a Mexicanos a Través de Asesorías Legales Externas (PALE), gob.mx, <http://www.gob.mx/sre/acciones-y-programas/programa-de-asistencia-juridica-a-mexicanos-a-traves-de-asesorias-legales-externas-pale> (last visited Mar 20, 2016).

<sup>22</sup> 42 U.S.C. 2996 et seq.

<sup>23</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a)(18), 110 Stat. 1321, 50 (1996).

1996, this prohibition has only been loosened to allow legal services for abused spouses and children regardless of their immigration status.<sup>24</sup>

### **A. Mexican Consular Services**

The Mexican Consulate in particular has become a global leader in the possibilities for expanding services to migrants, as Mexican migration to the United States exploded in the past half century.



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There are more Mexicans right now living outside of Mexico than ever before, with the trend expected to continue. As of 2014, there were 12 million Mexicans living

<sup>24</sup> *Fact Sheet: The Restriction Barring LSC-Funded Lawyers From Assisting Certain Immigrant Groups*, Brennan Center for Justice at New York University School of Law (2003), <https://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-assisting-certain-immigrant-groups>.

<sup>25</sup> Jeffrey S. Passel, D'Vera Cohn & Ana Gonzalez-Barrera, *Migration Between the U.S. and Mexico*, Pew Research Centers Hispanic Trends Project (2012), <http://www.pewhispanic.org/2012/04/23/ii-migration-between-the-u-s-and-mexico/>.

abroad. Of those 12 million, an estimated 98% lived in the United States.<sup>26</sup> The next 10 countries with the most Mexican migrants are:

 AÍ	POBLACIÓN
 CANADÁ	96,055 ★
 ESPAÑA	47,917 ★
 ALEMANIA	13,247 ★
 REINO UNIDO	11,000 ★
 BOLIVIA	8,655
 ARGENTINA	7,239
 SUIZA	6,460 ★
 PAISES BAJOS	5,254 ★
 COSTA RICA	4,874
 ITALIA	4,357 ★

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In contrast, the population of Mexico is around 120 million people, so almost 10% of Mexico's citizens do not live in its borders.<sup>28</sup> It is estimated that one in four Mexican citizens living in Mexico has a close relative living in the United States.<sup>29</sup> It should also be noted that many Mexican migrants live in mixed status households, where some family members have legal status in the United States and other do not. As a result, there are a large number of people not included in these statistics that nonetheless identify as Mexican, have high expectations of the Mexican consulate, and rely on Mexican consulate for certain services.

<sup>26</sup> Estadísticas de Mexicanos en el Exterior, <http://www.ime.gob.mx/en/agenda-de-informacion/estadisticas-de-mexicanos-en-el-exterior> (last visited Mar 4, 2016).

<sup>27</sup> Mexicanos en el Mundo, <http://www.ime.gob.mx/es/resto-del-mundo> (last visited Mar 4, 2016).

<sup>28</sup> This number is disputed by critics who claim that many undocumented migrants in the United States are excluded from official statistics. The Mexican government itself has claimed that the population of Mexicans in the United States is closer to 20% of the population within Mexico's borders. See [http://zedillo.presidencia.gob.mx/welcome/PAGES/library/od\\_mexcommunities.html](http://zedillo.presidencia.gob.mx/welcome/PAGES/library/od_mexcommunities.html)

<sup>29</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 The Hague Journal of Diplomacy 227–236, 227–236 (2012).

The Mexican government now recognizes that "the Mexican Nation extends beyond the territory contained within its borders."<sup>30</sup> Given the close relationship between Mexico and the United States, both geographically and economically, it is no surprise that as of 2011, 50 of the Mexican Consulate's 67 global offices were in the United States.<sup>31</sup> Each day, these consular offices assist between 200 and 600 Mexican nationals.<sup>32</sup>

## 1. Legal Services

The Mexican Consulate provides legal assistance to Mexican migrants through their Office of Legal Protection (OLP). One of the main priorities of the Consulates of Mexico is to "protect and safeguard the rights and well-being of the Mexican nationals abroad," and the legal rights of those nationals are of utmost importance.<sup>33</sup> In criminal law, the Mexican Consulate's intervention is limited to cases that may result in the death penalty.<sup>34</sup> In the civil realm, the consulate operates mainly in the fields of family, labor, and human rights law. Funds obtained from consular services, such as document issuance and notary services, are now returned to the consulate to be used on legal and social assistance. This allows the consulate's capacity to grow as the community it serves grows.<sup>35</sup>

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<sup>30</sup> Program for Mexican Communities Abroad, [http://zedillo.presidencia.gob.mx/welcome/PAGES/library/od\\_mexcommunities.html](http://zedillo.presidencia.gob.mx/welcome/PAGES/library/od_mexcommunities.html) (last visited Mar 4, 2016).

<sup>31</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 The Hague Journal of Diplomacy 227–236, 227-236 (2012).

<sup>32</sup> Gabriela Cesarman-Maus, *The Consular Program for Mexican Communities Abroad: A Source of Outreach for Health Workers*, 14 Journal of Transcultural Nursing 272–275 (2003).

<sup>33</sup> Department of Protection for Mexican Nationals, <http://consulmex.sre.gob.mx/nuevayork/index.php/en/protection-to-mexicans> (last visited Mar 4, 2016).

<sup>34</sup> Protección a Mexicanos, <http://consulmex.sre.gob.mx/raleigh/index.php/proteccion> (last visited Mar 4, 2016).

<sup>35</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 The Hague Journal of Diplomacy 227–236, 227-236 (2012).

The OLP provides legal assistance in a few ways. It issues memorandum and fact sheets about common issues facing the migrant community. The consulate also conducts workshops and holds hours for quick, drop-in consultations. For more nuanced issues, especially those that require legal representation in court, the Mexican Consulate has a lawyer referral program, PALE. The Programa de Asistencia Jurídica a Mexicanos a través de Asesorías Legales Externas (PALE) provides referrals to lawyers who specialize in issues affecting migrants. PALE was created in 1998 and began operation in 2000. Since then, PALE lawyers have assisted in about 5,300 cases.<sup>36</sup> The Consulate also works directly with the Department of Labor to help recover unpaid wages and report unsafe working conditions. The consulate periodically visits the rural areas where H2A and H2B (migrant agricultural workers) migrants live and work.

In total, the Mexican government spends \$8 million each year on the legal defense of Mexican nationals in the United States, and a further \$20 million on consular programs aimed at protecting especially vulnerable populations, such as victims of domestic violence, trafficking victims, unaccompanied minors, and non-Spanish-speaking migrants from indigenous communities.<sup>37</sup>

## 2. Economic and Administrative Services

The consulate also provides support to recent migrants by conducting orientation programs and working with local community organizations. In the economic realm, consulates conduct business development programs, assist with international money transfer, and provide scholarships for Mexican undergraduate students at foreign

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<sup>36</sup> Programa de Asistencia Jurídica a Mexicanos a Través de Asesorías Legales Externas (PALE), <http://www.gob.mx/sre/acciones-y-programas/programa-de-asistencia-juridica-a-mexicanos-a-traves-de-asesorias-legales-externas-pale> (last visited Mar 4, 2016).

<sup>37</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 The Hague Journal of Diplomacy 227–236, 227-236 (2012).

universities.<sup>38</sup> The consulate also provides services that address needs face nationals regardless of their country of residency, such as issuing passports, coordinating access to vote in Mexican elections, locating missing people, and issuing birth, marriage, and death certificates.<sup>39</sup> In total, Mexican consulates in the United States issue 3.75 million documents every year.<sup>40</sup> The consulate staff also coordinates the repatriation of remains when a national dies in a foreign country, and spends over \$4 million in financial support each year doing so.<sup>41</sup>

### 3. Cultural and Social Services

In 2003, the Mexican government made significant changes to the structure of the Mexican Consulate by establishing the Institute for Mexicans Abroad (IME), which expanded the 1990 Program for Mexican Communities Abroad (PCME).<sup>42</sup> The Mission of the IME is<sup>43</sup> “To promote strategies, integrate programs, gather proposals and recommendations of the communities, their members, their organizations and advisory bodies, aimed at strengthening their ties with their country of origin and to promote their integration in the societies where they live and interact.”<sup>44</sup> There seems to be a dual purpose between helping migrants maintain their connection to their country of origin,

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<sup>38</sup> Seminole County Regional Chamber Of Commerce, *Mexican Consulate In Orlando Partners With Seminole State, Valencia To Offer \$48,000 In Scholarships* (December 8, 2015), <http://www.seminolebusiness.org/news/details/mexican-consulate-in-orlando-partners-with-seminole-state-valencia-to-offer-48-000-in-scholarships>.

<sup>39</sup> Protección y Asistencia Consular, <http://consulmex.sre.gob.mx/washington/index.php/en/proteccion> (last visited Mar 4, 2016).

<sup>40</sup> Daniel Hernández Joseph, *Mexico's Concentration on Consular Services in the United States*, 7 The Hague Journal of Diplomacy 227–236, 227–236 (2012).

<sup>41</sup> Id.

<sup>42</sup> Antecedentes, <http://www.ime.gob.mx/en/antecedents> (last visited Mar 4, 2016).

<sup>43</sup> English translation. Original: “Promover estrategias, integrar programas, recoger propuestas y recomendaciones de las comunidades, sus miembros, sus organizaciones y órganos consultivos, tendientes a fortalecer sus vínculos con su país de origen y a fomentar su integración en las sociedades en las que residen e interactúan.”

<sup>44</sup> Misión y Visión, <http://www.ime.gob.mx/es/ique-es-el-ime/mision-y-vision> (last visited Mar 4, 2016).

while also helping migrants adapt to life in another country. As a result, the Mexican Consulate's service range is wide.

The Mexican Consulate also hosts cultural events and curates cultural institutes. There are 14 Cultural Institutes throughout the United States, each of which is operated by the regional consulate.<sup>45</sup>

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<sup>45</sup> *History*, Mexican Cultural Institute of New York, <http://mciny.org/about/history/> (last visited Mar 20, 2016)

## **II. An Overview of Core Human Rights Treaties**

As far back as there is a written record, societies have recognized in their legal code the inherent rights of human beings. It was not until after egregious violations of human rights during the Holocaust though, that the world sought to create common legal human rights standards that would be enforced in all countries throughout the earth. The first of these agreements was the Universal Declaration of Human Rights.

### **A. International Treaties**

#### **1. The Universal Declaration of Human Rights**

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly in Paris on December 10, 1948 and, for the first time, attempted to enumerate and universally protect human rights.<sup>46</sup> The Declaration was signed by 48 of the 58 UN member countries. Most of the UN member countries that abstained from ratifying were Soviet bloc countries.<sup>47</sup> Since 1948, the six-page-long UDHR has set a record for the most translated document in the world, existing in 466 languages and dialects from Abkhaz to Zulu.<sup>48</sup>

Today, along with the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the UDHR forms the Universal Bill of Rights. Its language and principles have been used in other international treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Declaration on the Elimination of All

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<sup>46</sup> The Universal Declaration of Human Rights, The UN Office of the High Commissioner of Human Rights, <http://www.ohchr.org/en/udhr/pages/udhrindex.aspx> (last visited March 5, 2016).

<sup>47</sup> United Nations Bibliographic Information System, Universal Declaration of Human Rights, <http://unbisnet.un.org:8080/ipac20/ipac.jsp?&profile=voting&uri=full=3100023~!909326~!0&ri=1&aspect=power&menu=search&source=~!horizon>.

<sup>48</sup> The Universal Declaration of Human Rights Translation Project, The UN Office of the High Commissioner of Human Rights, <http://www.ohchr.org/EN/UDHR/Pages/Introduction.aspx> (last visited March 5, 2016).

Forms of Intolerance and of Discrimination Based on Religion or Belief. It also influenced individual countries' constitutions, as well as decisions on the International Court.<sup>49</sup>

## 2. The International Convention on Civil and Political Rights

The creation of the International Convention on Civil and Political Rights (ICCPR) began around the same time as the UDHR, in recognition that separate documents with binding commitments were needed to enforce the non-binding Declaration. The ICCPR, along with the ICESCR, was adopted by the UN General Assembly in 1966.

The ICCPR mirrors some of the language of both the UDHR and ICESCR. It requires countries to protect such human rights as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial, and; minority rights.<sup>50</sup> Additionally, it includes two optional additional protocols. The first optional protocol establishes a process for individual complaints about treaty violations, and the second optional protocol specifically prohibits the death penalty except in cases of specific, particularly egregious war crimes.

The ICCPR has been signed by 116 countries. Among the 22 countries that have not signed the ICCPR are Saudi Arabia, Oman, Qatar, South Sudan, Myanmar, Singapore, Malaysia, and a variety of small island nations in the South Pacific.<sup>51</sup>

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<sup>49</sup> Gleeson, Kim, *Worldwide Influence of the Universal Declaration of Human Rights and the International Bill of Rights*, <http://www.universalrights.net/main/world.htm>.

<sup>50</sup> ACLU, *FAQ: The Covenant on Civil & Political Rights*, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last visited March 5, 2016).

<sup>51</sup> United National Office of the High Commissioner of Human Rights, *Status of Ratification Interactive Data*, <http://indicators.ohchr.org/> (last visited March 5, 2016).

The ICCPR is overseen by the United Nations Human Rights Committee, a body of 18 independent experts of “high moral character and recognized competence in the field of human rights” who are elected for 4-year terms.<sup>53</sup> Ratifying states submit reports to the committee when requested, generally every four years.<sup>54</sup>

### 3. International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by the UN General Assembly in 1965. The convention defines “racial discrimination” as “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”<sup>55</sup> It further enumerates states’ obligations for preventing and remedying racial discrimination, including repealing any laws that intend to or have the effect of perpetuating racial discrimination, and taking affirmative measures to remedy past and current racial inequalities.<sup>56</sup>

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<sup>52</sup> The United States signed the ICCPR in 1977 and ratified it in 1992 along with 14 Reservations, Understandings, and Declarations amending its responsibilities under the treaty. Among these are a reservation that the United States reserves the right to impose capital punishment, and a declaration that the covenant will not be self-executing, effectively undermining enforcement power.

<sup>53</sup> United National Office of the High Commissioner of Human Rights, Human Rights Committee Membership, <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/Membership.aspx> (last visited March 5, 2016).

<sup>54</sup> ACLU, *FAQ: The Covenant on Civil & Political Rights*, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last visited March 5, 2016).

<sup>55</sup> “International Convention on the Elimination of All Forms of Racial Discrimination” United Nations Treaty.

<sup>56</sup> ACLU, *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, [https://www.aclu.org/files/pdfs/humanrights/cerd\\_faqs.pdf](https://www.aclu.org/files/pdfs/humanrights/cerd_faqs.pdf) (last visited March 5, 2016).

CERD has been signed and ratified by 177 of the 197 United Nations countries, including all major countries. The non-signing countries include North Korea, Malaysia, Brunei, South Sudan, and many small island nations in the South Pacific.<sup>57</sup>

CERD created and is overseen by the Committee on the Elimination of Racial Discrimination. The committee is composed of 18 independent experts, elected for four-year terms, who must be from ratifying countries. The Committee meets twice a year to review country reports, which are submitted by each country every four years.<sup>58</sup>

#### 4. Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly in 1979. It defines what constitutes discrimination as "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."<sup>59</sup> It also outlines specific procedures States will adopt to prevent the defined discrimination. CEDAW covers general gender equality in the political, social, economic, and cultural fields. It also addresses sex trafficking, access to healthcare, equality within marriages, participation in the political process, and access to education.<sup>60</sup> CEDAW recognizes that culture and tradition are

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<sup>57</sup> United National Office of the High Commissioner of Human Rights, Status of Ratification Interactive Data, <http://indicators.ohchr.org/> (last visited March 5, 2016).

<sup>58</sup> h ACLU, *Frequently Asked Questions: Convention on the Elimination of All Forms of Racial Discrimination*, [https://www.aclu.org/files/pdfs/humanrights/cerd\\_faqs.pdf](https://www.aclu.org/files/pdfs/humanrights/cerd_faqs.pdf) (last visited March 5, 2016).

<sup>59</sup> "Convention on the Elimination of all forms of Discrimination Against Women," United Nations Treaty.

<sup>60</sup> Summary of CEDAW Provisions, [womenstreaty.org](http://www.womenstreaty.org/index.php/about-cedaw/summary-of-provisions), <http://www.womenstreaty.org/index.php/about-cedaw/summary-of-provisions> (last visited March 5, 2016).

powerful forces on gender roles, and it is the only human rights treaty that specifically affirms the reproductive rights of women.<sup>61</sup>

CEDAW has been ratified by almost every UN country. The eight countries that have not ratified it are Holy See, Iran, Niue, Palau, Somalia, Sudan, Tonga, and the United States.<sup>6263</sup>

CEDAW is overseen by the Committee on the Elimination of Discrimination Against Women, which is comprised of 23 independent experts on Women's Rights. In addition to reviewing reports from member states, under an additional optional protocol, the Committee is tasked with receiving individual complaints and initiating inquiries.<sup>64</sup>

## 5. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on November 20, 1989. As with the Convention on the Rights of Migrants, it applies established ideas specifically to people under age 18. Ratifying countries commit to protecting rights such as the freedom from violence, abuse, exploitation, abduction, or sale. They commit to providing adequate nutrition and health care to children, safe access to places to play, and free compulsory primary education. They also affirm general human rights to freedom of thought and expression, and equal treatment regardless of gender, race, or cultural background.<sup>65</sup>

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<sup>61</sup> Convention on the Elimination of All Forms of Discrimination Against Women, UN Entity for Gender Equality and the Empowerment of Women, <http://www.un.org/womenwatch/daw/cedaw/> (last visited March 5, 2016).

<sup>62</sup> Palau and the USA have signed CEDAW, but not ratified it.

<sup>63</sup> United National Office of the High Commissioner of Human Rights, Status of Ratification Interactive Data, <http://indicators.ohchr.org/> (last visited March 5, 2016).

<sup>64</sup> United National Office of the High Commissioner of Human Rights, Committee on the Elimination of Discrimination Against Women, <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Introduction.aspx>

<sup>65</sup> Convention of the Rights of the Child, Amnesty International, <http://www.amnestyusa.org/our-work/issues/children-s-rights/convention-on-the-rights-of-the-child-0> (last visited March 5, 2016).

The treaty also has three optional protocols. The first prevents the involvement of children in armed conflict; the second prohibits the sale of children and child pornography and prostitution; and the third adds protocols for individual children to submit complaints of specific violations.

Each of the 193 United Nations Member Countries has signed and ratified the CRC except for the United States. The United States signed the CRC in 1995, but met opposition from Senate conservatives who refused to consider ratification based primarily on concerns that the CRC undermines parental authority and both national and state sovereignty.<sup>6667</sup>

The CRC is monitored by the UN Committee of the Rights of the Child. This body is made up of 18 independent experts, and countries are expected to submit reports for review every five years.<sup>68</sup>

## 6. Convention on the Rights of Migrants

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) was adopted by the UN General Assembly in 1990. In recognition of the rapidly increasing numbers of migrant workers, the treaty sought to protect the workers and their families from abuse throughout the migration process.<sup>69</sup> The treaty does not assign rights to migrants that do not apply to all

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<sup>66</sup> North Carolina Senator and conservative leader, Jesse Helms, stated that "the United Nations Convention on the Rights of the Child is incompatible with God-given right and responsibility of parents to raise their children," and that "the Convention has the potential to severely restrict States and the Federal Government in their efforts to protect children and to enhance family life."

<sup>67</sup> Id.

<sup>68</sup> United National Office of the High Commissioner of Human Rights, Committee on the Rights of the Child, Monitoring Children's Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIntro.aspx> (last visited March 5, 2016).

<sup>69</sup> Migrantsrights.org, <http://www.migrantsrights.org/> (last visited March 5, 2016).

humans, but rather reiterates and draws attention to rights that apply to migrants and already exist in other international human rights treaties like the UDHR.

The principle rights specified in this treaty are the right to basic freedoms (thought, religion, movement within the State, safe living and working conditions, and freedom from physical abuse, among others), the right to due process, and the right to both privacy and information. The treaty also specifies rights that primarily arise among migrant populations, such as the right to return to one's country of origin, the right to have the same basic labor conditions as nationals of their host country, the right to transfer earnings and savings. Finally, the treaty discusses the fundamental rights of those migrants present in a country without proper governmental authorization.<sup>70</sup>

The treaty was adopted in 1990, and as of 1998 had only been ratified by 9 countries. In 1998, a group of UN and NGO organizations<sup>71</sup> created The Global Campaign for Ratification of the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.<sup>72</sup> By 2016, 48 countries have both signed and ratified the treaty, and another 18 countries have signed it. The vast majorities of ratifying countries are in Latin America and North Africa and tend to be sending states.<sup>7374</sup>

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<sup>70</sup> *International Migration Convention*, United Nations Educational, Scientific and Cultural Organization, <http://www.unesco.org/new/en/social-and-human-sciences/themes/international-migration/international-migration-convention/> (last visited March 5, 2016).

<sup>71</sup> Human Rights Watch, International Catholic Migration Commission, International Confederation of Free Trade Unions, International Labour Office, International Organization for Migration, Migrant Forum in Asia, Migrants Rights International, Office of the United Nations High Commissioner for Human Rights (OHCHR), Public Services International, United Nations Educational, Scientific and Cultural Organization, Women's International League for Peace and Freedom, and World Council of Churches

<sup>72</sup> The International Convention on Migrant Workers and its Committee, "Fact Sheet No. 24 (Rev. 1)" United Nations, 2005. <http://www.ohchr.org/Documents/Publications/FactSheet24rev.1en.pdf>

<sup>73</sup> The United States has not signed or ratified this treaty.

<sup>74</sup> United National Office of the High Commissioner of Human Rights, Status of Ratification Interactive Data, <http://indicators.ohchr.org/> (last visited March 5, 2016).

The UN Committee on Migrant Workers is the dedicated body for monitoring the ICRMW. It was formed in 2003 once the requisite number of ratifying countries had been met. It is comprised of 14 independent experts from participating States, who are elected every four years.<sup>75</sup> Participating States generally submit reports to the committee for review every five years.

## 7. Declaration on Fundamental Principles and Rights at Work

The International Labor Organization (ILO) adopted The Declaration on Fundamental Principles and Rights at Work (DFPRW) in 1998. The DFPRW recognizes four categories of fundamental and universal labor rights. 1) Freedom of association and the effective recognition of the right to collective bargaining; 2) The elimination of forced or compulsory labor; 3) The abolition of child labor; and 4) the elimination of discrimination in respect of employment and occupation.<sup>76</sup> The Declaration additionally calls attention to the heightened need for protection of migrant workers.<sup>77</sup>

The ILO itself has existed as a UN agency since 1919. Unique among UN agencies, the ILO is tripartite, and brings together governments, employers, and workers to set labor standards and develop international labor policies. There are 187 countries that are members of the ILO.<sup>78</sup>

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<sup>75</sup> United National Office of the High Commissioner of Human Rights, Committee on Migrant Workers, <http://www.ohchr.org/EN/HRBodies/CMW/Pages/Membership.aspx> (last visited March 5, 2016).

<sup>76</sup> “ILO Declaration on Fundamental Principles and Rights at Work,” International Labor Organization, <http://www.ilo.org/declaration/lang--en/index.htm> (last visited March 5, 2016).

<sup>77</sup> “The text of the Declaration and its follow-up,” International Labor Organization, <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (last visited March 5, 2016).

<sup>78</sup> For complete list of ratifying countries, see: <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11001:0::NO::>

## **B. Regional Treaties**

### **1. Inter-American Commission on Human Rights**

The Inter-American Commission on Human Rights (IACHR), created in 1959, is a body of the Organization of American States (OAS) whose mission is “to promote and protect human rights in the American hemisphere.” The IACHR works with the Inter-American Court of Human Rights, another body of OAS, to achieve their mission. They conduct their own investigations and create reports, as well as receiving individual complaints.<sup>79</sup>

The main text on which the IACHR relies is the American Convention on Human Rights, which was adopted by OAS in 1969 and has been ratified by 25 countries in the Americas.<sup>80</sup>

### **2. European Convention on Human Rights**

The European Convention on Human Rights (ECHR) was drafted by the Council of Europe in the aftermath of World War II, and adopted in 1950. The Council of Europe’s mission was to create “order to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.”<sup>81</sup> The Convention contains a catalogue of fundamental rights and freedoms all signing states must guarantee. These rights include physical integrity, dignity, due process before courts of

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<sup>79</sup> “What is the IACHR?” Organization of American States, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited March 5, 2016).

<sup>80</sup> Id.

<sup>81</sup> “ECHR- Introduction,” ECHR-Online, <http://echr-online.info/echr-introduction/> (last visited March 5, 2016).

law, protection of personal life, and participation in society. The Convention also created a European Court of Human Rights to adjudicate human rights violations.<sup>82</sup>

Every European country has signed and ratified the original Convention, though certain further provisions have not been as widely adopted.<sup>83</sup>

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<sup>82</sup> Id.

<sup>83</sup> “Simplified Chart of Signatures and Ratifications,” Council of Europe Portal, <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> (last visited March 5, 2016).

### **III. The United States**

#### **Introduction and Overview: the United States**

In 2013, more than 41.3 million immigrants lived in the United States, accounting for thirteen percent of the total population.<sup>84</sup> As the largest origin group in the United States,<sup>85</sup> Mexican immigrants account for 11.6 million immigrants, or twenty-eight percent of the total U.S. immigrant population.<sup>86</sup> The United States is the largest receiving country of Mexican immigrants, followed by Canada, Spain, and Germany.<sup>87</sup> Top destination states for Mexican immigrants in the United States are California,<sup>88</sup> Texas,<sup>89</sup> and Illinois.<sup>90</sup>

After decades of rapid growth, the Mexican immigrant population in the United States is stable.<sup>91</sup> Now, among recent immigrants, Mexico is no longer the top origin country for immigrants in the United States.<sup>92</sup> Furthermore, in recent years more Mexican immigrants have returned to Mexico than have migrated to the United States.<sup>93</sup>

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<sup>84</sup> *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (April 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Current%20and%20Historical> [hereinafter, *U.S. Statistics on Immigration*].

<sup>85</sup> *Mexican Immigrants in the United States*, MIGRATION POLICY INSTITUTE (March 17, 2016), <http://www.migrationpolicy.org/article/mexican-immigrants-united-states#Distribution%20by%20State%20and%20Key%20Cities> [hereinafter, *U.S. Mexican Immigrants*].

<sup>86</sup> *U.S. Statistics on Immigration*, *supra* note 1.

<sup>87</sup> *International Migrant Population by Country of Origin and Destination*, MIGRATION POLICY INSTITUTE (2013), <http://www.migrationpolicy.org/programs/data-hub/charts/international-migrant-population-country-origin-and-destination>.

<sup>88</sup> Thirty-seven percent of immigrants from Mexico settle in California. *U.S. Mexican Immigrants*, *supra* note 2.

<sup>89</sup> Twenty-one percent of immigrants from Mexico settle in Texas. *Id.*

<sup>90</sup> Six percent of immigrants from Mexico settle in Illinois. *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (“In 2013, China and India overtook Mexico as the most common countries of origin of immigrants who have resided in the United States for one year or less.”).

<sup>93</sup> *Id.*

The decline in Mexican immigrants can be attributed to a number of factors including, weakened job opportunities and tougher border enforcement.<sup>94</sup> Furthermore, difficulty accessing and securing work, housing, transportation, and other services as well as language and culture barriers<sup>95</sup> make Mexican immigrants a particularly vulnerable population.

Although the United States has the right to regulate migrants within its borders, international human rights obligations introduce additional policies to protect migrants from human rights abuses. Part III will examine the United States' human rights obligations to immigrant populations. Specifically, Part III analyzes international and regional treaties that protect migrants from human rights abuses in the United States and the United States' adherence to the relevant provisions. While the United States has not yet signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), it has entered into several international human rights treaties applicable to migrants. These include two treaties that the United States has signed and ratified: the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Further, the United States is a member of the Organization of the American States (OAS) and a member of the International Labour Organization (ILO).

Part III proceeds in four parts. Section A introduces the relevant international and regional human rights treaties as they pertain to the United States. Section B evaluates the United States' adherence to human rights treaty provisions for migrant rights. Section C

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<sup>94</sup> *U.S. Mexican Immigrants*, *supra* note 2.

<sup>95</sup> *The 7 Biggest Challenges Facing Refugees and Immigrants in the U.S.*, GLOBAL CITIZEN (Dec. 12, 2014), <https://www.globalcitizen.org/en/content/the-7-biggest-challenges-facing-refugees-and-immig/>.

evaluates the United States' adherence to human rights treaty provisions for labor rights, family rights, and civil/human rights. Section D assesses immigrants' access to civil legal services in the United States.

### **A. United States and Human Rights Treaties**

Section A provides a quantitative and qualitative analysis of the United States' human rights performance and provides an overview of the human rights treaties the United States has signed and ratified, as well as the United States' reservations, understandings, and declarations for these treaties. The Nominal Commitment to Human Rights Index (NCHR Index),<sup>96</sup> ranks country's human rights commitments on a scale of low, medium, and high ranks.<sup>97</sup> The NCHR Index ranked the United States commitment to human rights at the bottom of the scale, or "low nominal commitment."<sup>98</sup> The NCHR remarked, the United States has the most reservations to a single treaty (17 to the ICCPR), has the second most total reservations overall, is one of just two states that have not ratified the CRC, and is the lowest ranked of the UNSC P5<sup>99</sup> members.<sup>100</sup> The United States is ranked 186<sup>th</sup> on the NCHR Index with regard to its human rights performance.<sup>101</sup>

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<sup>96</sup> "The purpose of the Survey is to document the commitment of states to core human rights and humanitarian law treaties across the globe. However, while the main rankings offer an absolute dimension of this commitment by counting the total number of treaty ratifications, they do not reflect the influence that joining individual petition mechanisms and ratifying treaties with reservations have on a state's nominal commitment to human rights." *Nominal Commitment to Human Rights: A Global Survey*, UCL DEPARTMENT OF POLITICAL SCIENCE (last updated Dec. 9, 2008), [http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr\\_index](http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr_index).

<sup>97</sup> *United States of America*, NOMINAL COMMITMENT TO HUMAN RIGHTS: A GLOBAL SURVEY- COUNTRY PROFILE, [http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/countries1/nchr\\_united\\_states\\_of\\_america.pdf](http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/countries1/nchr_united_states_of_america.pdf) (last visited April 16, 2016) [hereinafter, *U.S NCHR Survey*].

<sup>98</sup> *Id.*

<sup>99</sup> United Nations Security Council Five permanent members include: China, France, Russian Federation, the United Kingdom, and the United States. UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/> (last visited April 16, 2016).

<sup>100</sup> *U.S. NCHR Survey*, *supra* note 14.

<sup>101</sup> *Id.*

The Maplecroft Human Rights Index<sup>102</sup> identifies countries' risk of committing a human rights violation.<sup>103</sup> In 2013, the United States ranked 139<sup>th</sup> among 197 countries, and was assigned a "medium" risk of human rights offenses on the Maplecroft Human Rights Index.<sup>104</sup> In 2016 Freedom House<sup>105</sup> assessed the United States as a level "1," the highest possible for political rights and civil liberties.<sup>106</sup> However, Freedom House noted a downward trend for these rights in the United States.<sup>107</sup>

Moreover, qualitative assessments of the United States' human rights performance are generally negative. The Universal Periodic Review (UPR) reviews and assesses the human rights records of United Nations' member states, including the United States and is conducted by the UN Human Rights Council (HRC).<sup>108</sup> The HRC considers human rights obligations that are expressed in the UN Charter, the Universal Declaration of Human Rights, and other instruments to which the State is a party.<sup>109</sup>

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<sup>102</sup> "The human rights dataset has been developed to enable multination [organizations] to identify, [prioritize] and manage various human rights and development risks to global operations in 198 countries." VERISK MAPLECROFT, <http://maplecroft.com/themes/hr/> (last visited April 16, 2016).

<sup>103</sup> *Latest Products and Reports*, VERISK MAPLECROFT (Dec. 4, 2013), <https://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/>.

<sup>104</sup> *The 10 Worst Countries for Human Rights*, THE WORLD POST (Dec. 4, 2013), [http://www.huffingtonpost.com/2013/12/03/human-rights-risk-atlas-2014-violations-maplecroft\\_n\\_4374133.html#slide=3174875](http://www.huffingtonpost.com/2013/12/03/human-rights-risk-atlas-2014-violations-maplecroft_n_4374133.html#slide=3174875).

<sup>105</sup> "Freedom in the World is Freedom House's flagship annual report, assessing the condition of political rights and civil liberties around the world. It is composed of numerical ratings and supporting descriptive texts for 195 countries and 15 territories." FREEDOM HOUSE, <https://freedomhouse.org/report-types/freedom-world> (last visited April 16, 2016).

<sup>106</sup> *United States*, FREEDOM HOUSE (2016), <https://freedomhouse.org/report/freedom-world/2016/united-states>.

<sup>107</sup> *Id.* "The United States received a downward trend arrow because of the cumulative impact of flaws in the electoral system, a disturbing increase in the role of private money in election campaigns and the legislative process, legislative gridlock, the failure of the Obama administration to fulfill promises of enhanced government openness, and fresh evidence of racial discrimination and other dysfunctions in the criminal justice system." *Id.*

<sup>108</sup> *Universal Periodic Review*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/j/drl/upr/> (last visited April 16, 2016).

<sup>109</sup> *Id.* "Individual countries are slated for review every four and a half years, with the United States scheduled for its second review in May 2015. UPR sessions take place at the HRC in Geneva, and are framed by reports submitted by national governments. The report submitted by the United States

The United States submitted its' second Universal Periodic Review in May 2015.<sup>110</sup> This UPR addressed the progress and challenges for ten areas: domestic mechanisms for human rights implementation,<sup>111</sup> civil rights and discrimination,<sup>112</sup> criminal justice,<sup>113</sup> indigenous issues,<sup>114</sup> immigration,<sup>115</sup> labor and trafficking,<sup>116</sup> national security, economic, social, and cultural measures, environment, and treaties and international human rights mechanisms.<sup>117</sup> Overall, the United States National Report painted the United States in a positive light, citing more progress than challenges. However, the compilation on the United States prepared by the Office of the United Nations High Commissioner for Human Rights<sup>118</sup> identified many human rights

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government for its UPR reflects interagency input and consideration of information collected from consultations with civil society and the American public." *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> In reviewing domestic mechanisms for human rights implementation, the United States cited "improved engagement with state and local governments to foster better awareness of human rights obligations at the state, tribal, and local levels." *National report submitted in accordance with paragraph 5 of the annex to Human Right Council resolution 16/21 United States of America*, 22 WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW 1, 3 (May 2015) [hereinafter, *United States HRC National Report*].

<sup>112</sup> In reviewing civil rights and discrimination, the United States addressed racial discrimination and focused in particular on excessive force in policing, racial bias in the criminal justice system, discrimination based on religious and hate crimes, racial discrimination in voting, employment, housing, education, and health, discrimination against lesbian, gay, bisexual, and transgender individuals, and discrimination against persons with disabilities. *Id.* at 4 – 9.

<sup>113</sup> The UPR reviewed the United States performance in criminal justice as it pertains to prisons, capital punishment, and criminal justice and international issues. *Id.* at 9 – 11.

<sup>114</sup> The UPR addressed indigenous issues and the current initiatives taken to remove barriers for Native communities. *Id.* at 11 – 12.

<sup>115</sup> The UPR addressed immigration issues and specifically considered the detention of migrants and immigration policies, discrimination or violence against migrants and access to services, and consular access and notification. *Id.* at 12 – 14.

<sup>116</sup> The UPR addressed labor and trafficking, citing U.S. law prohibiting different compensation based on sex and progress made against human trafficking, including sexual exploitation of children since the last report. *Id.* at 14 – 15.

<sup>117</sup> The recommendations addressing treaties and international human rights mechanisms offers insight into the treaties the United States has not signed and/or ratified. The United States reported on the steps taken to ratify the Convention on the Rights of Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in the past and continued support for both of these treaties. Additionally, the United States expressed support for the International Labour Organization Declaration on Fundamental Principles and Rights at Work. *Id.* at 21 – 22.

<sup>118</sup> "The present report is a compilation of the information contained in reports of the treaty bodies and special procedures, including observations and comments by the State concerned, in reports of the United Nations High Commissioner for Human Rights, and in other relevant official United Nations documents." *Compilation prepared by the office of the United Nations High Commissioner for Human Rights in*

protections that the United States has failed to meet.<sup>119</sup> In particular, the High Commissioner's report cites recommendations for the United States to ratify ICESCR,<sup>120</sup> CEDAW, CRC, ICMW, CRPD,<sup>121</sup> and several ILO conventions. The report noted concerns with the prevalence of domestic violence in the United States, racial disparities in the juvenile justice system, dearth of legislation regarding child labour in the agricultural sector, exclusion of undocumented immigrants from the Affordable Care Act, use of mandatory detention systems to hold asylum seekers and immigrants, and increased use of racial profiling to determine immigration status.<sup>122</sup>

The United States' human rights performance can be further assessed by their participation (or lack of participation) and reservations, understandings, and declarations (RUDs) in seven core human rights treaties.<sup>123</sup> Of the five relevant international human rights treaties, the United States has only ratified two, ICCPR and ICERD.<sup>124</sup> The United States has signed but not ratified an additional two, CEDAW and the CRC.<sup>125</sup> The United States has not signed or ratified ICMW.<sup>126</sup>

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*accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 22 WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW 1, 1 (May 2015), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/039/92/PDF/G1503992.pdf?OpenElement> [hereinafter, *United States HRC Compilation*].*

<sup>119</sup> *United States HRC Compilation*, supra note 35, at 3.

<sup>120</sup> International Covenant on Economic, Social, and Cultural Rights.

<sup>121</sup> Convention on the Rights of Persons with Disabilities.

<sup>122</sup> *United States HRC Compilation*, supra note 35.

<sup>123</sup> The International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention of the Child (CRC), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), the International Labour Organization (ILO), and the Organization of American States (OAS).

<sup>124</sup> *United States of America*, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited April 16, 2016) [hereinafter, *Office of the High Commission on the U.S.*].

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

Additionally, the United States is a member state of the International Labour Organization (ILO), a specialized agency of the United Nations.<sup>127</sup> However, the United States has only signed 14 out of 189 ILO Conventions. The United States is also a member of the Organization of American States, a regional organization.<sup>128</sup> As a member of OAS, the United States has only signed the Charter and the American Declaration of the Rights and Duties of Man.<sup>129</sup> The United States has not ratified any of the OAS regional human rights treaties.<sup>130</sup>

The United States' reluctance to commit to human rights treaties is a defining characteristic of the United States' human rights performance. U.S. exceptionalism is characterized as, "the willingness to sign a treaty only if the United States is exempted from its provisions, the use of different standards to judge U.S. behavior and the behavior of other countries, and the resistance of U.S. courts to accept the legal precedents established in other liberal democracies."<sup>131</sup> U.S. exceptionalism often gives the impression that the U.S. does not practice what they preach. Critiques from international figures claim the United States uses the human rights system as a tool to manipulate and refuses to play by the same rules as the other states in the system.<sup>132</sup> Former U.S. Ambassador to the United Nations, Charles Yost, stated, "We seriously undermine our

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<sup>127</sup> The International Labour Organization (ILO) is a specialized agency of the United Nations that aims "to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues." INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited April 16, 2016).

<sup>128</sup> ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/about/who\\_we\\_are.asp](http://www.oas.org/en/about/who_we_are.asp) (last visited April 16, 2016).

<sup>129</sup> *Basic Documents in the Inter-American System*. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, [http://www.oas.org/en/iachr/mandate/basic\\_documents.asp](http://www.oas.org/en/iachr/mandate/basic_documents.asp) (last visited April 16, 2016).

<sup>130</sup> Francisco J. Rivera Juaristi, *U.S. Exceptionalism and the Strengthening Process of the Inter-American Human Rights System*, 20 Human Rights Brief 19, 19 (2013) [hereinafter, *U.S. Exceptionalism*].

<sup>131</sup> Michal Ignatieff & John Ikenberry, *American Exceptionalism and Human Rights*, 84 FOREIGN AFFAIRS 1, 1 (2005).

<sup>132</sup> *U.S. Exceptionalism*, *supra* note 47, at 20.

own case when we resist joining in the international endeavor to enforce these rights which we ourselves had so much to do with launching.”<sup>133</sup>

Table 1 provides an overview of the seven core human rights treaties, the United States’ participation, and treaty provisions impacted by the United States’ reservations, understandings, and declarations.

Table 1.

Treaty	Date Signed	Date Ratified	Articles to which Reservations, Declarations, and Understandings (“RUDs”) attach
International Covenant on Civil and Political Rights (ICCPR)	October 5, 1977 <sup>134</sup>	June 8, 1992	Article 20, Article 7, Article 15, Article 10, Article 14, Article 26, Article 47 <sup>135</sup>
International Convention on the Elimination of All Forms of Discrimination (ICERD)	September 28, 1966	October 21, 1994	Article 1, Article 2, Article 3, Article 4, Article 5, Article 7, Article 22 <sup>136</sup>

<sup>133</sup> *Id.*

<sup>134</sup> The United States did not sign nor ratify the Optional Protocol to ICCPR in 1976 or the Second Optional Protocol to the ICCPR in 1991. *Office on the High Commissioner on the U.S.*, *supra* note 41.

<sup>135</sup> Upon ratifying the ICCPR the United States provided five reservations, five understandings, and three declarations. The United States’ reservations to the ICCPR included: (1) article 20 of the ICCPR does not require legislation that would restrict the right to free speech and association, (2) the United States reserves the right to impose capital punishment, (3) Article 7 is interpreted as cruel and unusual treatment or punishment, (4) the United States does not adhere to the third clause of Paragraph 1 of article 15, and (5) the United States “reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14.” The United States understandings of the ICCPR include: (1) Distinctions used in article 2, paragraph 1 and article 26 are permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective (2) “Entitlement to compensation may be subject to reasonable requirements of domestic law”, (3) “Reference to exceptional circumstances . . . permit the imprisonment of an accused person with convicted persons where appropriate, (4) “The provision of a criminal defendant’s counsel of choice when the defendant is provided with court appointed counsel on grounds of indigence, when the defendant is financially able to retain alternative counsel, or when imprisonment is not imposed”, and (5) This Covenant shall be implemented by the Federal Government and otherwise by the state and local governments. The United States declarations of the ICCPR include: (1) the provisions of the Covenant are not self-executing, (2) “States party to the covenant should . . . refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant”, and (3) Article 47 may be exercised only in accordance with international law. *International Covenant on Civil and Political Rights*, UNITED NATIONS: TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en#EndDec) (last visited April 16, 2016).

<sup>136</sup> Upon signing ICERD, the United States declared, “The Constitution of the United States contains provisions for the protection of individual rights, . . . and nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.” Upon ratification the United States issued three additional reservations, one understanding, and one declaration. The United States’ reservations to ICERD included: (1) the United States does not accept any obligation under the Convention that restricts individuals’ right to freedom of speech, expression, and association, to the extent they are protected by the Constitution and laws of the United States, (2) “To the extent . . . the Convention calls for a broader

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	July 17, 1980 <sup>137</sup>	N/A	N/A
Convention on the Rights of the Child (CRC)	February 16, 1995 <sup>138</sup>	N/A	N/A
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)	N/A	N/A	N/A
International Labour Organization (ILO)	1934 (The United States joined the ILO)	June 15, 1988 (Tripartite Consultation International Labour Standards Convention), September 25, 1991 (Abolition of Forced Labour Convention), Dec. 2, 1999 (Worst Forms of Child Labour Convention) <sup>139</sup>	N/A
Organization of American States (OAS)	Apr 30, 1948 (Charter of the Organization of the American States, Amer. Declaration of the Rights and Duties of Man)	June 15, 1951 (Charter of the Organization of American States) <sup>140</sup>	N/A

regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures . . . except as mandated by the Constitution and laws of the United States”, and (3) “Before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice . . . the specific consent of the United States is required in each case.” The United States understands “that this Convention be implemented by the Federal Government to the extent that it exercises jurisdiction therein, and otherwise by the state and local governments.” The United States declares ICERD is not self-executing. *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS: TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en#EndDec) (last visited April 16, 2016).

<sup>137</sup> The United States has not signed nor ratified the Optional Protocol to CEDAW. *Office on the High Commissioner on the U.S.*, *supra* note 41.

<sup>138</sup> The United States has signed and ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. The United States has not signed or ratified the Optional Protocol to the Convention on the Rights of the Child on a communications procedure. *Office on the High Commissioner on the U.S.*, *supra* note 41.

<sup>139</sup> The United States is a member state of the International Labour Organization (ILO). Of the eight fundamental conventions for ILO, the United States has only ratified two: the Abolition of Forced Labour Convention and the Worst Forms of Child Labour Convention. Out of four ILO governance conventions, the United States has only ratified one: Tripartite Consultation (International Labour Standards) Convention. Of 177 ILO technical conventions, the United States has only ratified eleven. INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm> (last visited April 16, 2016).

<sup>140</sup> The United States is a member of the regional international legal system of the Americas and adopted the American Declaration of the Rights and Duties of Man and the charter for the Organization of the American States (OAS) in 1948. While the United States is a member of the OAS and therefore held to the standards of the Declaration and Charter, the United States has not ratified the American Convention on Human Rights, and is not held to its standards. Martha F. Davis, *In the Interests of Justice: Human Rights and the Right to Counsel in Civil Cases*, 25 *TOURO L. R.* 147, 178 (2009) [hereinafter Davis, *Human Rights Council Civil Cases*]. The United States reservation to the charter stated, “That the Senate give its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.” *Charter of the Organization of American States*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, [https://www.cidh.oas.org/Basicos/English/Basic22b.CharterOAS\\_ratif.htm](https://www.cidh.oas.org/Basicos/English/Basic22b.CharterOAS_ratif.htm) (last visited April 16, 2016).

## **A. United States and Migrant Rights**

Under the United States Constitution both citizens and migrants have equal protection under the law, the right to due process, freedom from unlawful search and seizure, and other important legal protections.<sup>141</sup> However, because American politics are at odds with regard to migration issues, international treaties provide a model to analyze human rights protections for migrants in the United States.

First, although the United States has not signed or ratified the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,<sup>142</sup> the United States has signed two relevant international treaties with regard to its protection of migrants generally, the International Covenant on Civil and Political Rights (ICCPR) and the Convention on Elimination of All Forms of Racial Discrimination (ICERD). Second, as a member of the International Labour Organization (ILO), the United States has signed additional ILO conventions related to protection of migrants. Third, as a member of the Organization of American States, the United States has signed two relevant inter-American system human rights instruments, the American Declaration of the Rights and Duties of Man and the OAS Charter. Analysis of the relevant treaty provisions and reports on the United States' compliance identifies the human rights protections actually available for migrants in the United States. Additionally, identification of treaties the

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<sup>141</sup> *The Rights of Migrants in the United States*, THE ADVOCATES FOR HUMAN RIGHTS, [http://www.theadvocatesforhumanrights.org/uploads/migrant\\_rights\\_fact\\_sheet.pdf](http://www.theadvocatesforhumanrights.org/uploads/migrant_rights_fact_sheet.pdf) (last visited April 16, 2016) [hereinafter, *Advocates for Human Rights*]. According to the Universal Periodic Review of the United States, "The United States has an unwavering commitment to respect the human rights of all migrants, regardless of their immigration status, and vigorously prosecutes crimes committed against migrants and enforces labor, workplace safety, and civil rights laws." *United States HRC National Report*, supra note 28. At the same time, human right bodies have criticized the United States for failing to properly protect the rights of migrants.

<sup>142</sup> *Committee on Migrant Workers*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/CMW/Pages/CMWIndex.aspx> (last visited April 16, 2016).

United States has not signed or ratified offers insight into migrant rights that are not met in the United States.

## 1. International Treaties

### a. International Covenant on Civil and Political Rights (ICCPR)

The United States formally ratified the ICCPR in September 1992. By ratifying the ICCPR the United States undertook to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the . . . covenant, without distinction of any kind.”<sup>143</sup> The ICCPR contains positive duties, meaning the United States must take affirmative steps to implement the rights.<sup>144</sup> The first of these positive duties is to recognize the rights of all individuals regardless of national origin. Specifically, Article 2 of the ICCPR provides each member state should recognize the rights of all individuals without distinction of any kind,<sup>145</sup> and Article 26 of the ICCPR requires States to “guarantee to all persons equal and effective protection against discrimination.”<sup>146</sup>

The Human Rights Committee (HRC) has identified three concerns related to the United States treatment of immigrants.<sup>147</sup> First, the committee is concerned that detention of immigrants for prolonged periods of time may raise issues under article 9 of the

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<sup>143</sup> Davis, *Human Rights Council Civil Case*, *supra* note 57, at 157 – 58.

<sup>144</sup> *Id.* at 159.

<sup>145</sup> International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter, *ICCPR*] (“Such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

<sup>146</sup> *ICCPR*, *supra* note 62, at art. 26.

<sup>147</sup> These concerns were identified in the Human Rights Committee concluding observations on the fourth periodic report of the United States of America in the concluding observations on the fourth periodic report of the United States of America (April 2014). *Concluding observations on the fourth periodic report of the United States of America*, HUMAN RIGHTS COMMITTEE 1 (April 23, 2014) [Hereinafter, *United States HRC Report*].

Covenant.<sup>148</sup> Second, the HRC is concerned about the mandatory nature of the deportation of foreigners, without regard to elements such as the seriousness of crimes committed, the length of lawful stay, health status, family ties, or the humanitarian situation in the country of destination.<sup>149</sup> Third, the HRC expressed concern over immigrants' access to adequate health care in the United States. Specifically, noting concern over the exclusion of millions of undocumented immigrants from coverage under the Affordable Care Act.<sup>150</sup>

*b. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

The United States signed ICERD in 1966 and ratified ICERD in 1994.<sup>151</sup> ICERD defines racial discrimination as “any distinction, exclusion, restriction or preference based on race, [color], descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition . . . of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life.”<sup>152</sup> Article 5 of ICERD guarantees everyone without distinction of nationality or ethnic origin “enjoyment of economic, social, and cultural rights.”<sup>153</sup>

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<sup>148</sup> *United States HRC Report*, supra note 64, at 7; see also *ICCPR*, supra note 62, at art. 9 (“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”).

<sup>149</sup> *United States HRC Report*, supra note 64 at 7. In regards to mandatory detention and deportation, the HRC recommended the United States review policies and take measures to ensure immigrants have legal representation and allow for individualized decisions. *Id.*

<sup>150</sup> *Id.* The HRC indicated that this should include reproductive health-care services. *Id.* With regard to immigrants' right to health care, the HRC recommended the United States identify ways to improve access to adequate health care for undocumented immigrants and immigrants who have lawfully resided in the United States for less than five years. *Id.*

<sup>151</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en) (last visited April 16, 2016).

<sup>152</sup> *International Convention on the Elimination of All Forms of Racial Discrimination* art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter, *ICERD*].

<sup>153</sup> *ICERD*, supra note 69, at art. 5. Article 5 also provides, “States Parties undertake . . . to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notably in the enjoyment of the . . . right to education.” *Id.* Article 7 elaborates that, “States Parties

The Committee on the Elimination of Racial Discrimination addressed the rights of immigrants in the United States and identified several areas of concern.<sup>154</sup> In particular, the committee expressed concern over the “increasingly militarized approach to immigration law enforcement, leading to the excessive use of force by the CBP personnel; increased use of racial profiling by local law enforcement agencies to determine immigration status and to enforce immigration laws; increased criminal prosecution for breaches of immigration law; mandatory detention of immigrants for prolonged periods of time; and deportation of undocumented immigrants without adequate access to justice.”<sup>155</sup>

c. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)

The United States has signed CEDAW, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the treaty’s objective and purpose.”<sup>156</sup> However, the United States has not ratified CEDAW and is not legally bound by the terms of CEDAW.

d. Convention on the Rights of the Child (CRC)

The United States has signed the CRC, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the

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undertake to adopt immediate and effective measures, . . . with a view to combating prejudices which lead to racial discrimination.” *ICERD*, *supra* note 69, at art. 7.

<sup>154</sup> The Committee on the Elimination of Racial Discrimination addressed the rights of immigrants in the concluding observations on the combined seventh to ninth periodic reports of United States of America. *Concluding observations on the combined seventh to ninth periodic reports of the United States of America*, Committee on the Elimination of Racial Discrimination 1 (August 2014) [hereinafter, *United States ICERD Report*].

<sup>155</sup> *United States ICERD Report*, *supra* note 71, at 8.

<sup>156</sup> INTRODUCTION TO THE CONVENTION ON THE RIGHTS OF THE CHILD, <http://www.unicef.org/crc/files/Definitions.pdf> (last visited April 16, 2016) [hereinafter, *Convention on Rights of Child Definitions*].

treaty's objective and purpose.”<sup>157</sup> However, the United States has not ratified the CRC and is not legally bound by the terms of the CRC.

*e. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

The United States has not signed or ratified ICMW. As a result, the United States is neither bound by the terms of ICMW nor obliged to refrain from acts that would undermine ICMW's purpose.

*f. International Labour Organization (ILO)*

The United States partnership with the ILO began in 1919 and the United States formally joined the ILO in 1934.<sup>158</sup> Since 1934, the United States has only signed 14 of a possible 189 conventions.<sup>159</sup> Among the 189 ILO conventions, the United States has only ratified one that specifically addresses migrants and discrimination in the workplace, the Abolition of Forced Labor Convention.<sup>160</sup> Article 1 of the Convention provides, “Each Member . . . which ratifies this Convention undertakes to suppress and not to make use of any form of forced compulsory labour . . . as a means of racial, social, national, or religious discrimination.”<sup>161</sup>

ILO Publication,<sup>162</sup> *Protecting Aliens, Immigrants, and Ethnic Minorities from Discrimination in Employment*, addressed the experiences of immigrants in the United

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<sup>157</sup> *Id.*

<sup>158</sup> *Brief History and Timeline*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/washington/ilo-and-the-united-states/brief-history-and-timeline/lang--en/index.htm> (last visited April 16, 2016).

<sup>159</sup> *Ratifications for United States*, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last visited April 16, 2016) (“Out of the 14 Conventions ratified by the United States, of which 12 are in force, no convention has been denounced; none have been ratified in the past 12 months.”).

<sup>160</sup> *Id.*

<sup>161</sup> Abolition of Forced Labour Convention art. 1, Jan. 17, 1959, 320 U.N.T.S. 291 [hereinafter, *Abolition of Forced Labour*].

<sup>162</sup> *Publications*, International Labour Organization, [http://www.ilo.org/gateway/faces/home/publications?\\_adf.ctrl-](http://www.ilo.org/gateway/faces/home/publications?_adf.ctrl-)

States.<sup>163</sup> The publication cited equality of opportunity and treatment as the key concern of ILO standards for migrant workers.<sup>164</sup> The publication made four recommendations: (1) the prohibition against discrimination in employment must protect ethnic minorities and immigrants, (2) the laws must provide for enforcement by private individuals without the risk of political interference, (3) some victims of discrimination, such as immigrants, need administrative assistance in presenting their claims, and (4) forms of affirmative action that encourage employers to hire members of disfavored groups are necessary.<sup>165</sup>

## 2. Regional Treaties

### a. Organization of American States

In addition to its obligations under international treaties, the United States has human rights commitments based on membership in the Organization of American States (OAS). Article 45 of the OAS Charter provides that all human beings, without distinction, have a right to material well-being and to their spiritual development.<sup>166</sup> Similarly, Article 2 of the American Declaration of the Rights and Duties of Man provides, all persons are equal before the law without distinction.<sup>167</sup>

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state=92zba0rls\_294&locale=EN&countryCode=USA (last visited April 16, 2016) (“ILO Publications offer information and related content on all publications available on the world of work.”).

<sup>163</sup> George Rutherglen, *Protecting Aliens, Immigrants, and Ethnic Minorities from Discrimination in the United States*, WORLD EMPLOYMENT PROGRAMEE 1 (1994), available at [http://www.ilo.org/public/libdoc/ilo/1994/94B09\\_11\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1994/94B09_11_engl.pdf) [hereinafter Rutherglen, *Protecting Immigrants in the United States*].

<sup>164</sup> Rutherglen, *Protecting Immigrants in the United States*, *supra* note 80, at v.

<sup>165</sup> *Id.* at 41 (“In the end, it is only by improving the qualifications of aliens, immigrants, and members of minority groups that they can be given the means to participate equally in the increasingly competitive market for jobs.”).

<sup>166</sup> Charter of the Organization of American States, art. 45, Feb. 27, 1967, 721 U.N.T.S. 324 [hereinafter, *Charter of the Organization of American States*].

<sup>167</sup> American Declaration of the Rights and Duties of Man, O.A.S. G.A. Res. XXX, art. 2, O.A.S. Doc. OEA/Ser.L.V/II.82 doc. 6 rev. 1 (1948), available at [http://cidh.oas.org/Basicos/English/Basic2.American% 20Declaration.htm](http://cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm) [hereinafter, *American Declaration of the Rights and Duties of Man*].

Migratory issues are addressed through various avenues within the OAS, including the Rapporteurship on the Rights of Migrants.<sup>168</sup> In 1999 the Special Rapporteurship on Migrant Workers and Their Families made an on-site visit to California to observe the processes of immigration and asylum.<sup>169</sup> The Commission observed issues with the mandate of the Immigration and Naturalization Service, the procedures for handling migrants, the procedures for accelerated transfer, conditions in detention sites, access to attorneys and legal representation, and illicit trafficking in migrants.<sup>170</sup>

In conclusion, the United States has not signed ICMW, failing to explicitly provide human rights protections for migrant workers and members of their families in the United States. The United States has ratified ICCPR and ICERD provisions that guarantee rights to individuals without distinction of any kind. However, the HRC and Committee on the Elimination of Racial Discrimination have identified many occasions where the United States failed to meet these obligation to migrants. Specifically, the HRC and Committee on the Elimination of Racial Discrimination listed common concerns on the detention of immigrants and deportation of immigrants without adequate access to justice. Similarly, the Rapporteurship on the Rights of Migrants for the OAS expressed concern over the procedures used in U.S. immigrant detention sites.

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<sup>168</sup> *Migration*, ORGANIZATION OF AMERICAN STATES, <http://www.oas.org/en/topics/migration.asp> (last visited April 16, 2016).

<sup>169</sup> *Progress Report on the Situation of Migrant Workers and Their Families in the Hemisphere*, Special Rapporteurship on Migrant Workers and Their Families O.A.S. Doc. OEA/Ser.L/V/II.102 doc. 6. Rev. (1999), available at [http://www.cidh.org/Migrantes/migrantes98eng.htm#United\\_States](http://www.cidh.org/Migrantes/migrantes98eng.htm#United_States).

<sup>170</sup> *Id.*

### **C. The United States and Human Rights Protections: Labor, Family, Civil/Human Rights**

#### **1. Labor**

In 2013, immigrants made up seventeen percent of workers in the civilian labor force in the United States.<sup>171</sup> Since 1970 the percentage of immigrants in the United States workforce has more than tripled.<sup>172</sup> Despite the growing percentage of immigrants in the workforce, undocumented and documented immigrants can face unfavorable working conditions or forced labor.<sup>173</sup>

Analysis of the United States' compliance with relevant treaty provisions provides insight into the protections available for migrant workers in the United States. The ICCPR and ICERD both include provisions to protect the rights of workers.<sup>174</sup> Additionally, as a member of the International Labour Organization, the United States has signed 14 additional conventions that set labor standards and promote decent work for all. Lastly, the Organization of American States' charter provides provisions to protect the rights of workers in member States. However, treaty body reports on the United States' compliance within these conventions and provisions suggests many immigrants remain unprotected by labor laws in the United States.

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<sup>171</sup> *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POLICY INSTITUTE (April 14, 2016), <http://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states#Workforce%20Characteristics>.

<sup>172</sup> *Id.*

<sup>173</sup> *Advocates for Human Rights*, *supra* note 58. As the Office of the United Nations High Commissioner for Human Rights reviewed, "For an unacceptably large proportion of migrants, working conditions are abusive and exploitative, and may be characterized by forced labor, low wages, poor working environment, a virtual absence of social protection, the denial of freedom of association and union rights, discrimination and xenophobia, as well as social exclusion, all of which rob workers of the benefits of working in another country." *Dispelling the Migrant Myth*, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS\\_081380/lang--en/index.htm](http://www.ilo.org/global/publications/magazines-and-journals/world-of-work-magazine/articles/WCMS_081380/lang--en/index.htm) (last visited April 16, 2016).

<sup>174</sup> Because international human rights apply to everyone, regardless of immigration status, these labor protections should apply to all immigrants in the United States.

a. International Treaties

*i. International Covenant on Civil and Political Rights (ICCPR)*

The ICCPR speaks directly on labor rights in Article 8 and Article 22. First, Article 8 prohibits forced or compulsory labour.<sup>175</sup> Second, Article 22(1) provides everyone with the right to form and join trade unions.<sup>176</sup> Despite the United States ratification of the ICCPR, the Human Rights Committee has identified three concerns with immigrant's labor rights in the United States.<sup>177</sup> First, the HRC expressed concern about the "insufficient identification and investigation of cases of trafficking for labour purposes."<sup>178</sup> According to a report published by the Urban Institute and Northeastern University, "foreign workers, lured by promises of good jobs in America, soon find themselves enslaved in plain sight as victims of labor trafficking."<sup>179</sup> While some victims of labor trafficking are smuggled into the United States, approximately 71% enter the United States with a visa.<sup>180</sup>

Second, the HRC noted many farm workers and domestic workers are explicitly excluded from protection under labor laws and are more vulnerable to trafficking.<sup>181</sup> Average weekly earnings for migrants are 80% less than earnings of native-born Americans.<sup>182</sup> The agriculture and domestic services industries, in which many migrants

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<sup>175</sup> *ICCPR*, *supra* note 62, at art. 8 (3)(a).

<sup>176</sup> *Id.* at art. 22(1). Article 22(2) of the ICCPR states, "no restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others." *Id.* at art. 22(2).

<sup>177</sup> Specifically, in the concluding observations on the fourth periodic report of the United States of America, the Human Rights Committee noted three specific concerns for trafficking and forced labor. *United states HRC Report*, *supra* note 64.

<sup>178</sup> *Id.* at 6 – 7.

<sup>179</sup> Jeanne Sahadi, *Slave Labor in America Today*, CNN MONEY (Oct. 21, 2014), <http://money.cnn.com/2014/10/21/pf/labor-trafficking/>.

<sup>180</sup> *Id.*

<sup>181</sup> *United states HRC Report*, *supra* note 64, at 6 -7.

<sup>182</sup> *Advocates for Human Rights*, *supra* note 58.

work, could be excluded from minimum wage, overtime, and trade union laws.<sup>183</sup>

Moreover, many migrants that are undocumented end up in forced labor situations and employers use deportation to discourage undocumented migrants from reporting labor law violations.<sup>184</sup>

Third, the HRC was “concerned that workers entering the United States under the H2-B work visa program<sup>185</sup> are . . . at a high risk of becoming victims of trafficking and/or forced labour acts.”<sup>186</sup> The H2-B Guestworker Program permits migrants to enter the United States for seasonal employment.<sup>187</sup> While in the United States these workers could face stolen wages, seizure of identity documents, and denial of medical care for workplace injuries.<sup>188</sup>

The HRC recommended the United States to review laws and regulations concerning forced labor and provide full protection against forced labor for all categories of workers.<sup>189</sup> In addition, the HRC recommended further training for law enforcement, border and immigration officials, labour law enforcement agencies, and child welfare agencies.<sup>190</sup> The HRC also suggested further oversight of labor conditions for temporary visa programs.<sup>191</sup>

## ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> “The H-2B program allows U.S. employers or U.S. agents who meet specific regulatory requirements to bring foreign nationals to the United States to fill temporary nonagricultural jobs.” *H-2B Temporary Non-Agricultural Workers*, DEPARTMENT OF HOMELAND SECURITY, <https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers> (last visited April 16, 2016).

<sup>186</sup> *United states HRC Report*, *supra* note 64, at 6 – 7 (Articles 2, 8, 9, 14, 24, 26).

<sup>187</sup> *Advocates for Human Rights*, *supra* note 58.

<sup>188</sup> *Id.*

<sup>189</sup> *United states HRC Report*, *supra* note 64, at 7.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

Article 5 of ICERD provides State Parties undertake to guarantee everyone “the right to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration.”<sup>192</sup> Additionally, Article 5 lists the right to form and join trade unions.<sup>193</sup> The Committee on the Elimination of Racial Discrimination expressed concern that migrant workers in the H2-B work visa program are at high risk of becoming victims of trafficking and that many Hispanic children are employed in the agriculture industry and may face harsh and dangerous conditions.<sup>194</sup>

The committee made two recommendations concerning labor rights for immigrants. First, the committee suggested the United States review relevant laws and regulations to protect migrant workers from abusive working conditions.<sup>195</sup> Second, the committee recommended the United States ratify two ILO Conventions: No.29 (which concerns forced and compulsory labor) and No.138 (which concerns Minimum Age for Admission to Employment).<sup>196</sup>

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

The United States has signed CEDAW, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the

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<sup>192</sup> *ICERD*, *supra* note 69, at art. 5(e)(i).

<sup>193</sup> *Id.* at art. 5(e)(ii).

<sup>194</sup> *United States ICERD Report*, *supra* note 71, at 9 (articles 2, 5, and 6).

<sup>195</sup> This includes: “raising the minimum age for harvesting and hazardous work in agriculture under the Fair Labor Standards Act in line with international labour standards, and ensuring effective oversight of labour conditions.” *Id.*

<sup>196</sup> *Id.*

treaty's objective and purpose.”<sup>197</sup> However, the United States has not ratified CEDAW and is not legally bound by the terms of CEDAW.<sup>198</sup>

*iv. Convention on the Rights of the Child (CRC)*

The United States has signed CRC, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the treaty's objective and purpose.”<sup>199</sup> However, the United States has not ratified the CRC and is not legally bound by the terms of the CRC.

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

The United States has not signed or ratified ICMW. As a result, the United States is neither bound by the terms of ICMW nor obliged to refrain from acts that would undermine ICMW's purpose.

*vi. International Labour Organization (ILO)*

The United States ratified the Labour Administration Convention in 1995. Article 7 of the Labour Administration Convention promotes the extension of labour administration to categories of workers who are not considered employees by law, such as agricultural workers.<sup>200</sup> In the United States, many agricultural workers are exempt

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<sup>197</sup> *Convention on Rights of Child Definitions*, *supra* note 73.

<sup>198</sup> Given that the United States has signed CEDAW, it is important to note that Article 11 of CEDAW provides measures States Parties should take to eliminate employment discrimination against women. These rights include: (a) the right to work as an inalienable right, (b) the right to the same employment opportunities, (c) the right to promotion, job security, and all benefits, (d) the right to equal remuneration and equal treatment in respect of work, (e) the right to social security, and (f) the right to safe work conditions. Convention on the Elimination of All Forms of Discrimination Against Women art. 11(1), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter, *Convention on Women*]. Additionally CEDAW provides measures to prevent discrimination “against women on the grounds of marriage or maternity and ensure their effective right to work.” *Id.* at 11(2). Although the United States has not ratified CEDAW, as a signatory, it must avoid transgressing these norms, which inure to the benefit of migrant women.

<sup>199</sup> *Convention on Rights of Child Definitions*, *supra* note 73.

<sup>200</sup> Labour Administration Convention, Oct. 11, 1980, 1201 U.N.T.S. 180 [hereinafter, *Labour Administration Convention*].

from employment laws, such as the overtime and minimum wage provisions of the Fair Labor Standards Act (FLSA).<sup>201</sup> Specifically, in the United States, employees who are employed in agriculture are exempt from paid time and one half regular rates for work in excess of 40 hours per week.<sup>202</sup> With over forty-one percent of farm laborers not U.S. citizens,<sup>203</sup> the United States' FLSA exemptions for agricultural workers and lack of compliance with Article 7 of the Labour Administration Convention directly impacts United States immigrants. Unauthorized immigrants are more likely than U.S.-born workers to be employed in low-skilled industries, such as agriculture.<sup>204</sup> The number of unauthorized immigrant workers employed in agriculture is more than double the share of U.S. born workers who are.<sup>205</sup> In 1999, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) requested the United States provide details of the extension of the system of labour administration to agricultural workers.<sup>206</sup> The committee also requested conditions of work and working life of agriculture workers.<sup>207</sup>

The 2014 Recommendation providing supplementary measures for the Forced Labour Convention stated, "Members should take the most effective preventative measures . . . [for] orientation and information for migrants . . . in order for them to be better prepared to work and live abroad and to create awareness and better understanding

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<sup>201</sup> *Fact Sheet #2: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION (July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs12.pdf>.

<sup>202</sup> *Id.* Agricultural workers that do not do not utilize more than 500 "man days", or days during which an employee performs agricultural work for at least one hour, are exempt from the minimum wage. *Id.*

<sup>203</sup> *Farm Labor*, UNITED STATES DEPARTMENT OF AGRICULTURE ECONOMIC RESEARCH SERVICE (Oct. 20, 2015), <http://www.ers.usda.gov/topics/farm-economy/farm-labor/background.aspx>.

<sup>204</sup> Jeffrey S. Passel & D'Vera Cohn, *Industries of Unauthorized Immigrant Workers*, PEW RESEARCH CENTER (March 26, 2015), <http://www.pewhispanic.org/2015/03/26/chapter-2-industries-of-unauthorized-immigrant-workers/>.

<sup>205</sup> *Id.*

<sup>206</sup> Direct Request (CEACR) No. 150, LABOUR ADMINISTRATION CONVENTION (1999), *available at*, [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2170122:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2170122:NO).

<sup>207</sup> *Id.*

about trafficking for forced labour situations.”<sup>208</sup> In 2005, the CEACR noted several findings from the United States report on protection for trafficking victims.<sup>209</sup> In particular, the CEACR noted the United States’ prosecution of trafficking offense and encouraged the United States to supply further details of measures taken to prevent trafficking.<sup>210</sup> As explained above,<sup>211</sup> the immigrant community in the United States is deeply impacted by forced labor and human trafficking.

The United States ratified the Worst Forms of Child Labour Convention in 1999. Article 7 of the Convention requires States to “prevent the engagement of children in the worst forms of child labour” and “identify and reach out to children at special risk.”<sup>212</sup> In the United States, children over the age of 12 can legally work in agriculture with their parent’s permission or with their parents on the same farm.<sup>213</sup> The United States’ exemption for children in agriculture impacts many United States immigrants. Nearly 85 percent of agricultural workers in the United States are Hispanic.<sup>214</sup> Although child workers may be United States citizens, their parents may be undocumented or hold short-term agricultural visas.<sup>215</sup> Additionally, for United States’ immigrants, lack of childcare and dangerous conditions in migrant labor camps lead many parents to bring their

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<sup>208</sup> Forced Labour (Supplementary Measures) No. 203, INTERNATIONAL LABOUR ORGANIZATION (2014), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:3174688:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:3174688:NO).

<sup>209</sup> Observation (CEACR), ABOLITION OF FORCED LABOUR CONVENTION (2005), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2250652:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2250652:NO).

<sup>210</sup> *Id.*

<sup>211</sup> *See supra*, Section I(C)(1)(b)(i).

<sup>212</sup> International Labour Organization (ILO), *Worst Forms of Child Labour Convention*, June 17, 1999, C182 [hereinafter, *Worst Forms of Child Labor*]. Article 5 of the Convention states, “Each Member shall, after consultation with employers’ and workers organizations, establish or designate appropriate mechanisms to monitor the implementation of the provisions giving effect to this Convention.” *Id.*

<sup>213</sup> NATIONAL FARM WORKER MINISTRY, <http://nfwf.org/education-center/farm-worker-issues/children-in-the-fields/> (last visited April 17, 2016).

<sup>214</sup> U.S.: *Child Farmworkers’ Dangerous Lives*, HUMAN RIGHTS WATCH (May 5, 2010), <https://www.hrw.org/news/2010/05/05/us-child-farmworkers-dangerous-lives>.

<sup>215</sup> *Id.*

children with them to the fields.<sup>216</sup> In 2013 and 2014, the CEACR recommended “the government to pursue its efforts to strengthen the capacity of the institutions responsible for the monitoring of child labour in agriculture.”<sup>217</sup>

### b. Regional Treaties

#### *i. Organization of American States*

Article 34 of the OAS charter provides rights to fair wages, employment opportunities, and acceptable working conditions for all.<sup>218</sup> Article 45(c) of the OAS Charter lists the rights to collective bargaining and the workers’ right to strike.<sup>219</sup> A petition was filed by Mexico in the Inter-American Court of Human Rights seeking an advisory opinion on the general denial of rights for migrant workers in the United States.<sup>220</sup> The Inter-American Court of Human Rights reviewed the petition in 2003.<sup>221</sup> The petition raised questions concerning a variety of migrant labor rights including: payment of overtime, seniority rights, equality rights, and due process.<sup>222</sup> Data from the petition revealed United States legislation bars federally funded legal services lawyers from representing certain migrant workers.<sup>223</sup> The Inter-American Court issued an

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<sup>216</sup> Tammy Kim, *For Children of Migrant Workers, Choice Can Be the Field or the Car*, ALJAZEERA AMERICA (Oct. 25, 2013), <http://america.aljazeera.com/articles/2013/10/25/for-children-of-migrantworkersthefieldorthecar.html>.

<sup>217</sup> Observation (CEACR), WORST FORMS OF CHILD LABOUR CONVENTION (1999), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3057769:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3057769:NO).

<sup>218</sup> *Charter of the Organization of American States*, *supra* note 83, at art. 34.

<sup>219</sup> *Id.* at art. 45(c).

<sup>220</sup> Davis, *Human Rights Council Civil Case*, *supra* note 57, at 181 – 82.

<sup>221</sup> *Id.* at 182.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* Specifically, one particular brief filed by United States’ civil rights, labor, and immigration organizations explained “the 1974 Legal Services Corporation Act created the Legal Services Corporation, and its programs are prohibited from providing legal aid for, or in representation of most migrants who are not legal permanent residents.” *Id.*

advisory statement concluding the denial of civil legal assistance to undocumented migrant workers undermined labor protections in the Inter-American system.<sup>224</sup>

In conclusion, the ICCPR and ICERD contain provisions that protect immigrants from compulsory labor and provide immigrants with a right to form and join trade unions. However, the HRC and the Committee on the Elimination of Racial Discrimination have identified many occasions where the United States has failed to meet these obligations to workers. Because many migrant workers are employed in low-skilled industries, such as agriculture, United States immigrants are particularly vulnerable to labor rights violations. Specifically, the HRC and the Committee on the Elimination of Racial discrimination listed common concerns on trafficking for labor purposes, visa programs, and the exclusion of farmworkers from some labor laws. Similarly, the CEACR noted concern for agriculture workers.

## 2. Family

Historically, males comprised the majority of immigrants to the United States.<sup>225</sup> However, the 1965 Immigration Act emphasized family reunification and the majority shifted.<sup>226</sup> In 2014, approximately 51 percent of immigrants were female, with 21.2 million immigrant women living in the United States.<sup>227</sup> The shift in the gender of the immigrant population raises implications for the United States with respects to family structure, gender roles, and more.<sup>228</sup>

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<sup>224</sup> *Id.*

<sup>225</sup> Ariel G. Ruiz, *Immigrant Women in the United States*, MIGRATION POLICY INSTITUTE (March 20, 2015), <http://www.migrationpolicy.org/article/immigrant-women-united-states> [hereinafter, *Immigrant Women in U.S.*].

<sup>226</sup> *Id.*

<sup>227</sup> *U.S. Statistics on Immigration*, *supra* note 1.

<sup>228</sup> *Immigrant Women in U.S.*, *supra* note 142.

Although the United States has not ratified CEDAW and the CRC, the United States has signed two relevant international treaties with regard to its protection of family rights for United States immigrants, the ICCPR and ICERD. Additionally, as a member of the International Labour Organization, the United States has signed ILO conventions that provide protections for women and children and as a member of the Organization of American States, the United States has signed the American Declaration on the Rights and Duties of Man and the OAS Charter. Analysis of the relevant treaty provisions and reports on the United States' compliance identifies the human rights protections actually available for migrant families in the United States. Additionally, identification of treaties that the United States has not ratified offers insight into family rights that are not met in the United States.

a. International Treaties

*i. International Covenant on Civil and Political Rights (ICCPR)*

Article 3 of the ICCPR seeks to ensure the equal right of men and women to the enjoyment of all civil and political rights.<sup>229</sup> In April 2014, the HRC expressed concern “that domestic violence continues to be prevalent in the State party, and that ethnic minorities, immigrants, American Indian and Alaska Native women are at particular risk.”<sup>230</sup> Every year in the United States 1.3 million women are physically assaulted by an intimate partner.<sup>231</sup> Violence against women, and specifically domestic violence, is a human rights violation “States are obliged to apply due diligence to prevent.”<sup>232</sup> While

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<sup>229</sup> *ICCPR*, *supra* note 62, at art. 3.

<sup>230</sup> “*United States HRC Report*, *supra* note 64, at 7. The committee is also concerned that victims face obstacles to obtain remedies and that law enforcement authorities are not legally required to act with due diligence to protect victims of domestic violence and often inadequately respond to such cases (arts 3, 7, 9, and 26).” *Id.* at 7.

<sup>231</sup> *Id.* at 9.

<sup>232</sup> *Id.*

all women in the United States experience domestic violence at a rate of 22.1%, Latina immigrant women are estimated to experience domestic violence at much higher rates of 30% to 50%.<sup>233</sup> The unique obstacles faced by abused immigrant women include language and cultural barriers, ineligibility for public benefits, and fear of deportation.<sup>234</sup>

The United States claims that “regardless of immigration status, victims of domestic violence have full access to a network of 1,600 domestic violence shelters and other supportive services, including community health centers and substance abuse, mental health, and maternal and child health programs.”<sup>235</sup> However, in reality many immigrant victims of domestic abuse are afraid to come forward and seek help.<sup>236</sup> The HRC recommended that the United States ensure remedies are available to *all* domestic violence victims, and improve availability of emergency shelter, housing, childcare, rehabilitative services and legal representation for women victims of domestic violence.<sup>237</sup>

*ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

Article 5 of ICERD provides all individuals, regardless of national origin, “the right to marriage and choice of spouse.”<sup>238</sup> Article 2 of ICERD requires States Parties to condemn racial discrimination and take steps to eliminate racial discrimination in all its

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 10.

<sup>235</sup> *United States HRC National Report*, supra note 28. “VAWA specifically provides immigration protections for battered immigrants allowing certain family members of U.S. Citizens and lawful permanent residents who have been victims of domestic violence to independently petition for immigration status without the abuser’s knowledge. This self-petitioning process removes one barrier to leaving that victims might face and shifts control over the immigration process to the victim, providing him or her with more options.” *Id.*

<sup>236</sup> Caitlin Kandil, *Mexican Consulate Offshoot Aims to Help Abuse Victims*, LOS ANGELES TIMES (Nov. 29, 2015), <http://www.latimes.com/socal/weekend/news/tn-wknd-et-1129-mexican-women-20151129-story.html> (“What we’ve found is that if you’re a victim of domestic violence, many would rather go back to the abusive relationship. It was easier for them to put up with than trying to navigate the system.”).

<sup>237</sup> *United States HRC Report*, supra note 64, at 7 – 8.

<sup>238</sup> *ICERD*, supra note 69, at art. 5 (d)(iv)

forms.<sup>239</sup> The Committee on the Elimination of Racial Discrimination expressed concern for the rights of women subjected to gender violence. In particular, the committee expressed concern over “the disproportionate number of women from racial and ethnic minorities, . . . particularly immigrant women, . . . who continue to be subjected to violence, including rape and sexual violence.”<sup>240</sup> As discussed above,<sup>241</sup> domestic violence has a distinct impact on immigrant women and many immigrant women do not have access to domestic violence shelters. The committee encouraged the United States to intensify efforts to combat violence against women and to provide sufficient resources for service programs.<sup>242</sup>

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

The United States has signed CEDAW, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the treaty’s objective and purpose.”<sup>243</sup> However, the United States has not ratified CEDAW and is not legally bound by the terms of CEDAW.

*iv. Convention on the Rights of the Child (CRC)*

The United States has signed the CRC, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the

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<sup>239</sup> *Id.* at art. 2(1).

<sup>240</sup> *United States ICERD Report*, *supra* note 71, at 9.

<sup>241</sup> *See supra* section I(b)(2)(a)(i).

<sup>242</sup> *United States ICERD Report*, *supra* note 71, at 9.

<sup>243</sup> *Convention on Rights of Child Definitions*, *supra* note 73. Given that the United States has signed CEDAW, it is important to note that Article 9 of CEDAW provides, “State Parties shall grant women equal rights with men to acquire, change, or retain their nationality.” *Convention on Women*, *supra* note 115, at art. 9(1). Additionally, Article 9 provides “States Parties shall grant women equal rights with men with respect to the nationality of their children.” *Id.* at 9(2). Although the United States has not ratified CEDAW, as a signatory, it must avoid transgressing these norms, which inure to the benefit of migrant women.

treaty's objective and purpose.”<sup>244</sup> However, the United States has not ratified the CRC and is not legally bound by the terms of CRC.

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

The United States has not signed or ratified ICMW. As a result, the United States is neither bound by the terms of ICMW nor obliged to refrain from acts that would undermine ICMW's purpose.

*vi. International Labour Organization (ILO)*

Despite focusing on labor rights, the ILO also addresses other rights impacting immigrants in the United States. In particular, the Maternity Protection Recommendation provides, “Members should take measures to ensure assessment of any workplace risks related to the safety and health of pregnant or nursing women and her child.”<sup>245</sup> A report conducted by the National Women's Law Center noted low-wage occupations tend to be physically demanding, inflexible, and hazardous.<sup>246</sup> Immigrant women in low-wage occupations are more likely to suffer from pregnancy discrimination.<sup>247</sup> In particular, “the two kinds of pregnancy discrimination that immigrant women working in the . . . lower-wage sector, are going to face are either they would outright lose their job” or they are forced to maintain the same level or productivity with no accommodations.”<sup>248</sup> Immigrant

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<sup>244</sup> *Convention on Rights of Child Definitions*, *supra* note 73.

<sup>245</sup> Maternity Protection Recommendation No. 191, INTERNATIONAL LABOUR ORGANIZATION (2000), available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:R191](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R191).

<sup>246</sup> Natasha Bannan & Joanna Ingram, *Pregnancy Discrimination, Immigrant Women and Low-Wage Work*, HUFFPOST WOMEN (June 9, 2015), [http://www.huffingtonpost.com/natasha-lycia-ora-bannan/pregnancy-discrimination-immigrant-women-and-low-wage-work\\_b\\_7032834.html](http://www.huffingtonpost.com/natasha-lycia-ora-bannan/pregnancy-discrimination-immigrant-women-and-low-wage-work_b_7032834.html). “Inflexible schedules and working environments for low paying service jobs often require physically demanding tasks, leading many employers to refuse to make accommodations for pregnant workers.” *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> Annamarya Scaccia, *The Face of Pregnancy Discrimination*, REWIRE (May 1, 2013), <https://rewire.news/article/2013/05/01/the-face-of-pregnancy-discrimination/>.

women may be unable to report this workplace abuse because they feel disempowered based on their immigration status.

*b. Regional Treaties*

The Inter-American Commission on Human Rights monitors the human rights situations of member states.<sup>249</sup> In 2014, the IACHR conducted a visit to the southern border of the United States to evaluate the human rights situation for unaccompanied children and families who have entered the United States.<sup>250</sup> The IACHR noted violations to family life and protection of the family unit, protection of the child, and the right to seek and receive asylum.<sup>251</sup> Specifically, the IACHR was concerned with immediate immigration detention of families.<sup>252</sup> Additionally, the Commission noted the United States presumes unaccompanied Mexican children are not in need of international protection,<sup>253</sup> in conflict with the 2008 Trafficking Victims Protection Reauthorization Act (TVPRA), which requires border officials to determine whether the child has protection needs.<sup>254</sup> The commission recommended for the United States to adopt legislation to ensure children and families with children are not placed in immigration detention.<sup>255</sup>

In conclusion, the United States has not ratified CEDAW or the CRC, failing to explicitly provide human rights protections for women and children in the United States. Provisions of the ICCPR and ICERD provide protection that guarantee family rights in

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<sup>249</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited April 17, 2016).

<sup>250</sup> *IACHR Wraps up Visit to the United States of America*, ORGANIZATION OF AMERICAN STATES (Oct. 2, 2014), [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/110.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/110.asp).

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *h Id.*

the United States. However, the HRC and Committee on the Elimination of Racial Discrimination have identified occasions where the United States failed to meet these obligations to migrants. Specifically, the HRC and Committee on the Elimination of Racial Discrimination were concerned about the high rates of domestic violence for immigrant women. Additionally, IACHR expressed concern over the detention of immigrant children and immigrant families with children in the United States.

### 3. Civil/Human Rights

Hispanics born outside the United States are much more likely than those born in the United States to experience discrimination.<sup>256</sup> United State immigrants report discrimination in dealings with the police, in restaurants and other entertainment places, while getting healthcare, and while shopping.<sup>257</sup> The United States has signed two relevant international treaties with regard to its protection of civil/human rights for United States immigrants, the ICCPR and ICERD. Additionally, as a member of the International Labour Organization, the United States has signed ILO conventions that provide civil/human rights protections for United States immigrants. Lastly, as a member of the Organization of American States, the United States has signed the American Declaration on the Rights and Duties of Man and the OAS Charter, providing protections for migrants at the regional level. Analysis of the relevant treaty provisions and reports on the United States' compliance identifies the civil/human rights protections actually available for United States immigrants. Additionally, identification of treaties the United

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<sup>256</sup> Justin McCarthy, *Immigrant Status Tied to Discrimination Among Hispanics*, GALLUP (Aug, 20, 2015), <http://www.gallup.com/poll/184769/immigrant-status-tied-discrimination-among-hispanics.aspx>.

<sup>257</sup> *Id.*

States has not ratified offers insight into civil/human rights that are not met in the United States.

a. International Treaties

*i. International Covenant on Civil and Political Rights (ICCPR)*

The HRC has noted three civil/human rights concerns impacting United States immigrants. First, Article 25 of the ICCPR provides, every citizen with the right to vote without any distinction or unreasonable restriction.<sup>258</sup> The HRC noted concerns about voter identification requirements and other eligibility requirements that pose excessive burdens on voters in minority groups.<sup>259</sup> In 2014, 27 percent of Mexican immigrants in the United States were naturalized citizens, able to vote.<sup>260</sup> Migrants who adjust their status to citizens may face discrimination on account of their ethnicity and/or race as observed by the HRC. The committee recommended for the United States to take necessary measures to ensure voter identification requirements and eligibility requirements do not “impose excessive burdens on voters.”<sup>261</sup>

Second, Article 9 of the ICCPR provides, “No one shall be subjected to arbitrary arrest or detention.”<sup>262</sup> Additionally, Article 14 provides everyone shall be entitled to a fair and public hearing by an impartial tribunal.<sup>263</sup> The HRC recognized racial disparities in the United States’ criminal justice system and “the overrepresentation of individuals belonging to racial and ethnic minorities in prisons and jails.”<sup>264</sup> These findings have bearing on the treatment of migrants in the United States. Although, the immigration

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<sup>258</sup> *ICCPR*, *supra* note 62 at art. 25.

<sup>259</sup> *United states HRC Report*, *supra* note 64.

<sup>260</sup> *U.S. Mexican Immigrants*, *supra* note 2.

<sup>261</sup> *United states HRC Report*, *supra* note 64.

<sup>262</sup> *ICCPR*, *supra* note 62, at art. 9.

<sup>263</sup> *Id.* at art. 14.

<sup>264</sup> *United states HRC Report*, *supra* note 64, at 3.

system is formally civil, immigration law violations often lead to criminal prosecutions.<sup>265</sup> The HRC recommended the United States to take steps to address racial disparities in the criminal justice system by amending regulations at the federal, state, and local levels.<sup>266</sup>

Third, Article 6 of the ICCPR provides, every human being has the inherent right to life and no one shall be deprived of his life.<sup>267</sup> The HRC recognized the excessive use of force by law enforcement officials, including use of lethal force by Customs and Border Protection (CBP) officers at the United States-Mexico border.<sup>268</sup> The HRC recommended ensuring the new CBP directive is applied and enforced correctly with regard to the use of deadly force.<sup>269</sup>

*ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

Article 5 of ICERD provides enjoyment of political rights, equal access to public service, and civil rights.<sup>270</sup> The Committee on the Elimination of Racial Discrimination addressed three areas of civil/human rights that are disproportionately affecting immigrants in the United States. First, the committee addressed obstacles imposed by restrictive voter identification laws on individuals belonging to racial and ethnic minorities.<sup>271</sup> In 2012, studies suggested that new voter identification laws in the United

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<sup>265</sup> *Two Systems of Justice: How the Immigration System Falls Short of American Ideals of Justice*, AMERICAN IMMIGRATION COUNCIL (March 19, 2013), <http://www.immigrationpolicy.org/special-reports/two-systems-justice-how-immigration-system-falls-short-american-ideals-justice>.

<sup>266</sup> *Id.*

<sup>267</sup> *ICCPR*, *supra* note 62, at art. 6.

<sup>268</sup> *United States HRC Report*, *supra* note 64, at 6.

<sup>269</sup> *Id.*

<sup>270</sup> *ICERD*, *supra* note 69, at art. 5.

<sup>271</sup> *United States ICERD Report*, *supra* note 71, at 5.

States could hinder at least 10 million Hispanics from voting.<sup>272</sup> Specifically, the studies have identified three barriers for the Hispanic voter participation: citizenship-based voter purges, proof of citizenship requirements, and photo identification laws.<sup>273</sup> In 2014, 27 percent of Mexican immigrants in the United States were naturalized citizens, able to vote.<sup>274</sup> Migrants who adjust their status to citizens may face discrimination on account of their ethnicity and/or race as observed by the HRC. The HRC recommended for the United States to adopt federal legislation that prevents implementation of voting regulations.<sup>275</sup> Outside sources suggest making voter information available in Spanish, recruiting poll workers at naturalization ceremonies, and extending early voting periods and late-night voting options would increase Hispanic voters.<sup>276</sup>

Second, the committee noted excessive force by law enforcement has as disparate impact on undocumented migrants crossing the United States-Mexico border.<sup>277</sup> The committee noted in particular, criminal misconduct by Customs and Border Protection (CBP) against Hispanic/Latino Americans and undocumented migrants remains of great issue.<sup>278</sup> The committee urged the United States to address excessive force by law enforcement officials by ensuring prompt and effective investigation of each allegation, intensifying prevention efforts, and improving reporting of cases.<sup>279</sup>

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<sup>272</sup> Emily Deruy, *Could New Voter ID Laws Really Disenfranchise 10 Million Latinos*, ABC NEWS (Sept. 24, 2012), [http://abcnews.go.com/ABC\\_Univision/Politics/voter-id-laws-hinder-10-million-eligible-latinos/story?id=17312815](http://abcnews.go.com/ABC_Univision/Politics/voter-id-laws-hinder-10-million-eligible-latinos/story?id=17312815) [hereinafter, *Voter ID Law*]. “Overall, 17 states have enacted laws that would require voters to present photo identification at the polls before casting a ballot.” *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *U.S. Mexican Immigrants*, *supra* note 2.

<sup>275</sup> *United States ICERD Report*, *supra* note 71, at 5.

<sup>276</sup> *Voter ID Law*, *supra* note 190.

<sup>277</sup> *United States ICERD Report*, *supra* note 71, at 8.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

Third, the committee addressed the racial disparities in the criminal justice system, noting concern that members of racial and ethnic minorities “continue to be disproportionately arrested, incarcerated and subjected to harsher sentences.”<sup>280</sup> Studies have found that one in six Latino males is expected to be incarcerated in his lifetime,<sup>281</sup> while one in 17 white males is expected to be incarcerated in his lifetime.<sup>282</sup> The Federal Bureau of Prisons reports that 26.4 percent of inmates in federal prisons are non-U.S. citizens.<sup>283</sup> The Survey of Inmates in State and Federal Correctional Facilities show that 8.1 percent of prisoners in state prisons are immigrants (legal and illegal).<sup>284</sup> The committee recommended for the United States to take further steps to eliminate racial disparities in the criminal justice system, including amending law and policies.<sup>285</sup>

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

The United States has signed CEDAW, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the

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<sup>280</sup> *Id.*

<sup>281</sup> *Racial Disparities in Criminal Justice*, ACLU, <https://www.aclu.org/issues/mass-incarceration/racial-disparities-criminal-justice> (last visited April 17, 2016).

<sup>282</sup> *Id.*

<sup>283</sup> Jessica Vaughan & Steven Camarota, *Immigration and Crime: Assessing a Conflicted Issue*, CENTER FOR IMMIGRATION STUDIES (November 2009), <http://cis.org/ImmigrantCrime>.

<sup>284</sup> *Id.* (“However, the survey excludes jails and relies on inmate self-identification, which is likely to understate the number of immigrants.”).

<sup>285</sup> *United States ICERD Report*, *supra* note 71 at 8. The committee expressed also concern over “racial disparities at all levels of the juvenile justice system, including the disproportionate rate at which youth from racial and ethnic minorities are arrested in schools and referred to the criminal justice system, prosecuted as adults, incarcerated in adult prisons, and sentenced to life imprisonment without parole.” *Id.* at 10. As of 2000, “white youths charged with violent offenses are incarcerated for an average of 193 days after trial, but . . . Hispanics are incarcerated an average of 205 days.” Fox Butterfield, *Racial Disparities Seen as Pervasive in Juvenile Justice*, THE NEW YORK TIMES (April 26, 2000), <http://www.nytimes.com/2000/04/26/us/racial-disparities-seen-as-pervasive-in-juvenile-justice.html>. “These disparities accumulate, and they make it hard for members of the minority community to complete their education, get jobs, and be good husbands and fathers.” *Id.*

treaty's objective and purpose.”<sup>286</sup> However, the United States has not ratified CEDAW and is not legally bound by the terms of CEDAW.

*iv. Convention on the Rights of the Child (CRC)*

The United States has signed the CRC, indicating preliminary endorsement of the treaty. The United States is obliged “to refrain from acts that would undermine the treaty's objective and purpose.”<sup>287</sup> However, the United States has not ratified the CRC and is not legally bound by the terms of the CRC.

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

The United States has not signed or ratified ICMW. As a result, the United States is neither bound by the terms of ICMW nor obliged to refrain from acts that would undermine ICMW's purpose.

*vi. International Labour Organization (ILO)*

Article 1 of the Abolition of Forced Labour Convention provides each member of the ILO shall not make use of any form of forced labor as a means of racial, social, national, or religious discrimination.<sup>288</sup> In 2009, the CEACR noted the significant racial disparities in prison incarceration rates that involve a labor obligation. As noted above, racial disparities in prison incarceration rates significantly impact immigrants in the United States. The CEACR requested the United States take measures to ensure no racial, social, or national discrimination in prison sentences with labor obligations.<sup>289</sup>

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<sup>286</sup> *Convention on Rights of Child Definitions*, *supra* note 73.

<sup>287</sup> *Id.*

<sup>288</sup> *Abolition of Forced Labour*, *supra* note 78. In the United States, many prison sentences involve a labor obligation.

<sup>289</sup> Direct Request (CEACR), ABOLITION OF FORCED LABOUR CONVENTION (2009), *available at* [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:2302730](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2302730).

## b. Regional Treaties

### *i. Organization of American States*

Article 1 of the American Declaration on the Rights and Duties of Man provides everyone with the right to life, liberty, and security of his person.<sup>290</sup> Rapporteur on the Rights of Migrants, Felipe Gonzalez, elaborated, “Within any immigration control procedure, States are obliged to guarantee that their authorities respect the right to life and physical and psychological integrity of migrants, regardless of immigration status.”<sup>291</sup> In 2012, the IACHR expressed concern over the death of a Mexican national teenager at the Mexico-United States border.<sup>292</sup> The IACHR reported the unarmed 16 year old was shot and killed in the vicinity of the fence along the international border.<sup>293</sup> Additionally, in the IACHR Report on Immigration in the United States, the commission expressed concern over the excessive and disproportionate use of force by immigration agents at the Mexico-United States border.<sup>294</sup> Since, 2000 almost 6,000 migrants have died along the Mexico-United States border.<sup>295</sup> The IACHR urges the United States to investigate each incident and punish those who may be deemed responsible.<sup>296</sup>

In conclusion, provisions of the ICCPR, ICERD, ILO Forced Labour Convention, and American Declaration on the Rights and Duties of Man provide civil/human right protections for United States immigrants. However, the HRC, Committee on the

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<sup>290</sup> *American Declaration of the Rights and Duties of Man*, *supra* note 84.

<sup>291</sup> *IACHR Expresses Concern over Killing of Mexican Teenager by the US Border Patrol*, ORGANIZATION OF AMERICAN STATES (Oct. 23, 2012), [http://www.oas.org/en/iachr/media\\_center/PReleases/2012/126.asp](http://www.oas.org/en/iachr/media_center/PReleases/2012/126.asp) [hereinafter, *US Border Patrol*].

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> Collin Schultz, *Nearly 6,000 Migrants Have Died Along the Mexico-U.S. Border Since 2000*, SMITHSONIAN (Oct. 1, 2014), <http://www.smithsonianmag.com/smart-news/nearly-6000-migrants-have-died-along-mexico-us-border-2000-180952904/?no-ist>.

<sup>296</sup> *US Border Patrol*, *supra* note 208.

Elimination of Racial Discrimination, CEACR, and IACHR have each identified occasions where the United States has failed to meet these obligations to migrants. Specifically, all four committees expressed concern over the United States' excessive use of force at the Mexico-United States border. Additionally, the HRC and Committee on the Elimination of Racial Discrimination noted concern over voter identification laws and racial disparities in the criminal justice system.

#### **D. United States and Access to Civil Legal Services by Immigrants**

##### **1. International Human Rights Treaties and Access to Civil Legal Counsel in the United States**

International practice and interpretative material indicate that counsel in civil matters is an emerging human right, “especially when the civil matters involve fundamental rights.”<sup>297</sup> However, among the core international and regional human rights treaties, only two treaties reference access to civil legal services. Specifically, the International Covenant on Political and Civil Rights (ICCPR) indirectly addresses access to civil legal services and the Charter of the Organization of American States (OAS) directly addresses access to civil legal services. Additionally, the Committee for the Elimination of Racial Discrimination has addressed the United States' failure to provide civil legal services.

First, Article 14 of the ICCPR directly addresses matters in civil court, stating, “All persons shall be equal before the courts and tribunals, in determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent, and impartial

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<sup>297</sup> Davis, *Human Rights Council Civil Case*, *supra* note 57 at 156.

tribunal established by law.”<sup>298</sup> However, the ICCPR does not require states to provide individuals (or immigrants) access to civil legal services.<sup>299</sup> Jurisprudence under the ICCPR suggests that counsel should be provided for cases that involve fundamental human rights. Specifically, the HRC has clarified that legal assistance “may be required to ensure fairness in certain civil cases in the legal system.”<sup>300</sup>

Second, the Charter of the Organization of American States (OAS) is the only international human rights instrument in which the United States is a participant that directly references the right to counsel in civil matters.<sup>301</sup> The OAS Charter explicitly lists a right to free civil council.<sup>302</sup> Both the Inter-American Court and IACHR have provided free legal services on certain occasions to individuals without means.<sup>303</sup> Three factors are considered to determine when counsel must be provided: (1) resources of the individual, (2) difficulty of the issues, and (3) significance of the rights.<sup>304</sup>

Third, the Committee on the Elimination of Racial Discrimination addressed the United States’ failure to provide civil legal counsel to indigent individuals.<sup>305</sup> The

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<sup>298</sup> *Id.* at 158. Additionally, Article 2 of the ICCPR requires states to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy. *Id.* Additionally, Article 13 of the ICCPR states, “An alien lawfully in the territory of a state Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling security otherwise require, be allowed to submit reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons designated by the competent authority.” *ICCPR, supra* note 62.

<sup>299</sup> While the final text of the ICCPR does not directly provide a right to counsel in civil matters, the initial proposals of the ICCPR did address the right to civil counsel. However, a revision committee (consisting of France, the United Kingdom, and the United States) limited the right to assistance to criminal cases in 1948. Davis, *Human Rights Council Civil Case, supra* note 57 at 159.

<sup>300</sup> *Id.* at 163. A General Comment was issued by the HRC in 1984 stating that Article 14 applies in civil proceedings. Then, in 2007, Comment 32 replaced the previous general comment concerning Article 14, stating, “states are encouraged to provide free legal aid in noncriminal cases, for individuals who do not have sufficient means to pay for it. In some cases, they may even be obliged to do so.” *Id.* at 162.

<sup>301</sup> *Id.* at 156.

<sup>302</sup> *Id.* at 177.

<sup>303</sup> *Id.* at 181.

<sup>304</sup> *Id.*

<sup>305</sup> In the concluding observations on the combined seventh to ninth periodic reports of the United States of America, released in August 2014.

Committee noted “the lack of a generally recognized right to counsel in civil proceedings, which disproportionately affects indigent persons belonging to racial and ethnic minorities to seek an effective remedy in matters such as evictions, foreclosures, domestic violence, discrimination in employment, termination of subsistence income or medical assistance, loss of child custody, and deportation.”<sup>306</sup> The committee recommended that the United States take steps to allocate resources to provide effective access to legal representation for indigent individuals in civil proceedings.<sup>307</sup>

## 2. United States Domestic Law and Immigrants’ Rights to Civil Legal Counsel

The United States has limited immigrants’ rights to civil legal counsel through the enactment of amendments to the Immigration Nationality Act<sup>308</sup> and the Omnibus Consolidated Rescissions and Appropriations Act.<sup>309</sup> First, in the United States, immigrants do not have a right to legal counsel in immigration proceedings. Section 292 of the Immigration Nationality Act specifically states that an immigrant’s privilege of representation shall not be at the expense of the government.<sup>310</sup> However, *Franco-Gonzalez v. Holder* introduced an exception for immigrants with mental disabilities.<sup>311</sup> After the federal court decision, immigration officials implemented a new policy making “government-paid legal representation available to people with mental disabilities in

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<sup>306</sup> *United States ICERD Report*, *supra* note 71 at 11.

<sup>307</sup> *Id.* “Particularly with regard to proceedings that have serious consequences for their security, stability, such as evictions, foreclosures, domestic violence, discrimination in employment, termination of substance income or medical assistance, loss of child custody, and deportation proceedings.” *Id.*

<sup>308</sup> 8 U.S.C. § 1362 (2006).

<sup>309</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a)(18), 110 Stat. 1321, 50 (1996).

<sup>310</sup> 8 U.S.C. § 1362 (2006).

<sup>311</sup> *Franco-Gonzalez v. Holder*, No. CV 10-02211 DMG DTBX, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013).

immigration courts in every state.”<sup>312</sup> However, legal representation is still not available for the majority of noncitizens appearing in immigration removal proceedings every year,<sup>313</sup> despite evidence revealing legal representation increases immigrants’ chance of success in immigration proceedings.<sup>314</sup> Specifically, immigrants who were not detained and had legal representation were six times more likely to prevail in immigration proceedings than immigrants who did not have legal representation.<sup>315</sup>

In 2010, member countries participating in the Universal Periodic Review for the United States recommended, “the U.S. government ensure that immigrant detainees in deportation proceedings are entitled to counsel.”<sup>316</sup> However, this has not yet been implemented in the United States. Studies indicate over ninety percent of detainees do not have legal representation in removal proceedings.<sup>317</sup> Furthermore, studies show even when immigrants hire and pay for an attorney, the Department of Homeland Security (DHS) has interfered with immigrants retaining counsel, communicating with counsel, and has often barred counsel’s presence during interrogations.<sup>318</sup>

Outside of immigration proceedings, detainees without legal advocates are unable to “file complaints, compel accurate fact-finding, or press charges against the government

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<sup>312</sup> Julia Preston, In a First, Judge Orders Legal Aid for Mentally Disabled Immigrants Facing Deportation, NY TIMES (April 23, 2013), [http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&\\_r=1](http://www.nytimes.com/2013/04/25/us/legal-aid-ordered-for-mentally-disabled-immigrants.html?ref=politics&_r=1).

<sup>313</sup> *A Basic Human Right: Meaningful Access to Legal Representation*, THE HUMAN RIGHTS POLICY SEMINAR UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW 1, 97 (2015), available at <http://www.law.unc.edu/documents/academics/humanrights/malr.pdf>.

<sup>314</sup> *Id.* at 98. “A New York study launched by Judge Robert Katzman of the Second Circuit Court of Appeals found that ninety-seven percent of unrepresented immigrant detainees lost their deportation cases while seventy-four percent of those represented and not detained were successful in securing the relief for which they qualified.” *Id.* at 110.

<sup>315</sup> *Id.* at 118.

<sup>316</sup> *Id.* at 105..

<sup>317</sup> *Id.* at 109 (“A study of Seattle and Tacoma immigration courts showed that more than sixty-eight percent of respondents were detained. Of the non-detained respondents in that study, sixty-eight percent were able to obtain representation.”).

<sup>318</sup> *Id.* at 117.

or other perpetrators of abuse against them.”<sup>319</sup> “Every day, hundreds of thousands of immigrant detainees in the United States face indefinite periods of confinement . . . without meaningful due process guarantees or access to legal representation.”<sup>320</sup> In 2014 the U.N. Human Rights Committee expressed concern that the “mandatory detention of immigrants for prolonged periods of time without regard to the individual case may raise issues under article 9 of the [ICCPR] and that Committee urges the United States to “take measures ensuring that affected persons have access to legal representation.”<sup>321</sup> The United States Department of Homeland Security (DHS) and the United States Department of Justice (DOJ) have introduced legal orientation programs (LOPs) to assist immigrants in the detention context.<sup>322</sup> LOPs offer general presentations on immigration law and procedures and provide immigrants with a list of pro bono attorneys.<sup>323</sup> In some instances LOPs offer immigrants limited consultation with legal counsel.<sup>324</sup> However, LOP services reach less than thirty percent of detainees each year.<sup>325</sup> Two major issues prevent many immigrants from benefiting from LOP services. First, as of 2010, LOPs only operated in a small portion of detention facilities in the United States.<sup>326</sup> Second, LOP attorneys are “only permitted to spend approximately twenty-five percent of their work hours in direct representation of clients.”<sup>327</sup>

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<sup>319</sup> *Id.* at 116.

<sup>320</sup> *Id.* at 104.

<sup>321</sup> *Id.* at 109.

<sup>322</sup> *Id.* at 125.

<sup>323</sup> *Id.* at 126.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* “The IACHR has noted that the expansion of immigration detention has outpaced the expansion of funding for LOP. As a result, LOP services are reaching a shrinking percentage of the immigration detention population.” *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

Next, immigrants who are able secure legal representation often receive services through non-profit organizations, pro bono programs, or law school clinics.<sup>328</sup> However, LSC-funded organizations<sup>329</sup> are only able to represent certain categories of immigrants, including victims of human trafficking or victims of domestic violence or sexual assault.<sup>330</sup> Specifically, the Omnibus Consolidated Rescissions and Appropriations Act states, “None of the funds appropriated to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that provides legal assistance [to] any alien.”<sup>331</sup> Shortly after Congress enacted the restriction in 1996, the act was amended to permit LSC-funded lawyers to provide “limited assistance to abused spouses and children regardless of immigration status.”<sup>332</sup> Additionally, in 2000 the act was amended to permit LSC-funded lawyers to assist victims of human trafficking and sex trafficking regardless of their immigration status.<sup>333</sup>

In conclusion, despite the ICCPR suggesting civil counsel be provided for cases involving fundamental human rights and the OAS explicitly listing a right to free civil council, the United States has yet to provide a generally recognized right to council in

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<sup>328</sup> *Id.* at 125 (“As of 2013, there were an estimated 863 non-profit organizations across the United States that provided legal services for immigration and citizenship cases. Although this number seems large, it is important to remember that some of these are LSC-funded organizations.”).

<sup>329</sup> “Legal Services Corporation (LSC) is an independent corporation founded by Congress that provides grant funds, training, and technical assistance to civil legal aid programs.” *Id.* at 45.

<sup>330</sup> *Id.* at 125. “In an attempt to fill the holes left by LSC restrictions and limited government legal assistance programs, private and semi-private non-profit organizations have stepped in and played a large role in providing legal advocacy and direct representations for immigrants.” *Id.* at 126.

<sup>331</sup> Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 504(a)(18), 110 Stat. 1321, 50 (1996). “Unless the alien is present in the United States and [is a legal permanent resident, is a close relative to a citizen and has an application pending for status as a lawful permanent resident, has been granted asylum or admission as a refugee including conditional entry as a refugee prior to April 1, 1980, whose order or deportation has been withheld by the Attorney General, or belongs to a narrow category of lawfully admitted agricultural workers.” *Id.*

<sup>332</sup> BRENNAN CTR. JUST., FACT SHEET: THE RESTRICTION BARRING LSC-FUNDED LAWYERS FROM ASSISTING CERTAIN IMMIGRANT GROUPS (2003), *available at* <http://www.brennancenter.org/analysis/fact-sheet-restriction-barring-lsc-funded-lawyers-assisting-certain-immigrant-groups>.

<sup>333</sup> *Id.*

civil proceedings. As the committee on the Elimination of Racial Discrimination suggested, the failure to recognize a right to counsel in United States civil proceedings disproportionately impacts ethnic minorities, including immigrants. Furthermore, the United States has taken actions to add additional constraints on immigrants' access to civil legal counsel. The Immigration Nationality Act limits immigrants' "privilege" of representation, decreasing the chance of success in immigration proceedings for many immigrants. Additionally, the Omnibus Consolidated Rescissions and Appropriations Act places restraints on non-profit programs attempting to assist undocumented immigrants in the United States.

## **Conclusion**

With more than 41.3 million immigrants living in the United States, over thirteen percent of the United States' total population<sup>334</sup> is vulnerable to human rights violations against migrants.<sup>335</sup> International human rights obligations introduce additional policies to protect migrants from human rights abuses. However, the United States exceptionalism prevents human rights treaties and conventions from fully protecting immigrants living in the United States.

First, the United States unwillingness to sign certain treaties or only sign a treaty if the United States is exempted from key provisions eliminates protections for many United States immigrants. Of the five relevant international human rights treaties, the United States has only ratified two, the ICCPR and ICERD. Additionally, the United States has only signed 14 out of 189 ILO Conventions and has not ratified any of the OAS regional human rights treaties. Furthermore, of the treaties the United States has

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<sup>334</sup> *U.S. Statistics on Immigration*, *supra* note 1.

<sup>335</sup> *Lets' Fight Racism*, UNITED NATIONS, <http://www.un.org/en/letsfightracism/migrants.shtml> (last visited April 17, 2016).

signed, they have the most reservations to the ICCPR and the second most total reservations overall.

Second, the United States is also criticized by their refusal to abide by the same rules as the other states in the system. Despite ratifying the ICCPR and ICERD and joining the ILO and OAS, the United States has failed to meet many obligations to immigrants living in the United States. Treaty body committees have expressed concern over the United States detention and deportation of immigrants and procedures used within detention sites in the United States. Furthermore, the labor rights, family rights, and civil/human rights of United States immigrants are frequently violated. In particular, United States immigrants are vulnerable to labor right violations and trafficking for labour purposes, high rates of domestic violence, and excessive use of force by police and border control, and racial disparities in the criminal justice system. The lack of access to civil legal services in the United States leaves many immigrants unable to seek an effective remedy for these human rights violations. Furthermore, the United States has taken action to add additional constraints on immigrants' access to civil legal counsel in the United States.

In considering the United States treaty ratifications and compliance, the NCHR Index ranked the United States commitment to human rights at the bottom of the scale and the Maplecroft Human Rights Index assigned the United States a medium risk of committing human rights offenses. Despite the United States role in launching international and regional human rights systems, the United States has failed to join the international endeavor to enforce these rights.

## **Part IV. Canada**

### **Introduction and Overview: Canada**

Migrants who are foreign-born make up 20.6% of Canada's population.<sup>336</sup> Canada is also the second largest receiving country of Mexican emigrants.<sup>337</sup> However, the largest source country for immigrants to Canada is the Philippines.<sup>338</sup> Mexico is still among the overall top 10 birth countries for newcomers.<sup>339</sup> The United Nations Population Division estimates that about 70,000 Mexican migrants settled in Canada in 2013.<sup>340</sup> The majority of Mexican migrants to Canada are involved in agricultural work.<sup>341</sup> They are among the three largest groups of temporary workers involved in the Seasonal Agricultural Workers Program ("SWAP"), a program that brought 192,000 individuals to Canada in 2011.<sup>342</sup> Mexican emigration to Canada is on the rise. In the last 10 years, the percentage of Mexicans among foreign-born migrants to Canada has more

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<sup>336</sup> *Immigration and Ethnocultural Diversity in Canada*, STATISTICS CANADA: NATIONAL HOUSEHOLD SURVEY, 2011, available at <http://www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-010-x/99-010-x2011001-eng.pdf>

<sup>337</sup> *International Migrant Population by Country of Origin and Destination*, MIGRATION POLICY INSTITUTE, <http://www.migrationpolicy.org/programs/data-hub/charts/international-migrant-population-country-origin-and-destination> (last visited April 9, 2016) (citing *Trends in International Migrant Stock: Migrants by Origin and Destination*, UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS (2013), available at <http://esa.un.org/unmigration/TIMSO2013/migrantstocks2013.htm>).

<sup>338</sup> *Supra*, note 336.

<sup>339</sup> *Supra*, note 337.

<sup>340</sup> *Supra*, note 336; see also, *Fact Sheet – Temporary Foreign Worker Program*, GOVERNMENT OF CANADA, [www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp](http://www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp) (last visited April 13, 2016).

<sup>341</sup> Massey, Douglas S. & Brown, Amelia, E., *New Migration Stream between Mexico and Canada*, MIGRACIONES INTERNACIONALES (2011), available at [http://www.scielo.org.mx/scielo.php?pid=s1665-89062011000100005&script=sci\\_arttext](http://www.scielo.org.mx/scielo.php?pid=s1665-89062011000100005&script=sci_arttext) (listing occupation in Mexico for Canadian migrants before leaving as primarily agricultural). We are using occupation in Mexico for Mexican migrants to Canada as reflective of occupation in Canada for Mexican emigrants – that is, we are assuming that this occupation largely did not change upon emigration to Canada, and was perhaps part in parcel with their decision to emigrate altogether.

<sup>342</sup> Muñoz Carollo, Luis M., *Seasonal Agricultural Workers Program Mexico –Canada: Costs and Benefits* 24, available at [https://www.gwu.edu/~ibi/minerva/Spring2011/Luis\\_Munoz.pdf](https://www.gwu.edu/~ibi/minerva/Spring2011/Luis_Munoz.pdf)

than doubled.<sup>343</sup> This trend has been attributed in part to Canada's growing need for low-skilled labor,<sup>344</sup> while others believe it can be linked to the passage of the North American Free Trade Agreement ("NAFTA").<sup>345</sup> New immigrants to Canada settle primarily in Ontario and British Columbia.<sup>346</sup> Within these two regions, Mexican migrants live primarily in Vancouver and Toronto.<sup>347</sup>

This Chapter will examine Canada's human rights obligations to this foreign-born population. While Canada has yet to sign the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, it has entered into several international and regional treaties that establish human rights protections for migrants. The international treaties Canada has signed and ratified through the United Nations include the International Covenant on Civil and Political Rights ("ICCPR"), the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"), and the Convention on the Rights of the Child ("CRC").<sup>348</sup> Canada is also bound by treaties that it has signed and ratified through its membership in

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<sup>343</sup> *Supra*, note 336. In 2001, Mexico was ranked at number 26 among birth countries while in 2011, Mexico is among the overall top 10 birth countries for newcomers in 2011. *Id.*

<sup>344</sup> Muñoz Carollo, Luis M., *Seasonal Agricultural Workers Program Mexico –Canada: Costs and Benefits* 24, 37, available at [https://www.gwu.edu/~ibi/minerva/Spring2011/Luis\\_Munoz.pdf](https://www.gwu.edu/~ibi/minerva/Spring2011/Luis_Munoz.pdf)

<sup>345</sup> *Id.* at 37. NAFTA was signed by the U.S., Canada and Mexico in 1992, and while it was originally aimed to boost inter-country investment by reducing tariffs,<sup>345</sup> it had the unintended consequences of reducing Mexican agricultural prices making agricultural work unprofitable and exacerbating rural poverty in Mexico. Bacon, D., *How US Policies Fueled Mexico's Great Migration*, THE NATION (Jan 4, 2012) available at <http://www.thenation.com/article/how-us-policies-fueled-mexicos-great-migration/>. These circumstances fueled emigration for work-related purposes, contributing to Mexican emigration to the United States as well as Canada. *Id.*

<sup>346</sup> *Supra* note 336.

<sup>347</sup> *Supra* note 344.

<sup>348</sup> *Ratification Status for Canada*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, [http://tbinternet.ohchr.org/\\_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=EN](http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=31&Lang=EN) (last visited April 9, 2016).

the International Labor Organization.<sup>349</sup>In addition to these international treaties, Canada is a party to regional treaties. In particular, through Canada's participation in the Organization of American States, Canada has further human rights obligations.<sup>350</sup>

While it is clear that Canada has human rights obligations to migrants under these treaties, is less clear whether Canada is fulfilling them. The purpose of this Policy Report is to provide an answer to the overarching question: *to what extent and in what way is Canada meeting its human rights commitments to migrants pursuant to both international and regional treaties?*

This Chapter is organized as follows: the Chapter will begin with background information on the Canadian treaties that apply to migrants and will include an analysis of Canada's performance vis-à-vis its obligations pursuant to these treaties. This evaluation will draw from treaty body reports, shadow reports from community organizations, and self-reports from the Canadian government. Next, the Chapter will provide more specific examination of the protections, legislative and otherwise, that Canada has implemented to safeguard the human rights of persons living in Canada. This section will focus primarily on migrant-specific protections in the areas of labor, family and civil/human rights. Finally, the Chapter will end with a review on access to legal services in Canada. This section will provide an assessment as to the degree to which migrants have a right to a remedy, one of the more fundamental human rights obligations that participating states including Canada owe to their people, migrants included, under international humanitarian law.

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<sup>349</sup> *Country Profiles: Canada*, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110\\_COUNTRY\\_ID:102582](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11110:0::NO::P11110_COUNTRY_ID:102582) (last visited April 9, 2016).

<sup>350</sup> *Member States: Canada*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/member\\_states/member\\_state.asp?sCode=CAN](http://www.oas.org/en/member_states/member_state.asp?sCode=CAN) (last visited April 9, 2016).

## **I. Canada and Human Rights Treaties**

According to human rights indices, Canada's performance in the area of human rights is on the upper end of mediocre. The Nominal Commitment to Human Rights Index ("NCHR" Index), which ranks each country's human rights commitment on a scale of low, medium and high, ranks Canada's commitment to human rights as "medium."<sup>351</sup> The Maplecroft Human Rights Risk Index is more optimistic; it lists Canada at a "low risk" for human rights violation which is the lowest category of risk.<sup>352</sup> Furthermore, Freedom House assessed Canada as a level "1," the highest rating possible for political rights and civil liberties held by its inhabitants as of 2016.<sup>353</sup> Notwithstanding these assessments, Canada is still in only 67<sup>th</sup> position among ranked countries with regard to its human rights performance.<sup>354</sup>

Qualitative assessments of Canada's human rights performance too, are generally positive. In particular, Canada's most recent Universal Periodic Review Report completed by the United Nations indicates that Canada is a leader in its constitutional and legislative efforts to protect human rights.<sup>355</sup> In particular the Report cites the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights as the bulwark against

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<sup>351</sup> *NCHR Index*, NOMINAL COMMITMENT TO HUMAN RIGHTS: A GLOBAL SURVEY, available at [http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr\\_index](http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr_index)

<sup>352</sup> *Human Rights Risk Index 2014*, MAPLECROFT, available at <https://maplecroft.com/portfolio/new-analysis/2013/12/04/70-increase-countries-identified-extreme-risk-human-rights-2008-bhuman-rights-risk-atlas-2014b/>

<sup>353</sup> *Freedom in the World: 2016*, FREEDOM HOUSE, available at <https://freedomhouse.org/report/freedom-world/freedom-world-2016>

<sup>354</sup> *Country Profile: Canada*, NOMINAL COMMITMENT TO HUMAN RIGHTS: A GLOBAL SURVEY, available at [http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/countries2/nchr\\_canada.pdf](http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/countries2/nchr_canada.pdf)

<sup>355</sup> Human Rights Council, *Universal Periodic Review Second Cycle—Canada, National Report*, ¶122-23, U.N.Doc A/HRC/WG.6/16/CAN/1 (8 Feb. 2013), at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/CASession16.aspx>

human rights violations.<sup>356</sup> Further, treaty bodies have applauded Canada's adoption of the Human Rights Act of 2010,<sup>357</sup> as well as Canada's efforts to domesticate international human rights law through the establishment of the Human Rights Tribunal.<sup>358</sup>

The following is a tabular summary of key international and regional treaties to which Canada is bound. It includes any and all RUDS's Canada has entered into for each treaty.

**Table 2.**<sup>359</sup>

Treaty	Date Signed	Date ratified	Articles to which Reservations, Declarations and Understandings ("RUD's") attach
Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment ("CAT")	23 Aug 1985	24 Jun 1987	Articles 21 <sup>360</sup> and 22 <sup>361</sup>
International Covenant on Civil and Political Rights ("ICCPR")		19 May 1976	Articles 28 and 41 <sup>362</sup>
Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")	17 July 1980	10 Dec 1981	None
International Convention in the Elimination of All Forms of	24 August 1966	14 October 1970	None

<sup>356</sup> See *Id.*

<sup>357</sup> Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Canada*, ¶ 3, U.N.Doc CCPR/C/CAN/CO/6 (13 Aug. 2015) at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhskswUHe1nBHTSwwEsgdxQHJBoKwgsS0jmHCTV%2FFsa7OKzz9yna94OOqLeAavwpMzCD5oTanJ2C2rbU%2F0kxdos%2BXCyn4OFm3xDYg3CouE4uXS>.

<sup>358</sup> *Id.*

<sup>359</sup> The table is compiled from information in *supra* notes 16, 350 and 349. It is not an exclusive list of all treaties to which Canada is a party.

<sup>360</sup> *United Nations Treaties*, GOVERNMENT OF CANADA: CANADIAN HERITAGE, <http://www.pch.gc.ca/eng/1357322970926/1357323088069> ("The Government of Canada declares that it recognizes the competence of the Committee Against Torture, pursuant to article 21 of the said Convention, to receive and consider communications to the effect that a state party claims that another state party is not fulfilling its obligations under this Convention.") (last visited April 13, 2016).

<sup>361</sup> *Id.* ("The Government of Canada also declares that it recognizes the competence of the Committee Against Torture, pursuant to article 22 of the said Convention, to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a state party of the provisions of the Convention.").

<sup>362</sup> *Id.* ("The Government of Canada declares, under article 41 of the International Covenant on Civil and Political Rights, that it recognizes the competence of the Human Rights Committee referred to in article 28 of the said Covenant to receive and consider communications submitted by another State Party, provided that such State Party has, not less than twelve months prior to the submission by it of a communication relating to Canada, made a declaration under article 41 recognizing the competence of the Committee to receive and consider communications relating to itself."). This RUD may apply in a limited context to migrants since it protects the ability, for example, of a sending country (like Mexico) to submit to the Human Rights Committee a complaint about the failure of a receiving country (like Canada) to fulfill its obligations under the ICCPR to Mexican migrants.

Discrimination (“CERD”)			
International Covenant on Economic, Social and Cultural Rights (“ICESCR”)	N/A	19 May 1976	None
Convention on the Rights of the Child (“CRC”)	28 May 1990	13 Dec 1991	Articles 21, <sup>363</sup> 30, <sup>364</sup> 37 <sup>365</sup>
Convention on the Rights of Persons with Disabilities (“CRPD”)	30 March 2007	11 March 2010	Article 12 <sup>366</sup>
ILO Abolition of Forced Labour	14 July 1959		None
ILO Discrimination in respect of Employment and Occupation	26 Nov 1964		None
ILO Equal Remuneration Convention	16 Nov 1972		None
OAS Charter	13 Nov 1989	20 Dec 1989	None
OAS Inter-American Convention on the Granting of Political Rights to Women	29 Dec 1954		None
OAS Inter-American Convention on the Granting of Civil Rights to Women	17 March 1949		None

## **II. Canada and Migrant Rights**

The overall assessment of Canada’s human rights performance indicates that it is above average vis-à-vis other nations. A more complete understanding of Canada’s human rights performance as it relates to migrants requires a closer look at the international and regional treaties that Canada has signed and ratified that apply to migrants. This section will provide details on the treaty-specific provisions that directly or indirectly protect the rights of migrants who live in the nations bound by these treaties.

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<sup>363</sup> *Id.* (“With a view to ensuring full respect for the purposes and intent of article 20 (3) and article 30 of the Convention, the Government of Canada reserves the right not to apply the provisions of article 21 to the extent that they may be inconsistent with customary forms of care among aboriginal peoples in Canada[.]”).

<sup>364</sup> *Id.* (“It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the Convention must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the Convention for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.”).

<sup>365</sup> *Id.* (“The Government of Canada accepts the general principles of article 37 (c) of the Convention, but reserves the right not to detain children separately from adults where this is not appropriate or feasible[.]”).

<sup>366</sup> *Id.* (“Canada recognises [sic] that persons with disabilities are presumed to have legal capacity on an equal basis with others in all aspects of their lives. Canada declares its [sic] understanding that Article 12 permits supported and substitute decision-making arrangements in appropriate circumstances and in accordance with the law. To the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making arrangements, Canada reserves the right to continue their use in appropriate circumstances and subject to appropriate and effective safeguards. With respect to Article 12 (4), Canada reserves the right not to subject all such measures to regular review by an independent authority, where such measures are already subject to review or appeal. Canada interprets Article 33 (2) as accommodating the situation of federal states where the implementation of the Convention will occur at more than one level of government and through a variety of mechanisms, including existing ones.”).

## 1. International Treaties

### a. The International Covenant on Civil and Political Rights

Canada was a visible participant in the drafting of the Universal Declaration of Human Rights upon which the ICCPR is based.<sup>367</sup> Despite this initial enthusiasm, Canada only signed the ICCPR in 1976, 12 years after it was adopted by the General Assembly.<sup>368</sup> While the treaty makes no direct reference of migrants, Article 2 of Part II states that each State Party is obliged “to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ ] Covenant, without distinction of any kind, such as [...] national or social origin, [...] birth or other status.”<sup>369</sup> The applicability of the Covenant to migrants is reinforced by a comment by the Human Rights Committee, the oversight committee for the ICCPR. In its comment entitled “The positions of Aliens under the Covenant,” the Committee clarifies Article 2 of the Covenant, stating that it applies to people within each State Party territory “irrespective of his or her nationality or statelessness.”<sup>370</sup>

In addition to Article 2, the select provisions of the Covenant most relevant to migrants include Articles 3, 8, 12 and 26. In particular, Articles 3 and 26 obligate each State Party to the equal treatment of persons before the law. Article 3 requires State Parties to “ensure the equal right of men and women to the enjoyment of all civil and

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<sup>367</sup> *Canada's International Human Rights Policy*, GOVERNMENT OF CANADA: GLOBAL AFFAIRS CANADA, <http://www.international.gc.ca/rights-droits/policy-politique.aspx?lang=eng>

<sup>368</sup> *Reports on UN human rights treaties and other documents*, GOVERNMENT OF CANADA: CANADIAN HERITAGE, <http://www.pch.gc.ca/eng/1357136859881/1357137099645>.

<sup>369</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>370</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html> [accessed 18 April 2016] [http://portal.unesco.org/shs/es/files/6959/11031941751The\\_UN\\_Treaty\\_Monitoring\\_Bodies\\_and\\_Migrant\\_Workers.pdf/The+UN+Treaty+Monitoring+Bodies+and+Migrant+Workers.pdf](http://portal.unesco.org/shs/es/files/6959/11031941751The_UN_Treaty_Monitoring_Bodies_and_Migrant_Workers.pdf/The+UN+Treaty+Monitoring+Bodies+and+Migrant+Workers.pdf)

political rights set forth in the present Covenant” and similarly, Article 26, more explicitly states that “All persons are [...] entitled without any discrimination to the equal protection of the law.”<sup>371</sup> Equal protection can be interpreted as enabling migrants to have greater access to legal protections, and, perhaps aspirationally, access equal to that afforded to citizens. In this way, the ICCPR applies to and protects the rights of migrants living in State Member territories.

Moreover, this equal footing before the law represents the fundamental notion contained in the Universal Declaration of Human Rights from which the ICCPR was born<sup>372</sup> that there are not degrees of human rights based on the individual but rather that all persons (migrants and citizens alike) share “equal” human rights.<sup>373</sup> This seems to be at odds with the treatment of migrants under immigration law. In particular, under immigration laws, migrants are, by definition, legally distinct from citizens and further, this distinction gives rise to degrees of rights based on immigration status. For example, a citizen has the inherent right to work; a foreign worker does not and must obtain employment authorization to do so.<sup>374</sup> Many countries classify migrants based on many factors, including for example by the purpose of a migrant’s stay (work, education, asylum etc.) to which attendant rights vary between migrant classes as well as between all migrant classes and citizens. The Human Rights Committee has yet to discuss the

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<sup>371</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>372</sup> *International Human Rights Law: A Short History*, UN CHRONICLE (Jan 2009), <http://unchronicle.un.org/article/international-human-rights-law-short-history/>

<sup>373</sup> Universal Declaration of Human Rights, 10 Dec. 1948, <http://www.un.org/en/universal-declaration-human-rights/>

<sup>374</sup> See *Find out if you need a work permit to work in Canada*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/work/apply-who-nopermit.asp>; see also, *Definitions of Citizenship & Immigration Canada Terms*, VANCOUVER ENGLISH CENTER, <http://secure.vec.bc.ca/citizenship-immigration-terms.cfm>

degree to which equal treatment before the law under the Covenant presents a conflict with the domestic law, including immigration law, of each State party.

Another key provision of the ICCPR relevant to migrants is Article 8. This article prohibits forced labor.<sup>375</sup> The International Labour Organization reports that migrant workers, particularly those in agricultural, construction or domestic work are particularly vulnerable to forced labor.<sup>376</sup> This Article is especially relevant for Mexican migrants in Canada among whom more than half are agricultural workers,<sup>377</sup> and a smaller number are foreign domestic workers in Canada's live-in caregiver program.<sup>378</sup>

Finally, Article 12 of the ICCPR also bears on migrant rights. In essence, it grants a person the right *to be* a migrant. The relevant portion reads: "[e]veryone shall be free to leave any country, including his own," and further, that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."<sup>379</sup> This includes not only international movement, but domestic migration too. This provision expands the class of migrants to whom protection is afforded under the Covenant to not only include individuals who emigrate to Canada from another country, but also those who move inter-provincially. This is of particular importance given the rise of inter-provincial migration in Canada: in 2011-2012, more

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<sup>375</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

<sup>376</sup> *Forced Labour, Human Trafficking and Slavery*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (last visited April 17, 2016).

<sup>377</sup> *Supra* note 341.

<sup>378</sup> Kelly, P., Park, S., De Leon, C., Priest, J., *Profile of Live-in Caregiver Immigrants to Canada, 1993-2009*, TIEDI ANALYTICAL REPORT 18, 1,5 (Mar. 2011), available at <http://www.yorku.ca/tiedi/doc/AnalyticalReport18.pdf>

<sup>379</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

than 280,347 persons moved from one province to another, up from 257, 085 the previous year.<sup>380</sup>

*b. The International Covenant on the Elimination of All Forms of Racial Discrimination*

In addition to the ICCPR, ICERD is an international treaty to which Canada is bound that affects the rights of migrants. Canada signed ICERD on August 24, 1966, and later ratified it on October 14, 1970.<sup>381</sup> Most broadly, ICERD requires that State Parties not only “condemn racial discrimination [but also] [] undertake to pursue all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.”<sup>382</sup> Racial discrimination is defined not only as prejudice against an individual based on his or her race, but also prejudice based on ethnic origin.<sup>383</sup> Furthermore, where ethnic origin is tied to national origin,<sup>384</sup> ICERD therefore prohibits discrimination on the basis of national origin. This expansive definition is relevant to discrimination against Mexican migrants. In particular, even if Mexican migrants are considered racially Caucasian,<sup>385</sup> and they experience prohibited discrimination not on the basis of this race, but rather on the basis of national origin,

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<sup>380</sup> Willbond, Stephanie, *Migration: Interprovincial, 2011/2012*, STATISTICS CANADA, available at <http://www.statcan.gc.ca/pub/91-209-x/2014001/article/14012-eng.htm>. It is important to note that even though people who move between provinces are classified as “migrants” this is not an indication that this figure represents non-citizens who move between provinces; rather, “migrants” is used as a term to represent people who are moving from their original home in Canada. They are likely a mix of citizens and non-citizens and we do have data to sub-classify interprovincial migrants as citizens and non-citizens.

<sup>381</sup> Supra note 368.

<sup>382</sup> International Covenant on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

<sup>383</sup> International Covenant on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

<sup>384</sup> The Google definition of ethnicity is: “the fact or state of belonging to a social group that has a *common national or cultural tradition*” (emphasis added), [https://www.google.com/search?q=define%3A+ethnicity&oq=define%3A+ethnicity&aqs=chrome..69i57j69i58.3365j0j4&sourceid=chrome&es\\_sm=91&ie=UTF-8](https://www.google.com/search?q=define%3A+ethnicity&oq=define%3A+ethnicity&aqs=chrome..69i57j69i58.3365j0j4&sourceid=chrome&es_sm=91&ie=UTF-8) (last visited March 2, 2016 5pm)

<sup>385</sup> Demby, Gene, *On the Census, Who Checks ‘Hispanic,’ Who Checks ‘White,’ and Why*, NPR (June 16, 2014), <http://www.npr.org/sections/codeswitch/2014/06/16/321819185/on-the-census-who-checks-hispanic-who-checks-white-and-why>

ICERD still provides them with protection. Altogether, the expansive definition under ICERD ensures broad protection of discriminatory practices targeting Mexican migrants in Canada.

Much like the ICCPR, ICERD contains provisions granting equal treatment before the law. However, ICERD goes into much greater detail about what equal treatment entails. In particular, Article 5 states that equality before the law is couched as equal enjoyment of rights, including “[t]he rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration[.]”<sup>386</sup> This work-oriented equality provision is particularly relevant given the 104,160 foreign temporary workers Canada hosts.<sup>387</sup>

The ICERD Committee, however, refers to migrant protections beyond employment; it states that equality (or freedom from discrimination) for migrants extends to education, housing, public service access and social security benefit access.<sup>388</sup> Furthermore, in a general recommendation adopted in 2004 on the protection against discrimination of non-citizens, the Committee stated that the Covenant applied to a myriad of other scenarios including hate speech and racial violence as well as racial or ethnic profiling.<sup>389</sup> It is in this way that ICERD provides broader protections to migrants both within the workplace and beyond.

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<sup>386</sup> International Covenant on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

<sup>387</sup> *Facts and figures 2013 – Immigration overview: Temporary residents*, GOVERNMENT OF CANADA, <http://www.cic.gc.ca/english/resources/statistics/facts2013/temporary/index.asp>

<sup>388</sup> See generally, Committee on the Elimination of all Forms of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Article 9 of the Convention*, U.N.Doc CERD/C/CAN/CO/18 (25 May 2007) at <http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.CAN.CO.18.doc>

<sup>389</sup> *Supra* note 685 at 8.

*c. The Covenant on the Elimination of Discrimination Against Women*

Employment-based migrant rights are not only contained within the ICCPR and ICERD but are also present to the Covenant on the Elimination of Discrimination Against Women (“CEDAW”). Canada signed CEDAW in 1980, and ratified it a year later.<sup>390</sup> The Committee charged with monitoring the implementation of CEDAW has stated outright that “[w]omen migrant workers are [] entitled to protection from discrimination on the basis of the Convention.”<sup>391</sup> Support for this statement can be found in the text itself: Article 11 of CEDAW explicitly addresses the right to just and favorable working conditions.<sup>392</sup> It reads: “[s]tate[] [p]arties shall take all appropriate measures to eliminate discrimination against women in the field of employment.” The text further enumerates specific protected rights women shall enjoy in the workplace including the right to “equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work.”<sup>393</sup> These provisions, in light of the Committee declaration, presumably apply to migrant workers in Canada. This is particularly relevant given the growth in Canada’s live-in caregiver program, a part of the Temporary Foreign Worker Program for which the super-majority are women migrants.<sup>394</sup>

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<sup>390</sup> *Supra* note 348.

<sup>391</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No. 26 on women migrant workers*, U.N.Doc CEDAW/C/2009/WP.1/R (5 Dec. 2008) at [http://www2.ohchr.org/english/bodies/cedaw/docs/GR\\_26\\_on\\_women\\_migrant\\_workers\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/GR_26_on_women_migrant_workers_en.pdf)

<sup>392</sup> International Covenant on the Elimination of All Forms of Racial Discrimination, 21 Dec. 1965, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx>

<sup>393</sup> *Id.*; see also, Grange, Mariette, *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: a Do-it-yourself Kit* 37, (Mar. 2006), available at [https://www.iom.int/sites/default/files/our\\_work/ICP/IDM/ICMC-Strengthening-Protection-of-Migrant-Workers-and-Their-Families.pdf](https://www.iom.int/sites/default/files/our_work/ICP/IDM/ICMC-Strengthening-Protection-of-Migrant-Workers-and-Their-Families.pdf)

<sup>394</sup> *Supra* note 378.

Moreover, much like ICERD, CEDAW does not limit these rights to the employment context. Article 9, in particular, refers to the equal rights of women from a political perspective, specifically under immigration law; it reads: “[s]tate[] [p]arties shall ensure [...]that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.”<sup>395</sup> This provision equates rights between migrant women and migrant men. Further support can be found in a Recommendation set out by the Committee, which states “migrant women who live and work temporarily in another country should be permitted the same rights as men to have their spouses, partners and children join them.”<sup>396</sup> In this way, much like the ICCPR and ICERD, CEDAW too provides broad protections for migrant women in both the workplace and beyond.

d. The Convention on the Rights of Children

Among the other international treaties Canada has signed, the Convention on the Rights of Children (“CRC”), which Canada ratified the CRC in December of 1991, is arguably the most relevant to migrants according to a recent study sponsored by UNESCO.<sup>397</sup> This study reports that 71% of the treaty body’s conclusions refer to migrants.<sup>398</sup> Migrant children are among the population to whom protection under the Convention applies. Article 2 broadly declares that the Convention applies to “each child within [the parties’] jurisdiction without discrimination of any kind, irrespective of the

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<sup>395</sup> International Covenant on the Elimination of All Forms of Discrimination Against women, 18 Dec. 1979, <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf>

<sup>396</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 21: Art. 15 Cmt. 10, (13<sup>th</sup> Session, 1994), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

<sup>397</sup> See *Supra* note 685.

<sup>398</sup> *Supra* note 685 at 9.

child's or his or her parent's or legal guardian's race, color, [...] national, ethnic or social origin, [...] birth or other status.”<sup>399</sup> Since the Convention applies to migrant children as a whole, the protections under the Covenant, including but not limited to the right to health, education and social security<sup>400</sup> therefore also extend to migrant children in Canada.

Moreover, while neither this Article nor the treaty as a whole uses the word ‘migrant,’ there are other provisions that refer to the rights of refugees, which are another form of migrant. Article 22, for example, declares that state parties shall assist a “child who is seeking refugee status” particularly as it relates to family reunification by working with the United Nations as well as Non Governmental Organizations (“NGOs”).<sup>401</sup> Articles 9 and 10 too contain support for family reunification,<sup>402</sup> which remains a relevant issue for migrants who are unaccompanied minors.

The scope of protections under the CRC for migrant children in Canada is, in part, determined by any Reservations, Understandings and Declarations entered into by Canada. In particular, Canada has entered into an RUD under the CRC as to Article 30.<sup>403</sup> Article 30 underscores state party commitment to ethnic, religious and linguistic minorities to preserve their liberty to practice their language and culture freely.<sup>404</sup> This Article is particularly relevant to migrant children who bring with them new languages and cultures from their home countries.

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<sup>399</sup> International Covenant on the Rights of Children, 2 Sep. 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>400</sup> *Supra* note 685 at 16. For a summary on the rights under the CRC, see *Fact Sheet*, UNICEF, [http://www.unicef.org/crc/files/Rights\\_overview.pdf](http://www.unicef.org/crc/files/Rights_overview.pdf)

<sup>401</sup> International Covenant on the Rights of Children, 2 Sep. 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>402</sup> International Covenant on the Rights of Children, 2 Sep. 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>403</sup> *Supra* note 360.

<sup>404</sup> International Covenant on the Rights of Children, 2 Sep. 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

Interestingly, Canada's RUD as to this Article *strengthens* this commitment to minorities. The RUD states that Article 30 must be read in light of another provision, Article 4, which charges state parties with undertaking legislative and other measures to implement rights declared by the Convention. In other words, the RUD serves to clarify that Canada is responsible for the affirmative protection of rights through legislative or other means as it relates to ethnic, religious and linguistic minorities. In this way, Canada's RUD as to Article 30 therefore expands its commitments under the CRC to benefit of migrant children.

This RUD, however, should be read alongside another, which is not quite as favorable as it relates to migrant children. Canada's RUD as to Article 37 reserves the Canadian government's right not detain children and adults separately if it is not "appropriate or feasible."<sup>405</sup> While the Convention requires state parties to put the "best interest of the child" above what is practical,<sup>406</sup> Canada's RUD reverses these priorities. The extent to which this RUD dilutes protections for migrant children under the CRC is unclear because there is little information on whether Canada does in fact fail to segregate migrant adults and children as a matter of practice.

*e. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

As of March 2016, Canada has not signed or ratified the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families ("ICRMW").<sup>407</sup> However, there appears to be growing support in Canada for the ICRMW. In 2006, a member of Parliament affiliated with the New Democratic Party of

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<sup>405</sup> *Supra* note 360.

<sup>406</sup> International Covenant on the Rights of Children, 2 Sep. 1990, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

<sup>407</sup> See *Supra* note 348.

Canada took the initiative to engage the Minister of Citizenship and Immigration in a public discussion to reconsider this position.<sup>408</sup> NGOs too have urged the Canadian government to ratify ICRMW.<sup>409</sup> The main barrier to ratification from the perspective of NGOs according to recent study is the belief that the CMW does not add protections beyond those that Canada has already ratified.<sup>410</sup> However, if this were true it is unclear why Canada would have taken the initiative in to sign and ratify the Protocol Against Smuggling of Migrants by Land, Sea and Air in 2000 and 2002 respectively.<sup>411</sup> Ignorance of the ICRMW too, seems to be an added problem among elected officials; a recent study in which parliamentary members of the Standing Committee on Citizenship and Immigration were interviewed about the ICRMW suggests that the Convention is largely unknown among elected officials.<sup>412</sup>

If the Convention were in force, it would apply at a minimum to the some 192,000 migrants in Canada's Temporary Foreign Worker Program.<sup>413</sup> These workers are migrants in Canada's Seasonal Agricultural Worker Program (which include farmworkers from Mexico), the Live-In Caregiver Program, and the Low-Skilled Workers Program.<sup>414</sup> Even where Canada has not signed or ratified ICRMW, these migrants may have some protections under the Convention where their origin countries

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<sup>408</sup> Cholewinski, R & Pecoud, A., *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* 206, fn. 12 (2009), available at [http://hr.law.vnu.edu.vn/sites/default/files/resources/migration\\_and\\_human\\_rights\\_the\\_united\\_nations\\_convention\\_on\\_migrant\\_workers\\_rights.pdf](http://hr.law.vnu.edu.vn/sites/default/files/resources/migration_and_human_rights_the_united_nations_convention_on_migrant_workers_rights.pdf)

<sup>409</sup> *Id.*; see also *Canada, Human Rights and the United Nations*, THE MCLEOD GROUP, available at <http://www.mcleodgroup.ca/wp-content/uploads/2015/05/McLeod-Group-Policy-Brief-7-Human-Rights.pdf>

<sup>410</sup> *Supra* note 408 at 208.

<sup>411</sup> *Supra* note 360. The full text of the Treaty is available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/TransnationalOrganizedCrime.aspx>

<sup>412</sup> *Supra* note 408.

<sup>413</sup> *Fact Sheet – Temporary Foreign Worker Program*, GOVERNMENT OF CANADA, [www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp](http://www.cic.gc.ca/english/resources/publications/employers/temp-foreign-worker-program.asp) (last visited April 13, 2016).

<sup>414</sup> *Id.*

are signatories.<sup>415</sup> Article 1 states that the ICRMW applies “during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, [...] [as well as] the entire period of stay [...] [and] return to the State of origin[.]”<sup>416</sup> For Mexican migrants living in Canada, their origin country signed ICRMW in 1991 and further ratified it in 1999.<sup>417</sup> However, the scope of protections migrants may be entitled to pursuant to Mexico’s obligations under the ICRMW is unclear, as is the manner in which these protections could be delivered to Mexicans living abroad to fulfill these obligations.

f. International Labor Organization Directives

In addition to the United Nations, Canada is also a member of the International Labor Organization (“ILO”). Canada became a member in 1919,<sup>418</sup> and has since ratified 34 conventions out of a possible 189.<sup>419</sup> Among these 34 include three in particular that protect migrants from discrimination in the workplace. The first is the Convention concerning Discrimination in Respect of Employment and Occupation, which charges members with the task of declaring and promoting policy aimed at reducing discrimination in the workplace.<sup>420</sup> Discrimination under this Convention includes

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<sup>415</sup> The full text of the Treaty is available at <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

<sup>416</sup> The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 Dec. 1990, <http://www2.ohchr.org/english/bodies/cmw/cmw.htm>.

<sup>417</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: Status as at 13-04-2016 07:35:07 EDT*, UN TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-13&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-13&chapter=4&lang=en)

<sup>418</sup> *Supra* note 349.

<sup>419</sup> Canada, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/gateway/faces/home/ctryHome?locale=EN&countryCode=CAN&\\_adf.ctrl-state=lynvwyhc6\\_14](http://www.ilo.org/gateway/faces/home/ctryHome?locale=EN&countryCode=CAN&_adf.ctrl-state=lynvwyhc6_14)

<sup>420</sup> *C111- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*, INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_I D:312256:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312256:NO)

exclusion or preference on the basis of nationality or social origin.<sup>421</sup> Discrimination on the basis of nationality in the workplace is also addressed in the Abolition of Forced Labor Convention, which requires that members take affirmative steps to reduce and avoid the use of forced labor as a *means* of national discrimination.<sup>422</sup> Finally, the Employment Policy Convention charges members with advancing policy aimed to ensure workers, including migrant workers, the freedom of choice of employment without regard to his/her nationality.<sup>423</sup> These three treaties, if signed and ratified, would provide substantial human rights protections for migrants in Canada.

The ILO has paid particular attention to migrant rights in the workplace. In particular, the ILO's 1961 Housing Recommendation addresses the migrant worker housing, and urges members to investigate this issue and to take steps to ensure that migrant workers are treated equally compared to their nationalized counterparts.<sup>424</sup> Migrant farmworkers typically rely on employer-provided housing, and the sub-standard condition of this housing has become a burgeoning concern in Canada.<sup>425</sup> Fortunately in several provinces in Canada including British Columbia, Alberta, and Ontario have

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<sup>421</sup>*Id.*

<sup>422</sup>C105- *Abolition of Forced Labour Convention*, 1957 (No.105), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_I D:312250:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312250:NO)

<sup>423</sup>C112- *Employment Policy Convention*, 1964 (No. 122), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_I D:312267:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312267:NO)

<sup>424</sup>R115- *Workers' Housing Recommendation*, 1961 (No. 115), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:R115](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R115)

<sup>425</sup> See generally, *Housing Conditions for Temporary Migrant Agricultural Workers in B.C.*, JUSTICE FOR MIGRANT WORKERS (Oct. 2007), available at <http://www.justicia4migrantworkers.org/bc/pdf/Housing%20Report%20-%20Oct%2007.pdf>

enacted regulations that set minimum standards for temporary accommodations including that which is provided to agricultural workers.<sup>426</sup>

These agricultural migrant workers benefit too, from protections contained in additional ILO conventions under which Canada is obligated. In particular, these include efforts to promote agriculture-specific workplace safety,<sup>427</sup> which is of continuing importance in light of recent statistics that indicate there are 12.9 deaths per 100,000 people involved in farm work in Canada.<sup>428</sup>

Furthermore, migrant workers also benefit from ILO treaties that protect their right to organize and freedom to associate.<sup>429</sup> This too, has been of increasing importance

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<sup>426</sup> *Protection of Migrant Agricultural Workers in Canada, Mexico and the United States*, COMMISSION FOR LABOR COOPERATION (2002), available at <http://www.naalc.org/english/pdf/study4.pdf>

<sup>427</sup> *C187-Promotional Framework for Occupational Safety and Health Convention*, 2006 (No. 187), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312332](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312332) (requiring member states to “promote and advance, at all relevant levels, the right of workers to a safe and healthy working environment,” and specifically to “support mechanisms for a progressive improvement of occupational safety and health conditions [including] [...] in the informal economy.”); *R-192 Safety and Health in Agriculture Recommendation*, 2001 (No. 192), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312530](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312530) (recommending that member states “prescribe measures for the prevention and control of occupational hazards in agriculture[.]”); *R-110-Plantations Recommendations*, 1958 (No. 110), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_ILO\\_CODE:R110](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:R110) (including agricultural workers among plantations workers, and recommending that “[e]ach Member should provide that compensation shall be payable to workmen incapacitated by occupational diseases, or in the case of death from such diseases, to their dependants, [sic] in accordance with the general principles of the national legislation relating to compensation for industrial accidents.”).

<sup>428</sup> See *Agricultural Fatalities in Canada 1990-2008*, CANADIAN AGRICULTURAL INJURY REPORTING, <http://www.cair-sbac.ca/wp-content/uploads/2012/03/CAIR-booklet-blue-ENFin.pdf>

<sup>429</sup> *C087 -Freedom of Association and the Protection of the Right to Organise Convention*, 1948 (No. 87), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232) (stating under Article 5 that “[w]orkers' and employers' organisations [sic] shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers”). This Convention went into full force as of 23 March 1972. *Id.*

as it relates to Canada's Seasonal Agricultural Worker Program for which the overseeing body often neglects migrant perspectives in favor of the opinions of growers.<sup>430</sup>

## 2. Regional Treaties

### a. Organization of American States Declarations

In addition to its obligations under international treaties, Canada has human rights commitments pursuant to its membership in the Organization of American States ("OAS"). Canada had observer status in the OAS since 1972, and only became a fully-fledged member in 1990,<sup>431</sup> a year before it signed and ratified the Charter of the OAS.<sup>432</sup> The Charter has particular significance when it comes to migrant rights, and much like the international treaties discussed above, it too, provides that member states have an obligation to treat all inhabitants equally regardless of status as nationals or aliens.<sup>433</sup> This concept is underscored in Chapter One of the Declaration of the Rights and Duties of Man, which declares that all persons are equal, notwithstanding race or any other factor, which presumably includes national origin and immigration status.<sup>434</sup>

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<sup>430</sup>Brem, Maxwell, *Migrant Workers in Canada: A Review of the Canadian Seasonal Agricultural worker Program* 9, (2006), available at <http://www.nsi-ins.ca/wp-content/uploads/2012/10/2006-Migrant-Workers-in-Canada-A-review-of-the-Canadian-Seasonal-Agricultural-Workers-Program.pdf>. For more information on migrant worker rights in Canada see *Supra* note 408. For a broader discussion on migrant worker rights in Canada see generally, Fries, Erin M., *The International Labour and Human Rights of Migrant Workers under Canada's Temporary Foreign Worker Program* (2012) (Master's thesis, Lund University) available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=3055510&fileId=3055513>; see also, Macovei, Lidia, *Rights of Temporary Foreign Workers in Canada* (2012) (Master's thesis, University of Alberta) available at <https://era.library.ualberta.ca/downloads/ww72bb595>.

<sup>431</sup> Tittmore, Brian, *Canada and the OAS – The First Five Years*, *THE HUMAN RIGHTS BRIEF* (1995), available at <https://www.wcl.american.edu/hrbrief/v2i3/canada23.htm>

<sup>432</sup>*Charter of the Organization of American States (A-41): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, WASHINGTON, D.C., [http://www.oas.org/dil/treaties\\_A41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States\\_sign.htm](http://www.oas.org/dil/treaties_A41_Charter_of_the_Organization_of_American_States_sign.htm) (last visited April 13, 2016).

<sup>433</sup>Charter of the Organization of American States (A-41), Feb. 27, 1967, [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm)

<sup>434</sup> American Declaration of the Rights and Duties of Man, 1948, <http://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf>

Several other OAS treaties that Canada has signed too reflect the Canadian government's interest in the equal treatment of its inhabitants, particularly as it relates to discrimination on the basis of gender. These treaties include the Convention on the Nationality of Women, the Inter-American Convention on the Granting of Political Rights to Women, and the Inter-American Convention on the Granting of Civil Rights to Women,<sup>435</sup> all of which were signed by Canada shortly after it became a fully-fledged member.<sup>436</sup> Above and beyond the fundamental rights that the Charter and Declaration provide to ensure the equal treatment of migrants vis-à-vis their nationalized counterparts, these additional treaties ensure the right of migrants, and in particular women migrants, to be free from further discrimination on the basis of gender compared to their male counterparts, migrant or otherwise.

Notwithstanding these migrant protections, there are still some 57 additional treaties and treaty amendments that Canada has yet to sign or ratify.<sup>437</sup> Among these treaties are some that would provide an additional layer of protection to migrants, including the right for victims of discriminatory treatment to access the justice system. These rights are embodied in the American Convention on Human Rights,<sup>438</sup> the Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance,<sup>439</sup> and the Inter-American Convention Against all Forms of Discrimination

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<sup>435</sup> *Supra* note 360.

<sup>436</sup> Canada became a fully-fledged member in 1990. *Supra* note 431.

<sup>437</sup> *Current Status of Signatories and Ratifications of the Inter-American Treaties: Canada*, ORGANIZATION OF AMERICAN STATES, D.C., [http://www.oas.org/dil/treaties\\_signatories\\_ratifications\\_member\\_states\\_canada.htm](http://www.oas.org/dil/treaties_signatories_ratifications_member_states_canada.htm) (last visited April 13, 2016).

<sup>438</sup> See American Convention on Human Rights "Pact of San Jose, Costa Rica" (B-32), 22 Nov. 1969, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm)

<sup>439</sup> *Inter-American Convention Against Racism, Racial Discrimination and Related Forms of Intolerance (A-68): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-68\\_racism\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-68_racism_signatories.asp)

and Intolerance.<sup>440</sup> Migrants in Canada would benefit from these additional human rights protections if adopted by their host country.

### **C. Canada and Human Rights Protections: Labor, Family, Civil/Human Rights**

In evaluating Canada's human rights performance as it relates to migrants, the identification of treaties affecting migrants is only the first step in the process. This section will further examine Canada's performance as to these treaties. This will include an overview of civil legal protections that the Canadian government has undertaken in fulfillment of obligations under these treaties to which nationals and migrants alike may have access. The broad category of civil law protections is broken down into labor, family and civil/human rights. Comments on Canada's performance in these sub-areas will be drawn from treaty body reports.

#### **1. Labor Rights in Canada**

##### **a. International Treaty Bodies**

###### ***i. International Covenant on Civil and Political Rights Committee***

The Committee expressed concern that wage gaps continue to exist in the Canadian workforce to the detriment primarily of minority and indigenous women.<sup>441</sup>

###### ***ii. Convention on the Elimination of All Forms of Racial Discrimination Committee***

No relevant information found.

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<sup>440</sup> *Inter-American Convention Against All Forms of Discrimination and Intolerance (A-69): Signatories and Ratifications*, ORGANIZATION OF AMERICAN STATES, [http://www.oas.org/en/sla/dil/inter\\_american\\_treaties\\_A-69\\_discrimination\\_intolerance\\_signatories.asp](http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp)

<sup>441</sup> *Human Rights Committee discusses the report of Canada*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (8 JULY 2015) <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16215&LangID=E> (Citing Human Rights Committee, Consideration of reports submitted by States parties under article 40 of the Covenant, U.N.Doc CCPR/C/CAN/6 (28 Oct. 2013) at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhskswUHe1nBHTSwwEsgdxQHJWkYZjIUdFTA%2fqrtth9m%2fjDiefrZIBF03corNAQ%2fcKmp%2f7%2faY9%2fHT57CXXIAAGTBKu09gVMR2231eRVnZ95Xs>)

*iii. Convention on the Elimination of Discrimination Against Women Committee*

The CEDAW Committee has identified a number of initiatives that the government has undertaken to protect the rights of women in the workforce. In particular, the Committee commended Canada for the passage of the Human Rights Act in 2010, which explicitly prohibits discrimination on the basis of sex, including in the employment context.<sup>442</sup> This Act applies to all individuals living in Canada, without restriction on the basis of national origin<sup>443</sup> and applies unequivocally to temporary foreign workers.<sup>444</sup> In addition to this Act, the Committee also recognized further legislative protections Canada has passed that protect migrant rights, including a 2005 amendment to encompass new offenses aimed to reducing forced labor violations,<sup>445</sup> and an employment initiative designed to facilitate the resettlement of immigrants that includes assistance with job searches.<sup>446</sup> The Committee also noted the accomplishments of Quebec in particular, in establishing its 2001 initiative to integrate women into the workplace with a focus on the distinct needs of immigrant women and more broadly women of visible minorities.<sup>447</sup>

*iv. Convention on the Rights of Children Committee*

No relevant information found.

*v. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Committee*

No relevant information found.

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<sup>442</sup> Canadian Human Rights Act Art. 7-9, R.S.C., c. H-6 (1985). Full text of the Act is available at <http://laws-lois.justice.gc.ca/eng/acts/h-6/fulltext.html>.

<sup>443</sup> Canadian Human Rights Act Art. 2, R.S.C., c. H-6 (1985).

<sup>444</sup> Inter-American Court of Human Rights, Juridical Condition and Rights of Undocumented Migrants: Advisory Opinion OC-18/03 17 Sep. 2003, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf)

<sup>445</sup> Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (Combined Sixth and Seventh Periodic Reports of the States Parties): Canada, ¶ 82 U.N.Doc CEDAW/C/CAN/7 (17 Aug. 2007) at <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

<sup>446</sup> *Id.* ¶ 96.

<sup>447</sup> *Id.* ¶ 356-7.

vi. *International Labor Organization Evaluations*

The ILO reports on member performance as it relates to the treaties each has ratified through comments from the Committee of Experts on the Application of Conventions and Recommendations (“CEACR”). The Committee took note of the numerous legislative developments the Canadian government has undertaken for workers with a low skill level.<sup>448</sup> As part of Canada’s Economic Action plan, the government allocated \$55 million for training and skills development of low-skilled workers in the district of British Columbia<sup>449</sup> which is the second largest province that houses recent immigrants.<sup>450</sup> Moreover, Canada has enacted recent protections for foreign temporary workers in Ontario, which includes prohibitions against recruiters charging employees fees associated with recruitment, and a requirement that recruiters of foreign temporary workers provide employees not fluent in English information the employee’s native language.<sup>451</sup> Notwithstanding the legislative developments, the Committee concluded that job insecurity is a growing problem in Canada<sup>452</sup> which the Committee attributed in part to depressed government spending on labor initiatives as a whole.<sup>453</sup>

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<sup>448</sup> Hansen, Ellen, *Preliminary Assessment of Training and Retraining Programmes Implemented in Response to the Great Recession*, INTERNATIONAL LABOUR ORGANIZATION 15-17 (2012), available at [http://www.ilo.org/public/libdoc/ilo/2012/112B09\\_79\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/2012/112B09_79_engl.pdf)

<sup>449</sup> *Id.*

<sup>450</sup> Bacon, D., *How US Policies Fueled Mexico’s Great Migration*, THE NATION (Jan 4, 2012) available at <http://www.thenation.com/article/how-us-policies-fueled-mexicos-great-migration/>.

<sup>451</sup> *Canada*, INTERNATIONAL LABOUR ORGANIZATION: NATLEX (DATABABSE OF NATIONAL LABOUR, SOCIAL SECURITY AND RELATED HUMAN RIGHTS LEGISLATION), [http://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p\\_lang=en&p\\_country=CAN](http://www.ilo.org/dyn/natlex/natlex4.countrySubjects?p_lang=en&p_country=CAN) (last visited April 13, 2016); see also *Your Rights Under the Employment Protection for Foreign Nationals Act, 2009*, ONTARIO MINISTRY OF LABOUR (20 Nov. 2015) [http://www.labour.gov.on.ca/english/es/pubs/is\\_fn\\_epfn.php](http://www.labour.gov.on.ca/english/es/pubs/is_fn_epfn.php) (last visited April 13, 2016)

<sup>452</sup> *Id.*

<sup>453</sup> *Employment Service Convention – Canada, Observation (CEACR)*, INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS (2016), [http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID:3254525:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3254525:NO)

The Committee has most recently focused its attention on migrant workers.<sup>454</sup> It currently has a pending request for a report Canada's performance under ILO Conventions and Recommendations that relate to migrant workers, which was due in February 2016.<sup>455</sup>

## 2. Regional Treaties

### *a. Organization of American States Evaluations*

In 2003, the OAS issued an advisory opinion on the labor rights of undocumented migrants in the hemisphere.<sup>456</sup> The United Mexican States requested that the Inter-American Court of Human Rights ("IACHR") provide an opinion on whether the denial of labor rights as a result of undocumented status constitutes a violation of the non-discrimination and equal protection clauses under the American Declaration and ICCPR.<sup>457</sup> Canada was among several countries to respond. While it did not address this question directly, Canada stated that the country remains committed to protecting the fundamental human rights of temporary foreign workers.<sup>458</sup> The Canadian government added that under federal law, discrimination against migrants is prohibited pursuant to the Canadian Charter of rights and Freedoms clause of the 1982 Constitution Act.<sup>459</sup> This is in addition to provincial legislation that prohibits discrimination against migrants more specifically with respect to employment.<sup>460</sup>

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<sup>454</sup> *General Survey Concerning the Migrant Workers Instruments*, INTERNATIONAL LABOUR CONFERENCE 105<sup>TH</sup> SESSION, 254-57 (2016) available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_453898.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_453898.pdf)

<sup>455</sup> *Id.*

<sup>456</sup> See Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants*: Advisory Opinion OC-18/03 20-23, 17 Sep. 2003, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf)

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

## 2. Family Rights in Canada

### a. International Treaties

#### *i. International Covenant on Civil and Political Rights Committee*

No relevant information found.

#### *ii. Convention on the Elimination of All Forms of Racial Discrimination Committee*

No relevant information found.

#### *iii. Convention on the Elimination of Discrimination Against Women Committee*

The Committee's most recent reports on Canada's performance took note of several initiatives that demonstrate Canada's commitment to human rights in the area of family law. The first is the overhaul of the Legal Aid system.<sup>461</sup> Canada has established 12 pilot programs to expand legal services, and in doing so has greatly increased access to family law services, which primarily serve the needs of women.<sup>462</sup> The Committee noted, however, that Legal Aid does not provide complete civil services for immigrants,<sup>463</sup> but that community organizations have sprung up to fill the gaps in civil legal needs that primarily serve this population.<sup>464</sup>

In addition, the Committee also looked at Canada's many programs aimed at preventing and responding to domestic violence.<sup>465</sup> The Committee noted the work of the Quebec government in creating an action plan that addresses partner violence against immigrant women.<sup>466</sup> Manitoba too, has taken steps to address violence against

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<sup>461</sup> Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (Combined Sixth and Seventh Periodic Reports of the States Parties): Canada, ¶ 201 U.N.Doc CEDAW/C/CAN/7 (17 Aug. 2007) at <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

<sup>462</sup> *Id.*

<sup>463</sup> See generally, *infra* Part IV.

<sup>464</sup> *Id.* ¶435

<sup>465</sup> *Id.* ¶¶ 64, 290, 383.

<sup>466</sup> *Id.* ¶ 333.

immigrant women; the Committee identified several programs including the Immigrant Women's Counseling Service for victims of family violence, as well as the Entry Program for newcomers, which provides information to immigrants on child protection laws, abuse remedies, and police services.<sup>467</sup>

*iv. Convention on the Rights of Children Committee*

The Committee expressed concern about the situation of unaccompanied asylum-seeking children and children who come to Canada through irregular channels of migration.<sup>468</sup> In particular, the Committee urged the Canadian government to increase funding for social services and community welfare organizations serving migrant children.<sup>469</sup> The Committee also noted other measures the Canadian government should take to ensure the protection of this vulnerable group.<sup>470</sup> Under Canadian immigration law, there is no distinction between accompanied and unaccompanied children in taking into account the best interest of the child; the Committee urged the Canadian government to enact legislation to make the best interest of the child a priority in immigration proceedings.<sup>471</sup> As an additional protection, the Committee also urged the Canadian government to establish an independent guardianship for unaccompanied migrant children.<sup>472</sup>

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<sup>467</sup> *Id.* ¶ 444.

<sup>468</sup> Committee on the Rights of the Child, Concluding Observations on the Initial Periodic Report of Canada, adopted by the Committee at its sixty-first session ¶20-21 (7 Dec. 2012), U.N. Doc CRC/C/OPSC/CAN/CO/1 at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fCAN%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPSC%2fCAN%2fCO%2f1&Lang=en)

<sup>469</sup> *Id.*

<sup>470</sup> Committee on the Rights of the child, Concluding Observations on the Combined Third and Fourth Periodic Report of Canada, adopted by the Committee at its sixty-first session ¶73-74 (6 Dec. 2012), U.N. Doc CRC/C/CAN/CO/3-4, at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCAN%2fCO%2f3-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCAN%2fCO%2f3-4&Lang=en)

<sup>471</sup> *Id.*

<sup>472</sup> *Id.*

*v. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Committee*

No relevant information found.

*vi. International Labor Organization Evaluation*

No relevant information found.

*b. Regional Treaties*

*i. Organization of American States Evaluation*

No relevant information found.

3. Civil Rights in Canada

*a. International Treaties*

*i. International Covenant on Civil and Political Rights Committee*

No relevant information found.

*ii. Convention on the Elimination of All Forms of Racial Discrimination Committee*

No relevant information found.

*iii. Convention on the Elimination of Discrimination Against Women Committee*

No relevant information found.

*iv. Convention on the Rights of Children Committee*

The Committee expressed concern with discrimination against children with no status and the resulting exclusion of these children from the school system.<sup>473</sup> The Committee called upon the Canadian government to implement legislation that protects this group, and to undertake public awareness campaigns to reduce discriminatory

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<sup>473</sup> Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Canada ¶21, (3 Oct. 2003), U.N.Doc CRC/C/15/Add.215 at [http://canadiancsrc.com/UN\\_CRC/UN\\_Committee\\_Rights\\_Child\\_Canada\\_2nd\\_Report-Consideration\\_of\\_Report\\_Canada\\_03OCT03\\_en.pdf](http://canadiancsrc.com/UN_CRC/UN_Committee_Rights_Child_Canada_2nd_Report-Consideration_of_Report_Canada_03OCT03_en.pdf)

attitudes.<sup>474</sup> Furthermore, the Committee noted that Canada has human rights obligations pursuant to declarations adopted by Canada at the 2001 World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, and recommended that Canada submit a report to the Committee on the ways in which the legislative and other measures that Canada has taken or will take fulfill these additional obligations as it relates to children generally, migrant and otherwise.<sup>475</sup>

*v. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Committee*

No relevant information found.

*vi. International Labor Organization Evaluation*

As it relates to civil rights, the ILO has focused its attention on the Agricultural Employees Protection Act (“AEPA”) and its effect on collective bargaining rights. Many migrant workers rely on the United Food and Commercial Workers Union (“UFCW”) for representation.<sup>476</sup> The UFCW has rallied on behalf of temporary foreign workers, and operates seven centers serving exclusively migrant workers across Canada.<sup>477</sup> The UFCW brought a complaint to the ILO in 2009 arguing that while the AEPA allowed workers to join a union, it prevented workers from collectively bargaining.<sup>478</sup> The complaint highlighted the barriers to collective bargaining faced by migrant agricultural workers, who otherwise already encounter obstacles to participation in the political process.<sup>479</sup> The

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<sup>474</sup> *Id.* ¶22

<sup>475</sup> *Id.* ¶23

<sup>476</sup> *The Status of Migrant Farm Workers in Canada 2006-2007*, UNITED FOOD AND COMMERCIAL WORKERS UNION 5-6, available at <http://libgwd.cns.yorku.ca/gwd/wp-content/uploads/report-on-status-migrant-farm.pdf>

<sup>477</sup> *Id.*

<sup>478</sup> See *Interim Report: Case No. 2704 (Canada)*, INTERNATIONAL LABOUR ORGANIZATION: FREEDOM OF ASSOCIATION CASES (2010), [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002\\_COMPLAINT\\_TEXT\\_ID:2911888](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:50002:0::NO::P50002_COMPLAINT_TEXT_ID:2911888)

<sup>479</sup> *Id.*

Committee reviewed the action in light of Canada's obligations under the Freedom of Association and Protection of the Right to Organize Convention of 1948.<sup>480</sup> However, since a similar issue was at the time before the Supreme Court in Canada, the Committee deferred its decision until the Court's opinion had been released. The Court has since issued an opinion, holding that the AEPA does provide workers with the right to collectively bargain.<sup>481</sup> The Committee has not reacted to this development.

### b. Regional Treaties

#### *i. Organization of American States Evaluation*

No relevant information found.

### **D. Canada and Access to Immigrant Civil Legal Services**

Access to justice is a topic that is embedded in many of the international and regional treaties to which Canada is bound. In some cases, it is a right explicitly articulated within the treaty. Moreover, access to civil legal services, including those that are migrant-accessible, is not only a standalone right but it is also a tool to protect other more explicitly articulated rights under international humanitarian law. This is embodied in the discourse among treaty bodies, which has touched upon the issue of access to justice in evaluating the degree to which Canada is meeting its human rights obligations.<sup>482</sup> This purpose of this section of the Policy Report is to discuss the treaty and treaty body references to access to justice as it relates to Canada's human rights

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<sup>480</sup> *Supra* note 478.

<sup>481</sup> *Ontario v. Fraser*, 2011 SCC 20, ¶117 (29 April 2011), [http://www.ufcw.ca/templates/ufcwcanada/images/directions/1118/supreme\\_court\\_decision.pdf](http://www.ufcw.ca/templates/ufcwcanada/images/directions/1118/supreme_court_decision.pdf)

<sup>482</sup> See e.g., Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (Combined Sixth and Seventh Periodic Reports of the States Parties): Canada, ¶ 201 U.N.Doc CEDAW/C/CAN/7 (17 Aug. 2007) at <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

obligations, and further, to provides a broader answer to the question: *to what extent do migrants in Canada, in fact, have access to civil legal services?*

## 1. International Human Rights Treaties & Access to Civil Legal Services in Canada

The most direct reference to access to justice as it relates to migrant workers can be found in ILO Recommendations. Under the Migrant Workers Recommendation, the ILO recommends that member states assist migrant workers in providing legal services to the extent it is possible.<sup>483</sup> This is supported by guidelines released by the ILO on migrant workers in 2010.<sup>484</sup> The OAS has also advised member states on access to justice as it relates to migrants.<sup>485</sup> In particular, in 1999 the OAS issued an advisory opinion on foreign nationals' right to information on consular assistance from the IACHR.<sup>486</sup> The OAS has also issued an advisory opinion in 2003 on rights of undocumented migrant workers, which involved a discussion on the application of the principle of equality and non-discrimination to migrant worker access to justice.<sup>487</sup> These opinions tie the right to legal assistance for migrants to key textual obligations to which member states are bound,

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<sup>483</sup> *R151-Migrant Workers Recommendation, 1975 (No. 151)*, INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312489](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312489) (stating that members should be engaged in “helping migrant workers and their families to obtain information and advice from appropriate bodies, for instance by providing interpretation and translation services; to comply with administrative and other formalities; and to make full use of services and facilities provided in such fields as education, vocational training and language training, health services and social security, housing, transport and recreation: Provided that migrant workers and their families should as far as possible have the right to communicate with public authorities in the country of employment in their own language or in a language with which they are familiar, particularly in the context of legal assistance and court proceedings”).

<sup>484</sup> See *International Labour Migration: A rights-based approach*, INTERNATIONAL LABOUR ORGANIZATION (2010), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/publication/wcms\\_208594.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_208594.pdf)

<sup>485</sup> See Inter-American Court of Human Rights, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law: Advisory Opinion OC-16/99* (1 Oct. 1999),

<sup>486</sup> *Id.*

<sup>487</sup> Inter-American Court of Human Rights, *Juridical Condition and Rights of Undocumented Migrants: Advisory Opinion OC-18/03* 17 Sep. 2003, [http://www.corteidh.or.cr/docs/opiniones/seriea\\_18\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf)

which will likely, and hopefully, make it easier to establish an express right to counsel under international humanitarian law in the future.

In addition to the discourse among treaty bodies about access to justice as a standalone right, the issue has also been examined as a tool to protect against other more clearly stated human rights. In particular, the ICCPR Committee has discussed developments in the Legal Aid system and the way it fulfills the right to a fair trial under the treaty.<sup>488</sup> The CEDAW Committee too, has referred to Canada's Legal Aid program in assessing the degree to which women have access to legal services to assert and protect their right to equality before the law under the treaty.<sup>489</sup>

## 2. Domestic law and Immigrant Right to Civil Legal Counsel

What is missing however from both regional and international treaty body discussions is a broader sense of what rights to counsel are provided to migrants living in Canada, whether this is government-funded or otherwise. The Canadian Charter of Rights and Freedoms does not provide a right to free or subsidized counsel under the Canadian Charter of Rights and Freedoms in civil matters for citizens, let alone migrants.<sup>490</sup> The Canadian Bar Association attempted to establish a right to counsel in civil matters in a 2005 test case by citing the Canadian constitution as well as international human rights

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<sup>488</sup> Human Rights Committee, Sixth Report of Canada ¶106 (2013), [http://www.pch.gc.ca/DAMAssetPub/DAM-drtPrs-humRts/STAGING/texte-text/international-Relatif-Civil-Political-Rights\\_1421161581645\\_eng.pdf?WT.contentAuthority=3.1](http://www.pch.gc.ca/DAMAssetPub/DAM-drtPrs-humRts/STAGING/texte-text/international-Relatif-Civil-Political-Rights_1421161581645_eng.pdf?WT.contentAuthority=3.1)

<sup>489</sup> See Committee on the Elimination of Discrimination against Women, Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women (Combined Sixth and Seventh Periodic Reports of the States Parties): Canada, ¶ 201 U.N.Doc CEDAW/C/CAN/7 (17 Aug. 2007) at <http://www.un.org/womenwatch/daw/cedaw/reports.htm>

<sup>490</sup> See Constitution Act, 1982. The full text of the Act is available at <http://laws-lois.justice.gc.ca/eng/Const/page-15.html>.

law; however, they were ultimately unsuccessful.<sup>491</sup> However, cases based on section 7 of the Charter, which guarantees the right to security of the person,<sup>492</sup> have gained some traction. In *New Brunswick v. G.*, a 1999 case that was appealed up to the Supreme Court of Canada, the Court held that there was a right to state-funded representation in civil cases pursuant to section 7 of the Charter.<sup>493</sup> This case involved an indigent mother who could not afford legal representation to defend against the removal of her children from her care, and who did not have the benefit of Legal Aid assistance because the program covered only permanent removals.<sup>494</sup> The plaintiff moved the Court to order the Minister to provide her with money to pay for attorney's fees, or to appoint counsel from the Legal Aid office or the Attorney General's office.<sup>495</sup> She also sought a declaration that the limitations on Legal Aid violated the section 7 of the Charter. The *New Brunswick* court held in her favor.<sup>496</sup> The right to state-funded legal representation in civil cases, however, has been limited to civil disputes where the Canadian government is a party.<sup>497</sup> This case has been cited in shadow reports submitted to the Human Rights Committee, whose task is to evaluate Canada's human rights performance as to the ICCPR.<sup>498</sup>

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<sup>491</sup> The Canadian Bar Association v. HMTQ et al., 2006 BCSC 1342 (5 Sep. 2006). The full opinion can be accessed here: <http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1342/2006bcsc1342.html>. For more information on Canadian case law on the right to counsel see Heinrich, Erika, *Canadian Jurisprudence Regarding the Right to Legal Aid*, LAWYERS' RIGHTS WATCH CANADA (2 Sep. 2013), <http://www.lrwc.org/canadian-jurisprudence-regarding-the-right-to-legal-aid-report/>

<sup>492</sup> Constitution Act, 1982.

<sup>493</sup> *New Brunswick (Minister of Health and Community Services) v. G.(J.)* 1999 S.S.C.R. 46. The full opinion is available here: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1725/index.do>

<sup>494</sup> *Id.*

<sup>495</sup> *Id.*

<sup>496</sup> *Id.*

<sup>497</sup> Constitution Act, 1982; see also, Wong, Andrea, *The Yellow Brick Road? Establishing a Constitutional Right to State-Funded Counsel for Matters of Civil Law in Canada*, JOURNAL OF PUBLIC POLICY, ADMINISTRATION AND LAW 44-45 (2011).

<sup>498</sup> Canadian Feminist Alliance for International Act, *Report to the Human Rights Committee on the Occasion of the Committee's consideration of the Sixth Periodic Report of Canada* 72 (June 2015), [http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/INT\\_CCPR\\_CSS\\_CAN\\_20770\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CAN/INT_CCPR_CSS_CAN_20770_E.pdf)

### 3. Immigrant Access to Civil Legal Representation

The Legal Aid Program is a cost-sharing program between the federal government and provinces that was established in the 1970's that provides access to justice for economically disadvantaged persons.<sup>499</sup> Eligibility for Legal Aid is not determined at the federal level; rather, it is determined at the province level.<sup>500</sup> Not all Legal Aid programs provide legal assistance to non-citizens. For example, Ontario extends legal aid services on a limited basis to visitors, refugees and other individuals on a work permit.<sup>501</sup> In other provinces, migrants who are not eligible for general Legal Aid assistance may be eligible for immigration-related services, including assistance with refugee claims.<sup>502</sup> In this way, migrants in Canada cannot rely on the state-funded Legal Aid program to meet all of their civil legal needs.

Apart from the Legal Aid program, some provinces have set up standalone clinics that provide free consultations to migrant workers.<sup>503</sup> Some of these are government-based, such as the Nova Scotia drop-in clinic for Temporary Foreign Workers.<sup>504</sup> This clinic does not limit legal services to immigration or refugee issues; rather, clients can seek advice on other issues too, including advice on employment disputes.<sup>505</sup> Other

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<sup>499</sup> Doust, Leonard T., *Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia* 6, (March 2011) [http://www.publiccommission.org/media/PDF/pcla\\_report\\_03\\_08\\_11.pdf](http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf)

<sup>500</sup> See generally, Roberts, Paul & Tsoukalas, Spyridoula, *Legal Aid Eligibility and Coverage in Canada* (Oct 2002), [http://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03\\_la5-rr03\\_a5/rr03\\_la5.pdf](http://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_la5-rr03_a5/rr03_la5.pdf)

<sup>501</sup> *Out of Province*, LEGAL AID ONTARIO, <http://www.legalaid.on.ca/en/getting/outofprovince.asp> (last visited April 15, 2016).

<sup>502</sup> *Immigration/Refugee Law*, LEGAL AID ONTARIO, [http://www.legalaid.on.ca/en/getting/type\\_immigration.asp](http://www.legalaid.on.ca/en/getting/type_immigration.asp) (last visited April 15, 2016); see also *List of Legal Aid Office [providing immigration and refugee legal aid]*, IMMIGRATION AND REFUGEE BOARD OF CANADA, <http://www.irb-cisr.gc.ca/Eng/RefClaDem/Pages/ClaDemGuideLegAidJur.aspx> (last visited April 15, 2016).

<sup>503</sup> See e.g., *Legal Clinic for Temporary Foreign Workers*, MOSAIC, <http://mosaicbc.com/settlement-services/community-development/legal-clinic-temporary-foreign-workers> (last visited April 15, 2016).

<sup>504</sup> *Drop-in Clinic for Temporary Foreign Worker*, IMMIGRATION SERVICES ASSOCIATION OF NOVA SCOTIA, <http://www.stage.isans.ca/drop-in-clinic-for-temporary-foreign-workers/> (last visited April 15, 2016).

<sup>505</sup> *Id.*

clinics are spearheaded by non-profits; for example, the non-profit MOSAIC provides a clinic in Vancouver for temporary foreign workers to seek advice on employment and family law matters.<sup>506</sup> Not all organizations involved in providing legal services to migrants are non-profits; for example, Law Courts Center, an LLC, has set up a program through which temporary migrant workers can obtain assistance in filing uncontested divorces in British Columbia.<sup>507</sup> Bilingual volunteers staff this program, in part; however, most volunteers are Filipino conversant, and it is unclear whether there are Spanish-speaking volunteers on site too, to serve Mexican temporary foreign worker clients.<sup>508</sup>

Despite the development of these legal assistance clinics outside from the Legal Aid program, treaty bodies have yet to consider them in their calculus. Looking at these additional programs may be a necessary part of their examination of access to justice in Canada not only because some of these projects are government-sponsored, but also because they provide a broader and deeper understanding of legal needs within the Canadian population, including among the migrant population living there, which would enable treaty bodies to engage in a more thorough evaluation of how the government is or can be meeting these needs.

## **Conclusion**

This Chapter of the Policy Report is aimed at evaluating Canada's human rights performance as it relates to migrants. Canada has signed and ratified more than 20 treaties on a regional and international level<sup>509</sup> and at least half of which directly or

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<sup>506</sup> *Supra* note 503.

<sup>507</sup> *Uncontested Divorce Order Application Clinic for Temporary Foreign Workers*, LAW COURTS CENTER, <http://lawcourtscenter.camp7.org/Resources/Documents/Law%20Courts%20Center%20AC%20Temporary%20Foreign%20Worker%20Uncontested%20Divorce%20Information%20v150616.pdf> (last visited April 15, 2016).

<sup>508</sup> *Id.*

<sup>509</sup> *Supra* note 360.

indirectly protect migrant rights. The treaties applicable to migrant rights provide protections in the areas of labor, family and civil/human rights. Canada is obligated under these treaties to protect migrant rights even if it has yet to sign and ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

Canada's performance as it relates to these treaties has been largely positive. Where treaty bodies have expressed concern, it has been limited to the following main areas: forced labor, barriers to unionizing among agricultural workers, and the lack of social welfare services for migrant minors. The growth of the Legal Aid program has allayed some of these concerns to the extent that it provides migrants with the right to a remedy. Access to justice, however, remains an on-going concern in light of the limited eligibility of migrants for Legal Aid.

Despite these concerns, treaty bodies have been unequivocal in their praise for domestic laws in Canada that protect migrant rights. In particular, treaty bodies frequently refer to the Canadian Charter of Rights and Freedoms, as well as the establishment of the Human Rights Tribunal to enforce the Charter, as a foundational protection against discrimination of migrants. The Canadian legislature and courts have taken tangible steps to protect human rights specific to migrants, including but not limited to setting minimum standards for temporary agricultural workers, prohibiting recruiters from charging employees fees associated with temporary foreign worker recruitment, and requiring that temporary foreign worker recruiters provide employees not fluent in English information the employee's native language. These developments reflect a

meaningful reaction to treaty body recommendations and a genuine commitment to human rights.

Overall, Canada's human rights performance as it relates to migrants is above average compared to other nations, although there is room for improvement.

## **Part V. Spain**

### **Introduction and Overview: Spain**

Since the 1990's Spain has shifted from a country of primarily emigration to a country of primarily immigration.<sup>510</sup> Spain is a country of approximately 48 million people.<sup>511</sup> There are 8.31 migrants per 1000 population making Spain the country with the 13<sup>th</sup> highest migration right.<sup>512</sup> For comparison, the United States of America ranks 34<sup>th</sup> in migration rate.<sup>513</sup> Most immigrants to Spain come from Africa, Latin America, and Eastern Europe.<sup>514</sup> Spain is the third most popular destination for Mexican migrants with almost 50,000 settling there according mid-2015 estimates.<sup>515</sup> Many migrants are low-skilled and come to Spain on temporary or work visas.<sup>516</sup> Since 2010, migration to Spain has decreased considerably due to the economic crisis, high unemployment, and financial troubles that the country is still trying to overcome.<sup>517</sup>

Spain's high proportion of regular and irregular immigrants attributed to several factors. The Spanish economy has a high demand for low-skilled foreign labor.<sup>518</sup> Spain has one of the largest informal economies in the European Union.<sup>519</sup> Spain has difficulty controlling immigration in part due to a poorly managed and financed administrative

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<sup>510</sup> *Citizenship Pathways and Border Protection: Spain*, Library of Congress, (last updated Jul. 30, 2015), <https://www.loc.gov/law/help/citizenship-pathways/spain.php>.

<sup>511</sup> The World Factbook, *Spain*, CENTRAL INTELLIGENCE AGENCY, (last updated Mar. 8, 2016), updated <https://www.cia.gov/library/publications/the-world-factbook/geos/sp.html>.

<sup>512</sup> *Id.*

<sup>513</sup> The World Factbook, *Country Comparison: Net Migration Rate*, CENTRAL INTELLIGENCE AGENCY, (last updated 2015), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2112rank.html#sp>.

<sup>514</sup> See *supra*, note 510.

<sup>515</sup> Jie Zong and Jeanne Batalova, *Mexican Immigrants in the United States*, MIGRATION POLICY INSTITUTE, (Mar. 17, 2016), <http://www.migrationpolicy.org/article/mexican-immigrants-united-states%20>.

<sup>516</sup> See *supra*, note 510.

<sup>517</sup> See *supra*, note 510.

<sup>518</sup> See Zong and Batalova, *supra*, note 515.

<sup>519</sup> See Zong and Batalova, *supra*, note 515.

bureaucracy in regards to immigration.<sup>520</sup> Spain is geographically and culturally close to many source countries and there are well-developed migration networks to Spain.<sup>521</sup>

Spain's immigration policy is generally based on a visa system, but Spain does have bilateral agreements with some countries and European Union Member States that govern immigration.<sup>522</sup> The purpose of the visa system is to restrict illegal migration and provide workers for the Spanish labor market.<sup>523</sup>

Temporary residence permit holders are entitled to live and work in Spain for three months.<sup>524</sup> Additionally, their temporary permit time may be extended for two years.<sup>525</sup> To receive a residence permit, applicants must have no criminal record in their country of origin, Spain, or any country they have resided in the past five years, not be a risk to public health because of contagious disease, and possess a signed employment contract.<sup>526</sup>

There are several pathways to receive residence authorization including social, family, and labor ties.<sup>527</sup> Applicants seeking residence based on social roots must show that they have engaged in cultural and social integration programs for foreigners as well as provide proof of family ties to other legal residents.<sup>528</sup>

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<sup>520</sup> Joaquin Arango and Maia Jachimowicz, Regularizing Immigrants in Spain: A New Approach, (Sep. 1, 2015), <http://www.migrationpolicy.org/article/regularizing-immigrants-spain-new-approach>.

<sup>521</sup> See Arango and Jachimowicz, *supra*, note 520.

<sup>522</sup> See *supra*, note 510.

<sup>523</sup> See *supra*, note 510.

<sup>524</sup> See *supra*, note 510.

<sup>525</sup> See *supra*, note 510.

<sup>526</sup> See *supra*, note 510.

<sup>527</sup> See *supra*, note 510.

<sup>528</sup> See *supra*, note 510.

Residence permit holders are permitted to naturalize provided they speak Spanish, are well-integrated, and have been residents of Spain for one to ten years depending on their country of origin.<sup>529</sup>

In 1985 Spain began implementing measures to regularize large numbers of irregular immigrants.<sup>530</sup> These programs were analogous to amnesty in the United States.<sup>531</sup> The last of these measures was implemented in 2005 and applied to residents who had no criminal records, and who had an employment contract for at least six months.<sup>532</sup> The programs were popular at the time and generally successful in reducing labor abuses and boosting tax revenue.<sup>533</sup> When Spain's economy faltered in 2008, unemployment rose and attitudes towards migrants changed.<sup>534</sup>

In order to get a sense of what consular services Mexican migrants require in Spain, it is first necessary to attempt to measure and assess how Spain protects human rights. Part I will review the treaty provisions signed by Spain and give a general assessment of Spain's compliance with those treaties. Part II will concentrate on migrant rights in Spain. Part III will focus on how these treaties provide labor rights, family rights, and civil/human rights generally. Finally, Part IV will investigate access to Civil Legal Services for migrants.

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<sup>529</sup> See *supra*, note 510.

<sup>530</sup> See *supra*, note 510.

<sup>531</sup> Daniel González, *Spain's Welcome Mat for Immigrants Wearing Thin*, THE ARIZONA REPUBLIC, (last accessed Apr. 19, 2016), <http://www.azcentral.com/news/articles/global-immigration-spain.html>.

<sup>532</sup> See *supra*, note 510.

<sup>533</sup> See González, *supra*, note 531.

<sup>534</sup> See González, *supra*, note 531.

## **A. Spain and Human Rights Treaties**

This part examines the general human rights obligations affecting migrants to which Spain has committed. It will begin with a review of the international treaties to which Spain has committed through signing and ratification as well as any RUD's modifying those treaties. These treaties include The International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child. This section will also cover treaties that Spain has not signed or ratified that could impact migrants including the Convention on the Rights of Migrants, and the Convention for the Elimination of all forms of Racial Discrimination. Additionally, this section will review other obligations including directives from the International Labor Organization, and the European Council and European Court of Human Rights.

International indices tend to rate Spain's commitment to human rights between "good" and "medium."<sup>535</sup> The Universal Nations Report of the Working Group on the Universal Periodic Review for 2010 reported that Spain has ratified most international treaties and regional human rights treaties.<sup>536</sup> Furthermore, the report found that Spain is "unequivocally" committed to building public policy on integration "based on an intercultural model and dialogue among cultures."<sup>537</sup>

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<sup>535</sup> Nominal Commitment To Human Rights: A Global Survey rated Spain as having a "high commitment" to core human rights and humanitarian law treaties across the globe. *See Nominal Commitment to Human Rights: A Global Survey*, UCL DEPARTMENT OF POLITICAL SCIENCE (last accessed Apr. 18, 2016), [http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr\\_index](http://www.ucl.ac.uk/spp/research/research-projects/nchr/nchr_index); Maplecroft rated Spain as having "Medium Risk" on the 2014 Human Rights Risk Index. *See Human Rights Risk Index*, MAPLECROFT, (2013), [http://reliefweb.int/sites/reliefweb.int/files/resources/2014\\_Human\\_Rights\\_Risk\\_Index\\_Map.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/2014_Human_Rights_Risk_Index_Map.pdf).

<sup>536</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/144/32/PDF/G1014432.pdf?OpenElement>, at 3.

<sup>537</sup> <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/144/32/PDF/G1014432.pdf?OpenElement>, at 4.

Despite this high praise, Amnesty International slammed Spain for ill-treatment and excessive use of force by police forces as well as collective expulsions and excessive use of force against individuals who attempted to enter Spain irregularly from Morocco into the Spanish enclaves of Ceuta and Melilla.<sup>538</sup> Monitoring agencies have expressed concern that deteriorating economic conditions in Spain will lead to degradation of human rights.<sup>539</sup>

One 2013 report by the Transatlantic Council on Migration asserts that Spain has not seen a significant backlash against immigration, even in the face of the economic crisis.<sup>540</sup> The report proposes several factors for this including that “most Spaniards still view immigration through the lens of the labor market,” and that “Spain’s distinct political culture, which emerged following the end of the Franco dictatorship, discourages public statements that could be perceived as undermining the democratic values of equality and liberty.”<sup>541</sup> The report cautions, however, that Spain’s favorable stance on immigration could be changing.<sup>542</sup>

**Table 3.**

Treaty	Date Signed	Date Ratified	Articles to which Reservations, Declarations and Understandings (“RUD’s”) attach
International Covenant on	28 Sep 1976	27 Apr 1977	Article 41 <sup>543</sup>

<sup>538</sup> See Amnesty International, *The State of the World’s Human Rights*, AMNESTY INTERNATIONAL, (2016), <http://www.amnestyusa.org/sites/default/files/pol1025522016english.pdf> 336-39.

<sup>539</sup> See *Spain*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS, (last visited Apr. 18, 2016), <http://www.cesr.org/section.php?id=161>; *Joint Submission to the Committee on Economic, Social and Cultural rights*, CENTER FOR ECONOMIC AND SOCIAL RIGHTS, (May 2012), <http://www.cesr.org/downloads/Joint%20Submission%20CESCR%2048%20Session%20Executive%20Summary%20English.pdf?preview=1>.

<sup>540</sup> Joaquin Arango, *Exceptional in Europe? Spain’s Experience with Immigration and Integration*, MIGRATION POLICY INSTITUTE, (March 2013), available for download at [www.migrationpolicy.org](http://www.migrationpolicy.org), at 1

<sup>541</sup> *Id.* at 1

<sup>542</sup> *Id.* at 1

<sup>543</sup> The Government of Spain declares that, under the provisions of article 41 of the [Covenant], it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant.

Civil and Political Rights (“ICCPR”)			
Convention on the Elimination of All Forms of Racial Discrimination (“CERD”)		13 Sep 1968	Article 14 <sup>544</sup>
Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”)	17 Jul 1980	5 Jan 1984	“The ratification of the Convention by Spain shall not affect the constitutional provisions concerning succession to the Spanish crown.” <sup>545</sup>
Convention on the Rights of the Child (“CRC”)	26 Jan 1990	6 Dec 1990	Articles 21 <sup>546</sup> and 38 <sup>547</sup>

## **B. Spain and Migrant Rights**

### **1. International Treaties**

#### **a. International Covenant on Civil and Political Rights (ICCPR)**

Spain signed the International Covenant on Civil and Political Rights (ICCPR) on September 28, 1976 and ratified it on April 27, 1977.<sup>548</sup> The ICCPR obligates Spain to “protect and preserve basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom

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International Covenant on Civil and Political Rights, UNITED NATIONS TREATY COLLECTION, Dec. 16, 1966, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec).

<sup>544</sup> [The Government of Spain] recognizes the competence of the Committee on the Elimination of Racial Discrimination to receive and consider communications from individuals or groups of individuals within the jurisdiction of Spain claiming to be victims of violations by the Spanish State of any of the rights set forth in that Convention. Such competence shall be accepted only after appeals to national jurisdiction bodies have been exhausted, and it must be exercised within three months following the date of the final judicial decision. International Convention on the Elimination of All Forms of Racial Discrimination, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en#EndDec), (last visited Apr. 18, 2016).

<sup>545</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-8&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec)

<sup>546</sup> Spain understands that article 21, paragraph (d), of the Convention may never be construed to permit financial benefits other than those needed to cover strictly necessary expenditure which may have arisen from the adoption of children residing in another country. Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en).

<sup>547</sup> Spain, wishing to make common cause with those States and humanitarian organizations which have manifested their disagreement with the contents of article 38, paragraphs 2 and 3, of the Convention, also wishes to express its disagreement with the age limit fixed therein and to declare that the said limit appears insufficient, by permitting the recruitment and participation in armed conflict of children having attained the age of fifteen years. *Id.*

<sup>548</sup> See [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en).

and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial, and; minority rights.”<sup>549</sup> The ICCPR also requires governments to “take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy.”<sup>550</sup> Spain also signed and ratified the Optional Protocol to the International Covenant on Civil and Political Rights that establishes an individual complaint mechanism to the ICCPR.<sup>551</sup>

The government of Spain declared of the ICCPR that, “Under the provisions of article 41 of the [Covenant], it recognizes the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Covenant.”<sup>552</sup>

The government further declared of the Optional Protocol of the ICCPR, “The Spanish Government accedes to the Optional Protocol to the International Covenant on Civil and Political Rights, on the understanding that the provisions of article 5, paragraph 2, of that Protocol mean that the Human Rights Committee shall not consider any communication from an individual unless it has ascertained that the same matter has not been or is not being examined under another procedure of international investigation or settlement.”<sup>553</sup>

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<sup>549</sup> FAQ: The Covenant on Civil & Political Rights (ICCPR), AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/faq-covenant-civil-political-rights-iccpr> (last updated Apr. 2014).

<sup>550</sup> *Id.*

<sup>551</sup> *See Status of Ratification*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE COMMISSIONER, <http://indicators.ohchr.org/> (last visited Apr. 18, 2016).

<sup>552</sup> *Id.*

<sup>553</sup> *Id.*

*b. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

Spain is not a signatory to ICERD, but did ratify the treaty in 1968.<sup>554</sup> Spain entered the treaty by accession and ratified the treaty and, therefore, is bound by ICERD. Under the terms of ICERD, Spain is bound to “pursue by all appropriate means a policy of eliminating racial discrimination in all its forms.”<sup>555</sup> In particular, ICERD requires that countries guarantee to everyone “without distinction as to race, colour, or national or ethnic origin” rights including “freedom of opinion and expression” as well as economic, social and cultural rights such as the right to work.<sup>556</sup> The rights protected under ICERD are particularly relevant to migrants who by definition are of a different nationality than host country. In addition, the protections required by ICERD are invaluable to migrants who often travel to new countries in search of economic opportunities and with little political power to advocate for themselves.

*c. The International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*

Spain signed and ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as well as the Optional Protocol of CEDAW.<sup>557</sup> The treaty “defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination.”<sup>558</sup> Under CEDAW, Spain is obligated to undertake a series of measures to end discrimination against women,

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<sup>554</sup> *Id.*

<sup>555</sup> International Convention on the Elimination of All Forms of Racial Discrimination, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-2&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-2&chapter=4&lang=en) (last visited April 16, 2016) Art. 2.

<sup>556</sup> *Id.* at Art. 5

<sup>557</sup> See *Supra*, note 551.

<sup>558</sup> Convention on the Elimination of All Forms of Discrimination Against Women, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/> (last updated Dec. 31, 2007).

including: “to incorporate the principle of equality of men and women in their legal system, abolish all discriminatory laws and adopt appropriate ones prohibiting discrimination against women; to establish tribunals and other public institutions to ensure the effective protection of women against discrimination; and to ensure elimination of all acts of discrimination against women by persons, organizations or enterprises.”<sup>559</sup> Additionally, Spain signed and ratified the Optional Protocol to CEDAW that creates complaint and inquiry mechanisms for CEDAW.<sup>560</sup>

The government of Spain has declared that “[t]he ratification of the Convention by Spain shall not affect the constitutional provisions concerning succession to the Spanish crown.”<sup>561</sup> This declaration is narrowly tailored and does not affect how the convention applies to migrant rights.

d. The International Convention on the Rights of the Child

Spain signed the Convention on the Rights of the Child (CRC) on January 26, 1990, and ratified the treaty on December 6, 1990.<sup>562</sup> The Convention lays “the foundational principles from which all rights must be achieved, call for the provision of specific resources, skills and contributions necessary to ensure the survival and development of children to their maximum capability. The articles also require the creation of means to protect children from neglect, exploitation and abuse.”<sup>563</sup>

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<sup>559</sup> *Id.*

<sup>560</sup> History of the Optional Protocol, UN WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/history.htm> (last updated Dec. 31, 2007)..

<sup>561</sup> *See supra*, note 551.

<sup>562</sup> Convention on the Rights of the Child, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-11&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en) (last visited Apr. 18, 2016).

<sup>563</sup> Understanding the CRC, UNICEF, [http://www.unicef.org/crc/index\\_understanding.html](http://www.unicef.org/crc/index_understanding.html) (last update May 19, 2014).

Spain has made two declarations in regards to the CRC. The first clarified that “Spain understands that article 21, paragraph (d), of the Convention may never be construed to permit financial benefits other than those needed to cover strictly necessary expenditure which may have arisen from the adoption of children residing in another country.” This declaration modifies article 21 which states, “States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall . . . (b) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it.”<sup>564</sup> Essentially the first declaration limits financial benefits to necessary expenditures spent in adopting children from foreign countries.

The second declaration made by Spain references to article 38, paragraphs 2 and 3 of the CRC states, “Spain . . . wishes to express its disagreement with the age limit fixed therein and to declare that the said limit appears insufficient, by permitting the recruitment and participation in armed conflict of children having attained the age of fifteen years.”<sup>565</sup> Spain agrees with states and humanitarian organizations that have manifested their disagreement with the contents of article 38 because the language of article 38 permits children who are too young to “take a direct part in hostilities.”<sup>566</sup> Both declarations made by Spain on the CRC do not significantly alter any obligations Spain has undertaken under this treaty in regards to migrants.

The Article 2 of the CRC makes it clear that the treaty applies to each child within a jurisdiction regardless of “his or her parent’s or legal guardian’s . . . national . . .

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<sup>564</sup> Convention on the Rights of the Child, United Nations Human Rights Office of the High Commissioner, <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx> (last visited Apr. 18, 2016).

<sup>565</sup> *Id.*

<sup>566</sup> *Id.*

status.”<sup>567</sup> Migrant children are undoubtedly included in this language. Therefore, Spain is bound by the various protections children, and migrant children, receive under the CRC.

e. The International Convention on the Protection of the Rights of All Migrants and Members of their Families (ICMW)

Spain has not signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The primary purpose of the Convention is to foster respect for the human rights of migrants.<sup>568</sup> The Convention “does not create new rights for migrants but aims at guaranteeing equality of treatment, and the same working conditions for migrants and nationals.”<sup>569</sup> Countries that have ratified the Convention are primarily countries of origin for migrants (such as Mexico) who hope to utilize the Convention as “an important vehicle to protect their citizens living abroad.”<sup>570</sup>

f. The International Labor Organization (ILO)

Spain is a member of the International Labor Organization.<sup>571</sup> The ILO aims to regulate hours of work, prevent unemployment, provide a living wage, protect vulnerable workers, provide equal remuneration for work of equal value, and protect the interests of workers employed in countries other than their own among other goals.<sup>572</sup> Spain has

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<sup>567</sup> *Id.* at Art. 2.

<sup>568</sup> See *United Nations Convention on Migrants' Rights*, UNESCO, (2005), <http://unesdoc.unesco.org/images/0014/001435/143557e.pdf>.

<sup>569</sup> *Id.* at 7.

<sup>570</sup> *Id.* at 11.

<sup>571</sup> Normal, *Ratifications for Spain*, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102847](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102847) (last visited Apr. 18, 2016).

<sup>572</sup> *International Labour Organization*, ENCYCLOPEDIA.COM, [http://www.encyclopedia.com/topic/International\\_Labor\\_Organization.aspx](http://www.encyclopedia.com/topic/International_Labor_Organization.aspx) (last visited Apr. 18, 2016).

ratified all eight fundamental conventions of the ILO as well as all four governance conventions and 121 of 177 technical conventions.<sup>573</sup>

Member governments must report back to the ILO on the steps they have taken to bring ILO recommendations and conventions before legislative authorities, and report on the decision of those authorities.

## 2. Regional Treaties

### a. European Council and European Court of Human Rights (ECHR)

Spain Is tied for worst place in regards to Council of Europe human rights treaty ratification rates with only five of ten selected human rights treaties ratified.<sup>574</sup>

Regardless of the nationality or legal status of migrants, including asylum seekers, they are entitled to enjoy the protection offered by the European Convention on Human Rights insofar as they fall under the States Parties' jurisdiction.<sup>575</sup> Protections include requiring states follow the principle of “*non-refoulement*,” to refrain from conducting “pushbacks” or “collective expulsions,” and to ensure that migrants, including asylum-seekers, are not subject to ill, inhuman or degrading treatment, among others.<sup>576</sup>

*Non-Refoulement* was established in Article 33 of the Geneva Convention which prohibits the expulsion of a refugee “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or

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<sup>573</sup> *Supra*, note 571.

<sup>574</sup> Bask Çali, Alice Wyss and Cristian Anton, *Nominal Commitment to Human Rights: A Global Survey*, UCL SCHOOL OF PUBLIC POLICY, (Dec. 10, 2009), available at <http://www.asylumlawdatabase.eu/en/content/en-protection-migrants-and-asylum-seekers-states%E2%80%99-main-legal-obligations-under-council>. [http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/nchr\\_project.pdf](http://www.ucl.ac.uk/spp/research/research-projects/nchr/downloads/nchr_project.pdf), at 7.

<sup>575</sup> See Protection Of Migrants And Asylum-Seekers: States' Main Legal Obligations Under The Council Of Europe Conventions, available at <http://www.asylumlawdatabase.eu/en/content/en-protection-migrants-and-asylum-seekers-states%E2%80%99-main-legal-obligations-under-council> at 1 .

<sup>576</sup> See *id.* at 1.

political opinion”.<sup>577</sup> *Non-Refoulement* is now a recognized principle of customary international law binding on all states and not subject to derogation.<sup>578</sup> A “pushback” is similar to *non-refoulement*, but occurs when states expel migrants that are in extraterritorial zones where the state exercises effective control.<sup>579</sup> When ships are intercepted in international waters, state agents must protect the rights of the migrants on-board under the ECHR. Collective expulsions occur when states expel groups of migrants without looking at the claims of each individual.<sup>580</sup> Article 4, Protocol No. 4 of the ECHR requires that the personal circumstances of each individual claim be examined on an individual basis, in a fair and objective manner.<sup>581</sup>

### **C. Spain and Human Rights Protections: Labor, Family, Civil/Human Rights**

#### **1. Labor**

##### **a. International Treaties**

##### ***i. International Covenant on Civil and Political Rights (ICCPR)***

In a briefing for the United Nations Human Rights Committee on Spain’s compliance with the ICCPR, Amnesty International noted that the Constitutional Court declared unconstitutional various articles of the Organic Law that restricted migrants’ right to assembly, form labor unions, and association.<sup>582</sup> The unconstitutional laws only granted those rights to authorized residents.<sup>583</sup> The ruling also declared laws unconstitutional which denied the right to further education and free legal assistance to

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<sup>577</sup> League of Nations, Convention relating to the International Status of Refugees, Article 3.

<sup>578</sup> See Yannis Ktistakis, *Protecting Migrants Under the European Convention on Human Rights and the European Social Charter*, COUNCIL OF EUROPE PUBLISHING, [http://www.coe.int/t/democracy/migration/Source/migration/ProtectingMigrantsECHR\\_ESCWeb.pdf](http://www.coe.int/t/democracy/migration/Source/migration/ProtectingMigrantsECHR_ESCWeb.pdf) at 80.

<sup>579</sup> See *id.* at 19.

<sup>580</sup> See *id.* at 105.

<sup>581</sup> Article 4, Protocol No. 4 European Court of Human Rights.

<sup>582</sup> Amnesty International, *Spain: Briefing to the Human Rights Committee*, AMNESTY INTERNATIONAL, (June, 2009), [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI\\_Spain93.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_Spain93.pdf) at 35

<sup>583</sup> *Id.*

irregular migrants.<sup>584</sup> The unconstitutional laws were in conflict with Articles 21 and 22 of the ICCPR in conjunction with Article 2.<sup>585</sup>

*ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

The 2000 law on the Rights and Freedoms of Foreigners in Spain and their Social (Law of Foreign Nationals) integration recognized the right of association, assembly, union membership and strike for migrants regardless of their migration status.<sup>586</sup> Unfortunately, the law also created restrictions to access to justice and education for migrants who lack regular migration status in Spain.<sup>587</sup>

The Law on Foreign Nationals “restricts the right to education of migrants over the age of 18.”<sup>588</sup> Creating a distinction between migrants and nationals runs contrary to ICERD which applies to everyone without distinction to nationality and implicates Articles 1 and 5 of the treaty. Education is often the key to improving one’s labor situation and restrictions based on nationality harm the migrant community in Spain.

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

Despite legislative instruments and various plans and policies, Spain still has a culture of ‘machismo’ and patriarchal religious attitudes that harm gender equality.<sup>589</sup> In 2010 the Ministry of Equality was dissolved and its functions were split between the

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<sup>584</sup> *Id.*

<sup>585</sup> *Id.*

<sup>586</sup> See Amnesty International, Spain: Briefing to the UN Committee on the Elimination of Racial Discrimination, AMNESTY INTERNATIONAL, (February 2011), [http://www2.ohchr.org/english/bodies/cerd/docs/ngos/AI\\_Spain78.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/ngos/AI_Spain78.pdf) at 6.

<sup>587</sup> See *id.* at 6.

<sup>588</sup> See *id.* at 6.

<sup>589</sup> See UN Working Group On The Issue Of Discrimination Against Women In Law And In Practice, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, (Dec. 19, 2014).

Ministry of Health, Social Affairs and Equality.<sup>590</sup> Gender visibility, specificity and focus were further reduced when the Women's Institute was transformed into an entity responsible for all forms of discrimination.<sup>591</sup> Institutional changes as well as austerity measures have contributed to reduced equality for women in the labor market.<sup>592</sup> Migrant women are particularly susceptible to the disadvantaged position of women as a whole in Spain due to their reduced political influence.

The labor market in Spain is unfavorable for women workers. The wage gap between men and women is 21.5% in the private sector and 13.4% in the public sector.<sup>593</sup> Women have a lower level of participation as full time workers than the EU average.<sup>594</sup> Women are the primary victims of the practice of reducing full time jobs to part-time plus overtime hours in order to avoid employment costs.<sup>595</sup> Furthermore, women in Spain still occupy at a higher rate jobs that pay less than men.<sup>596</sup> Migrant women – who occupy up to 50% of domestic jobs<sup>597</sup> - are particularly vulnerable.

Migrant workers constitute most live-in domestic workers and are exposed to harsh conditions.<sup>598</sup> Employers may deduct one-third from the total salary above the minimum wage of live-in domestic workers for food and accommodation.<sup>599</sup> While there

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<sup>590</sup> *See id.*

<sup>591</sup> *See id.*

<sup>592</sup> *See id.*

<sup>593</sup> *See id.*

<sup>594</sup> *See id.*

<sup>595</sup> *See id.*

<sup>596</sup> SPAIN: *Shadow report regarding the VI periodical report presented by Spain to the Committee on the elimination of all forms of discrimination against women*, PLATAFORMA IMPACTO DE GÉNERO YA, (June, 2009), [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ESP/INT\\_CEDAW\\_NGO\\_ESP\\_44\\_8697\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/ESP/INT_CEDAW_NGO_ESP_44_8697_E.pdf) at 3

<sup>597</sup> *Id.* at 2

<sup>598</sup> *See supra*, note 589.

<sup>599</sup> *See supra*, note 589.

were improvements after a 2011 law on domestic workers, those workers are still excluded from unemployment insurance.<sup>600</sup>

The Organic Law for Effective Equality prohibits discrimination, provides a framework for equal access to employment and career development, gender balance for selection and evaluation committees, and equal pay for work of equal value.<sup>601</sup> However, women often do not feel empowered to enforce their right to equal employment opportunities and social awareness of some remedies are insufficient.<sup>602</sup> Furthermore, a 2012 law for the regulation of determining costs in the area of administration of justice imposed prohibitive court fees for labor cases.

Negative gender stereotyping harms women in all spheres of life.<sup>603</sup> Discriminatory language exists in courts, women hold a secondary role in church, and women are generally limited to traditionalist and sexist roles in the media and advertising.<sup>604</sup> Women in vulnerable situations such as women in poverty and migrant women are subject to multiple discriminatory stereotypes.<sup>605</sup>

These reports implicate many of Spain's obligations under CEDAW. Article 11 requires that state parties take all appropriate measures to eliminate discrimination against women in the field of employment.<sup>606</sup> In particular, migrant women have rights under CEDAW ensuring the right to unemployment, job security and benefits.<sup>607</sup> The UN Working group noted that "The disconnect between women's educational achievements

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<sup>600</sup> See *supra*, note 589.

<sup>601</sup> See *supra*, note 589.

<sup>602</sup> See *supra*, note 589.

<sup>603</sup> See *supra*, note 589.

<sup>604</sup> See *supra*, note 589.

<sup>605</sup> See *supra*, note 589.

<sup>606</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660

U.N.T.S. 195 Art. 11.

<sup>607</sup> *Id.*

and access to economic opportunities should be addressed in schools, through the removal of stereotypes in the educational system and the provision of career advisory services for girls. Stakeholders reported that textbooks have still not been revised since the CEDAW recommendation in its Concluding Observations in 2009.”<sup>608</sup> Issues such as these that affect Spanish women in general, also affect migrant women. Migrant women are particularly in need of access to economic opportunities so that they don’t get locked into exploitative labor roles.

Finally, the UN Working group observed that “Migrants in an irregular situation are no longer covered by universal health care, with exceptions, and [ ] this has a disparate impact on migrant women as those who cannot afford to pay are deprived of an important facility in the medical services for detection of gender-based violence.”<sup>609</sup>

*iv. Convention on the Rights of the Child (CRC)*

Article 32 of the CRC protects children “from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.”<sup>610</sup> Child labor is generally not an issue in Spain.<sup>611</sup>

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMR)*

No relevant information found.

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<sup>608</sup> See *supra*, note 589.

<sup>609</sup> See *supra*, note 589.

<sup>610</sup> Convention on the Rights of the Child, art. 32.  
<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

<sup>611</sup> Bureau of Democracy, Human Rights, and Labor, *Spain: Country Reports on Human Rights Practices*, U.S. Department of State, (Mar. 31, 2003), <http://www.state.gov/j/drl/rls/hrrpt/2002/18392.htm>.

*vi. International Labour Organization (ILO)*

Because domestic work often occurs in private and migrant workers are sometimes have irregular legal status, it is difficult to regulate domestic work and abuses are more likely to occur. In light of the harsh working conditions of domestic migrant workers, the UN Working Group recommends that the Spanish government ratify the 189 ILO Convention on the Protection of Domestic Workers.<sup>612</sup>

Spanish law allows workers, including migrant workers, to form and join independent unions of their choice without excessive requirements or previous authorization.<sup>613</sup> The International Trade Union Confederation (ITUC) noted that Spanish employers frequently hired new workers on temporary contracts.<sup>614</sup> In theory, these workers these workers should be protected by collective bargaining agreements, but, in practice, workers were more often individually negotiating with their employers.<sup>615</sup> This particularly harmed the collective bargaining power of immigrants who make up 63% of temporary workers.<sup>616</sup>

2. Family

*a. International Treaties*

*i. International Covenant on Civil and Political Rights (ICCPR)*

In 2008 Amnesty International raised concern about the treatment of unaccompanied minors in Spain.<sup>617</sup> Specifically, Amnesty International noted the “lack of safeguards in the administrative procedures that determine [unaccompanied minor’s]

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<sup>612</sup> See *supra*, note 589.

<sup>613</sup> Bureau of Democracy, Human Rights, and Labor, *2010 Human Rights Report: Spain*, U.S. Department of State, (Apr. 8, 2011), <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154452.htm>.

<sup>614</sup> *Id.*

<sup>615</sup> *Id.*

<sup>616</sup> *Id.*

<sup>617</sup> See Amnesty International *supra*, note 582, at 34.

repatriation, including, in some cases, no provision of legal assistance to the minor.”<sup>618</sup>

Additionally, in some cases the child’s family has not been contacted prior to repatriation.<sup>619</sup> Several rulings on appeals against decisions granting repatriation for unaccompanied foreign minors noted “serious irregularities” that did not take into account the best interest of the child and put the safety of minors at risk.<sup>620</sup> In response to these concerns, Amnesty International recommended that Spain “respect and enforce existing obligations with regard to the protection of unaccompanied minors,” stop actions that do not take the minor’s best interest into account, and “apply adequate measures to correctly identify minors.”<sup>621</sup>

*ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

Amnesty International found that there were deficiencies in the extent to which human rights were incorporated in the training of Spanish security forces at the national level.<sup>622</sup> Training of these forces hardly addressed “limitations on the duty to obey the use of force, or issues related to migration, asylum, racism and xenophobia.”<sup>623</sup> Furthermore, Amnesty International found that Spain has not implemented recommendations by international human rights bodies such as ICERD and has not updated the training of law enforcement officials in almost a decade to the current context of human rights in Spain.<sup>624</sup> Article 7 of ICERD mandates that state parties adopt effective measures to combat prejudices that lead to racial discrimination. Security forces represent state parties as the enforcement arm of government, therefore, it is imperative that Spain enact

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<sup>618</sup> See Amnesty International *supra*, note 582, at 34.

<sup>619</sup> See Amnesty International *supra*, note 582, at 34.

<sup>620</sup> See Amnesty International *supra*, note 582, at 34.

<sup>621</sup> See Amnesty International *supra*, note 582, at 34.

<sup>622</sup> See *supra*, note 586, at 11

<sup>623</sup> See *supra*, note 586, at 11

<sup>624</sup> See *supra*, note 589.

adequately policies in compliance with ICERD to combat prejudice and discrimination and set the tone for society as a whole towards migrants.

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

The Spanish Constitution of 1978 establishes the principle of equality and non-discrimination in accordance with Spain's obligations under CEDAW.<sup>625</sup> Unfortunately, discrimination still exists, particularly in regards to migrant women.

There is a lack of specialized resources in the treatment of gender violence for migrant women.<sup>626</sup> Unfortunately, immigrant women are the group most vulnerable to gender violence, "although they constituted 11.4 percent of the female population in the country, they applied for 34 percent of the 9,890 protection orders during the second quarter of the year."<sup>627</sup>

A 2012 law for the regulation of determining costs in administration of justice imposed high fees for filing actions in court and created a serious barrier to litigation in civil and family law cases.<sup>628</sup> Barriers to litigation for civil and family law cases disproportionately affect migrants who already face disadvantages compared to nationals in terms of access to the justice system.

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<sup>625</sup> Committee on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention of the Elimination of All Forms of Discrimination Against Women*, (Apr. 15, 2003), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N03/330/27/IMG/N0333027.pdf?OpenElement>, at 10.

<sup>626</sup> See Plataforma Impacto de Género *supra* note 596 at 3.

<sup>627</sup> See *supra*, note 613.

<sup>628</sup> See *supra*, note 589.

*iv. Convention on the Rights of the Child (CRC)*

Migrant children in Spain are entitled to education, healthcare and basic social services regardless of their immigration status.<sup>629</sup> All children in Spain are entitled to inalienable rights that cannot be denied on the basis of their nationality and, furthermore, the child does not need to fulfill any formal requirements, such as registration with government authorities, to be eligible for their rights.<sup>630</sup> All migrant children are entitled to education irrespective of their immigration status, but there have been disputes over whether this right extends to non-compulsory education for children between the ages of 16 and 18.<sup>631</sup> In one case, the Constitutional Court held that the exclusion of children with irregular immigration status for non-compulsory education was unconstitutional, and contrary to article 28 of the CRC.<sup>632</sup>

Unaccompanied or separated migrant children are provided a network of residential centers to accommodate their basic needs but in recent years these centers have become crowded and it has become common practice for the Child Welfare Service to conduct medical examinations on children who claim to be 16 or 17 years old and discharge children who they find to be older than 18.<sup>633</sup>

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

No relevant information found.

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<sup>629</sup> Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, (June, 2012), <http://www.statewatch.org/news/2012/nov/rights-the-child-in-europe.pdf> at 78

<sup>630</sup> *Id.* at 78

<sup>631</sup> *Id.* at 78

<sup>632</sup> *See Id.* at 79.

<sup>633</sup> *See Id.* at 79.

vi. *International Labor Organization (ILO)*

A Royal Decree issued in November of 2011 ensured that domestic workers, many of whom are migrants, are paid the minimum wage, have a maximum working week of 40 hours, and minimum daily periods of rest.<sup>634</sup> Ensuring fair wages and hours for domestic workers is important for ensuring stability among migrant families.

3. Civil/Human Rights

a. *International Treaties*

i. *International Covenant on Civil and Political Rights (ICCPR)*

In 2008 Amnesty International voiced concern that Spain was harming the rights of migrants in violation of Articles 7, 9 and 13 of the ICCPR.<sup>635</sup> Specifically measures aimed at hindering the access of undocumented persons through the southern border and undermining the principle of *non-refoulement*.<sup>636</sup> These measures create complications for victims of human rights violations who are attempting to seek asylum in Spain.<sup>637</sup> Moreover, migrants are forced to travel longer and more dangerous routes exposing them to more abuse at the hands of criminal networks and other agents.<sup>638</sup>

In 2006 a large number of migrants and asylum-seekers arrived in the Canary Islands and strained the asylum determination procedures there. Amnesty International recognized the positive efforts by officials to deal with the influx of migrants there but, nonetheless, expressed concern about restricted access to asylum procedures, deficiencies in the identification process of potential refugees, inadequate information and education

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<sup>634</sup> *Spain Approves New Regulations for Domestic Employees*, INTERNATIONAL LABOUR ORGANIZATION, [http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/@protrav/@travail/documents/publication/wcms\\_173686.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@travail/documents/publication/wcms_173686.pdf), (last visited April 18, 2016).

<sup>635</sup> See *supra*, note 582.

<sup>636</sup> See *supra*, note 582 at 32.

<sup>637</sup> See *supra*, note 582 at 32.

<sup>638</sup> See *supra*, note 582 at 32.

of migrants on arrival, and inadequate delivery of legal and interpretation services.<sup>639</sup>

Amnesty International has documented occurrences of illegal and irregular expulsions, however, the number of people that may have been expelled outside of official procedures is unknown.<sup>640</sup> In response to these findings, Amnesty International recommended that Spain guarantee through legislation and practice access to fair asylum procedures, and for Spain to respect the principle of *non-refoulement*.<sup>641</sup>

In 2015 these same concerns were still present. A new amendment to Spain's immigration law legalized the automatic and collective expulsion of migrants and refugees from the borders of Ceuta and Melilla by a practice called "border rejections."<sup>642</sup> This practice denies migrants access to formal asylum procedures and exposes them to the risk of human rights violations upon return.<sup>643</sup> Stemming from a fear of public disorder and terror attacks, these laws restrict protests, freedom of expression and peaceful assembly, all of which are useful tools migrants may use to advocate for their rights.<sup>644</sup>

*ii. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*

In 2010 the Report of the Working Group on the Universal Periodic Review found that Spain had implemented many of the recommendations made by the Committee on the Elimination of Racial Discrimination.<sup>645</sup> These recommendations included

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<sup>639</sup> See *supra*, note 582 at 33.

<sup>640</sup> See *supra*, note 582 at 34.

<sup>641</sup> See *supra*, note 582 at 34.

<sup>642</sup> See Amnesty International, *Spain: Two-pronged assault targets rights and freedoms of Spanish citizens, migrants and refugees*, AMNESTY INTERNATIONAL, (Mar. 26, 2015, 15:45 UTC), <https://www.amnesty.org/en/latest/news/2015/03/spain-two-pronged-assault-targets-rights-and-freedoms-of-spanish-citizens-migrants-and-refugees/>.

<sup>643</sup> See *id.*

<sup>644</sup> See *id.*

<sup>645</sup> See *supra*, note 589.

adopting measures such as preparation of studies and analysis on racist and xenophobic trends in Spanish society by the Spanish Racism and Xenophobia Monitoring Centre.<sup>646</sup> Furthermore, the Committee approved of the Spanish Government developing a human rights plan for 2008 to 2012 that sets out concrete measure for combating racism.<sup>647</sup>

Unfortunately, Spain's record is not as good in the face of economic recession. In 2012 Spain cut health care services to about 150,000 immigrants living in Spain in an effort to save money.<sup>648</sup> Amnesty International and other NGOs accused the government of Spain of violating international agreements by "excluding a significant section of the population – immigrants without proper residence permits – from public healthcare."<sup>649</sup> This action breaches Spain's duty to not discriminate on the basis of national origin under ICERD.

*iii. Convention on the Elimination on All Forms of Discrimination against Women (CEDAW)*

The percentage of women holding positions at the highest level of the judiciary is extremely low.<sup>650</sup> As a result of the low involvement of women in the judicial system there is mistrust in the judiciary in regards to gender issues.<sup>651</sup> Some judges are biased and too quick to dismiss women's claims for restraining order, prevention of visitation

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<sup>646</sup> See *supra*, note 589.

<sup>647</sup> See *supra*, note 589.

<sup>648</sup> Giles Tremlett, *Immigrants in Spain to Lose the Right to Public Healthcare*, THE GUARDIAN, (Aug. 31, 2012, 12:17 EDT), <http://www.theguardian.com/world/2012/aug/31/immigrants-spain-lose-public-healthcare>.

<sup>649</sup> *Id.*

<sup>650</sup> See *supra*, note 589.

<sup>651</sup> See *supra*, note 589.

rights, and custody from their violent partners.<sup>652</sup> This situation inevitably affects, and likely disproportionately so, the rights of migrant women.

Migrant women in Spain are particularly vulnerable. The UN Working Group is concerned at the lack of implementation of existing protocols for identifying trafficking victims, particularly in cases of expulsion.<sup>653</sup> Furthermore, migrants in an irregular situation are no longer covered by universal health care.<sup>654</sup> This has a disparate impact on migrant women who cannot afford to pay for medical services that help with the detection of gender-based violence.

*iv. Convention on the Rights of the Child (CRC)*

The UN Working Group acknowledged that Spain's Ministry of Equality set up a social forum to serve as a vehicle for debate between government institutions and non-government institutions to strengthen policies for promoting children's rights, with particular emphasis on the problem of trafficking of women and children.<sup>655</sup>

Migrant children held in detention centers are the victims of physical and psychological violence according to some reports.<sup>656</sup> They are sometimes deprived of education, and leisure times and sometimes detention centers must administer medicine to calm children down.<sup>657</sup> There are three emergency centers that housed approximately 276 children.<sup>658</sup> Human Rights Watch expressed concern over lack of oversight in these

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<sup>652</sup> See *supra*, note 589.

<sup>653</sup> See *supra*, note 589.

<sup>654</sup> See *supra*, note 589.

<sup>655</sup> See *supra*, note 589.

<sup>656</sup> See Audrey Ramel, *Children of Spain: Realizing Children's Rights in Spain*, HUMANIUM, <http://www.humanium.org/en/europe-caucasus/spain/>, (last updated Nov. 6, 2011).

<sup>657</sup> See *id.*

<sup>658</sup> See *supra*, note 613.

centers, the absence of an occupancy limit, and the lack of confidential complaint mechanisms.<sup>659</sup>

*v. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)*

No relevant information found.

*vi. International Labour Organization (ILO)*

No relevant information found.

**D. Spain and Access Civil Legal Services by Immigrants**

Spain is encouraged and obligated to create meaningful access to civil legal services by many of the treaties that it has ratified. Even when the right to civil legal aid is not specifically pronounced in domestic law, the duty to provide legal aid is vital to ensure the rights guaranteed by all international and regional human rights instruments including: equality before the law, equal protection of the law, and an effective remedy by a competent tribunal for human rights violations.

The ICCPR confers upon Spain a duty to guarantee equal access to effective remedies for human rights violations. Article 2, paragraph 3 (a) ensures that “any person whose rights or freedoms as herein recognized are violated shall have an effective remedy.”<sup>660</sup> Article 26 of the ICCPR mandates that “all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>661</sup> This extends to all persons without regards to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>662</sup> Clearly the ICCPR seeks to grant migrants, regardless of legal status, equal access to protection of

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<sup>659</sup> See *supra*, note 613.

<sup>660</sup> International Covenant on Civil and Political Rights Art. 2, paragraph 3 (a).

<sup>661</sup> International Covenant on Civil and Political Rights Article 26.

<sup>662</sup> International Covenant on Civil and Political Rights Article 26.

the law and not just in the limited context of criminal actions. To truly ensure the rights protected by the ICCPR are realized equally, Spain is obligated to provide legal aid for civil matters.

The ILO protects immigrant access to civil legal services in regards to many claims related to employment. The ILO Migrant Workers Recommendations from 1975 recommend that social services should be provided to migrant workers and their families which, among other things, advocate that migrant workers and their families should “have the right to communicate with public authorities in the country of employment in their own language . . . particularly in the context of legal assistance and court proceedings.”<sup>663</sup> Furthermore, migrant workers should enjoy equal treatment with national workers as regards legal assistance to claims such as outstanding remuneration for work performed, benefits due in respect to injury suffered under employment, and in accordance with national practice irrespective of the legality of the migrant worker’s stay in the host country.<sup>664</sup>

At the end of a trial in Spain, a court has to decide which party will pay court costs during the “*condena en costas*” (order to pay costs).<sup>665</sup> Court costs include procurator and lawyer’s fees, court fees depending on the type and size of the case, costs for translation and interpretation, costs for publishing official announcements and journals, expert’s fees, and deposits required for lodging some appeals.<sup>666</sup> Normally the loser pays costs, but in civil court the claimant or defendant’s claim has to be 100%

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<sup>663</sup> See *supra*, note 571 at 24(b)

<sup>664</sup> See *supra*, note 571 at 34.

<sup>665</sup> See *Legal Aid in Spain*, (last visited Apr. 18, 2016), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/139606/legal-aid-in-spain.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/139606/legal-aid-in-spain.pdf), at 1.

<sup>666</sup> *Id* at 1.

successful in order to be awarded costs in its favor or no costs order will be made.<sup>667</sup> The awarded costs is subject to a procedure known as taxation which usually reduces the amount to one less than the real legal costs.<sup>668</sup>

In Spain, legal aid, or *asistencia jurídica gratuita*, is a right for members of the public who cannot afford trial costs.<sup>669</sup> Legal aid may cover court fees, pre-trial legal advice, procurator's fees, costs for publishing official announcements and journals, expert's fees, affidavits, lawyer's fees, and an 80% reduction in the fees for notarial deeds and certificates from the land registry.

Spanish citizens and other qualified classes may be eligible for legal aid in Spain.<sup>670</sup> All European Community citizens who have insufficient means are eligible.<sup>671</sup> The test for insufficient means an individual's total family income must not be more than twice the national minimum wage.<sup>672</sup> In addition, the individual's annual income must be less than the Public Indicator of Multiple Effects' Income<sup>673</sup> set by the government.<sup>674</sup> In 2011 the minimum wage was €641,40 per month and the Public Indicator was €532,51 per month.<sup>675</sup> Legal aid is also available to non-European Community nationals who are legally residing in Spain as well as non-Community nationals who are recognized by international treaties to have entitlement.<sup>676</sup> For criminal cases, foreign residents who can

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<sup>667</sup> *Id.*

<sup>668</sup> *Id.*

<sup>669</sup> *Id.*

<sup>670</sup> *Id.*

<sup>671</sup> *Id.*

<sup>672</sup> *Id.*

<sup>673</sup> *See What are the Limits Public Indicator of Multiple Effect Income?* MUTUA UNIVERSAL, (last visited Apr. 18, 2016), <http://www.mutuauniversal.net/en/atencion-al-usuario/faqs/faq/Que-son-los-Topes-IPREM/> ("The Indicator Income Public of Multiple Effects is an employed index in Spain as a reference for the granting of economic aids, grants, grants or the unemployment benefit among others. This index was born in 2004 to substitute to the Minimum Wage as a reference for these aids.").

<sup>674</sup> *See supra*, note 665 at 2.

<sup>675</sup> *See supra*, note 665 at 2.

<sup>676</sup> *See* [http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_spa\\_en.htm](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_spa_en.htm)

demonstrate insufficient means are entitled to legal aid even when they do not legally reside in Spain.<sup>677</sup> Furthermore, all foreign citizens who have insufficient means for litigation are entitled to legal assistance in all proceedings relative to their application for asylum regardless of their legal status.<sup>678</sup> Victims of gender violence, terrorism and human trafficking, as well as minors and mentally disabled who have been subject to abuse are all entitled to legal aid. In addition, in labor matters, any employed person regardless of nationality or means is eligible for legal aid.<sup>679</sup> Finally, public-interest associations and foundations are eligible for legal aid.<sup>680</sup>

Legal aid covers all criminal major matter proceedings including appeals and enforcement including appeals and enforcement of judgment. Minor criminal offences for which a procurator and lawyer are not required are not covered by legal aid.<sup>681</sup> Legal aid is available for all cases involving sums of over €900.<sup>682</sup> For cases involving smaller sums of money, legal aid may be granted at the discretion of the judge or court to ensure that both parties are on equal footing.<sup>683</sup> In urgent circumstances a solicitor or barrister may be temporarily appointed to represent a party subject to later procedures to determine if the party in fact was eligible for legal aid.<sup>684</sup>

## ***Conclusion***

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<sup>677</sup> <http://www.mjusticia.gob.es/cs/Satellite/Portal/en/servicios-ciudadano/tramites-gestiones-personales/asistencia-juridica-gratuita>

<sup>678</sup> See *Legal Aid – Spain*, European Judicial Network, (last updated Jan. 22, 2007), <http://www.mjusticia.gob.es/cs/Satellite/Portal/en/servicios-ciudadano/tramites-gestiones-personales/asistencia-juridica-gratuita>.

<sup>679</sup> *Id.*

<sup>680</sup> *Id.*

<sup>681</sup> See *supra*, note 665 at 2.

<sup>682</sup> *Supra*, note 678.

<sup>683</sup> *Supra*, note 678.

<sup>684</sup> *Supra*, note 678.

Overall Spain has done a fair job of ratifying and complying with international treaties and obligations in regards to migrant rights. Considering the very high relative proportion of migrants in Spain, the rights of both regular and irregular migrants are reasonably well insured by Spanish policies. Spain should continue to improve the rights of migrants even in the face of economic recession.

## **V. Comparison of the United States, Canada, and Spain Human Rights Performance**

The United States, Canada, and Spain are the most popular destinations for Mexican migrants. Currently, there are 11.6 million Mexican migrants in the United States, about 70,000 Mexican migrants living in Canada, and nearly 50,000 Mexican migrants have settled in Spain.

The United States, Canada, and Spain have not signed or ratified the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (“ICMW”). While all three of these countries have not yet signed the ICMW, each has entered into several international human rights treaties that are applicable to migrants. The following table includes a summary of these treaties and the degree to which they refer to migrants:

**Table 4.**<sup>685</sup>

Treaty	Conclusions referring to migrants	Percentage of conclusions referring to migrants
ICCPR	62	46%
ICERD	114	43%
CEDAW	109	66%
CRC	155	71%
OAS treaties	Unknown	Unknown
ILO directives	Unknown	Unknown

Specifically, each treaty signed by the United States, Canada, and/or Spain provides a variety of different rights to immigrants living in these countries. The following table provides a visual summary of migrant rights broadly afforded under the international and regional treaties discussed in this paper:

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<sup>685</sup> This table is adapted from the following article: Slinckx, Isabelle, *The UN Treaty Monitoring Bodies and Migrant Workers: a Samizdat* 9, (Nov. 2004), available at [http://portal.unesco.org/shs/es/files/6959/11031941751The\\_UN\\_Treaty\\_Monitoring\\_Bodies\\_and\\_Migrant\\_Workers.pdf/The+UN+Treaty+Monitoring+Bodies+and+Migrant+Workers.pdf](http://portal.unesco.org/shs/es/files/6959/11031941751The_UN_Treaty_Monitoring_Bodies_and_Migrant_Workers.pdf/The+UN+Treaty+Monitoring+Bodies+and+Migrant+Workers.pdf)

**Table 5.**<sup>686</sup>

	ICCPR	ICERD	CEDAW	CRC	ILO	OAS Charter & Declaration
Right to work; Right to favorable working conditions		Article 5(e-1)	Article 11(1-a, 1-b, 1-b, 2), and Article 16(G)	Article 32 (1, 2-A, 2-b, 2-c), Article 36	C187- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) <sup>687</sup>	Charter, Article 34(g), 45; Declaration, Chapter One, Article XIV
Prohibition against forced labor and trafficking	Article 8		Article 6	Article 11, 32, 34, 35, 36	C026 – Forced Labour Convention, 1930 (No. 29) <sup>688</sup>	
Right to non-discrimination, Equality before the law	Articles 2(1), 3, 26. General comment 15	Articles 2(1), 5, General Recommendations 30 and 31	Articles 2, 9-16	Articles 2(1), 2(1)	C111- Discrimination (Employment and Occupation) Convention, 1958 (No. 111) <sup>689</sup>	Charter, Article 10, 16, 34, 45; Declaration Chapter One, Article II
Right to family reunification				Article 9, 10(1), 22(2).		

Of the core human rights treaties discussed above, the United States has only ratified two international treaties, has ratified 14 out of 189 ILO Conventions, and has not ratified any of the OAS regional human rights treaties. Comparatively, Canada has ratified four of the core international treaties, has ratified 34 out of a possible 189 ILO Conventions, and has ratified several additional OAS regional human rights treaties. Lastly, Spain has ratified four of the core international human rights treaties, has ratified 133 of a possible 189 ILO Conventions, and has ratified five of ten regional human rights treaties of the European Council. Table 6 provides an overview of the seven core human rights treaties and the United States, Canada, and Spain's participation.

<sup>686</sup> See Grange, Mariette, *Strengthening Protection of Migrant Workers and their Families with International Human Rights Treaties: a Do-it-yourself Kit* 30-49, (Mar. 2006), available at [https://www.iom.int/sites/default/files/our\\_work/ICP/IDM/ICMC-Strengthening-Protection-of-Migrant-Workers-and-Their-Families.pdf](https://www.iom.int/sites/default/files/our_work/ICP/IDM/ICMC-Strengthening-Protection-of-Migrant-Workers-and-Their-Families.pdf)

<sup>687</sup> C187- Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312332](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO:12100:P12100_INSTRUMENT_ID:312332)

<sup>688</sup> C029- Forced Labour Convention, 1930 (No. 29), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312174:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312174:NO)

<sup>689</sup> C111- Discrimination (Employment and Occupation) Convention, 1958 (No. 111), INTERNATIONAL LABOUR ORGANIZATION: INTERNATIONAL LABOUR STANDARDS, [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312256:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312256:NO)

**Table 6.**

Treaty	United States	Canada	Spain
International Covenant on Civil and Political Rights (“ICCPR”)	Ratified: 9 June 8 1992	Ratified: 19 May 1976	Ratified: 27 Apr 1977
Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)	Signed: 17 July 1980	Ratified: 10 Dec 1981	Ratified: 5 Jan 1984
International Convention in the Elimination of All Forms of Discrimination (“CERD”)	Ratified: 21 October 1994	Ratified: 14 October 1970	Ratified: 13 Sep 1968
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (“ICMW”)	Not Signed or Ratified	Not Signed or Ratified	Not Signed or Ratified
Convention on the Rights of the Child (“CRC”)	Signed: 16 February 1995	Ratified: 13 Ratified: Dec 1991	Ratified: 6 Dec 1990
OAS Charter (Canada and United States)	Ratified: 15 June 1951	Ratified: 20 Dec 1989	Ratified 5 of then human rights treaties
European Council and European Court of Human Rights			
International Labour Organization (“ILO”)	Member	Member	Member

Furthermore, key indices comment on the United States, Canada, and Spain’s human rights performance. In considering the United States, Canada, and Spain’s treaty ratifications and compliance, the NCHR Index ranked the United States commitment to human rights at the bottom of the scale, Canada’s commitment to human rights in the middle of the scale, and Spain’s commitment to human rights at good to medium. Additionally, the Maplecroft Human Rights Index assigned the United States a medium risk of committing human rights offenses and Canada a low risk for human rights violations.

Overall, despite the United States role in launching international and regional human rights systems, the United States has failed to join the international endeavor to enforce these rights. Comparatively, Canada and Spain’s human rights performance as it relates to migrants is above average compared to other nations, although there is room for improvement.

## **Conclusion**

It is clear that, while many migrant rights are being protected by treaties that Canada, Mexico, and the United States have signed, each country has significant protections to improve upon. Signing and ratification of human rights treaties certainly increase the likelihood of human rights being protected, but they do not ensure it. RUDs may further undermine the effectiveness of a treaty. Conversely, just because a country has not ratified a treaty, does not mean the tenants of that treaty aren't being followed in that country.

Despite the many challenges countries face in providing human rights protections to migrants, they should continue to make every effort to increase the services they provide and migrants' access to those services. Countries should also work to improve the standing of treaties by following the ones they have signed, ratifying ones with which they agree, and showing a genuine commitment to the human rights of migrants.