

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

Rasika Jayasuriya and Brian Opeskin

Corresponding author:

Professor Brian Opeskin ([brian.opeskin@mq.edu.au](mailto:brian.opeskin@mq.edu.au))

Macquarie University, Sydney NSW 2109, Australia

## ABSTRACT

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

**KEYWORDS:** children left behind; domestic workers; human rights; migration; mothers; rights of the child; Sri Lanka.

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‘The prolonged absence of migrant domestic workers negatively affects the family unity ... and also often results in violations of the rights of their children who have remained in the country of origin.’ (UN Committee on Migrant Workers)<sup>1</sup>

## I. INTRODUCTION

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

### a. *The Global Context of Migrant Domestic Work*

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

One migration stream that has received considerable recent attention is the rise of large-scale labor migration of domestic workers. Migrant domestic workers (hereafter abbreviated to MDWs) lie at the intersection of two larger groups—‘migrant workers’, who are persons engaged in a remunerated activity outside the State of their nationality;<sup>4</sup> and ‘domestic workers’, who are persons who perform work within an employment relationship in other

<sup>1</sup> Committee on Migrant Workers, *General Comment No 1: Migrant Domestic Workers*, UN Doc CMW/C/GC/1 (23 February 2011), [15].

<sup>2</sup> United Nations Population Division, 'Trends in International Migration Stock: The 2013 Revision' (UN Department of Economic and Social Affairs, 2013), Tables 1, 3.

<sup>3</sup> United Nations Development Programme, 'Human Development Report 2009: Overcoming Barriers-Human Mobility and Development' (UNDP, 2009), 21.

<sup>4</sup> A definition is found in *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), Art 2(1).

people's private homes.<sup>5</sup> A typical MDW (usually a woman) is thus someone who migrates from her country of nationality to work in a private home in another country, performing various tasks such as cooking, cleaning, and caring for children or the elderly.

Estimating the scale of MDWs globally is challenging because of the need for common definitions, reliable national data, and acceptable methods for aggregating them. It is possible to get some insight into the issue by considering the larger phenomenon of domestic workers generally. Credible estimates by the International Labour Organization (ILO), based on data from 117 countries, suggest that the size of the domestic work sector is large and growing.<sup>6</sup> The ILO conservatively estimates that at least 52.6 million men and women were employed as domestic workers across the world in 2010, accounting for 3.6 per cent of global wage employment. This was a 58 per cent increase on the number of domestic workers 15 years prior, reflecting not only an upward trend in population and employment, but a growing share of domestic workers as a percentage of total employment.<sup>7</sup>

Domestic work is heavily gendered. Although some men are employed in private households (mostly as gardeners, chauffeurs and security guards), women account for 83 per cent of global domestic workers. This makes domestic work a significant source of employment for women, who often face greater obstacles than men in finding paid work.<sup>8</sup> This is true also in the Middle East—a region of special importance to this study—where 63 per cent of the 2.1 million domestic workers are women, and where one-in-five employed females are engaged as domestic workers. While these figures relate to domestic workers as a whole and not the subset of MDWs, the ILO has observed that 'domestic work is closely interlinked with international migration'.<sup>9</sup> Its data do not permit reliable estimates of the share of migrants among domestic workers, but country-specific examples show that it can be substantial.

One of the reasons for the size and growth of MDWs is the encouragement given to this migration stream by many developing countries. Remittances sent home by migrant workers lead to greater investment in health, education and small business, which has macroeconomic benefits in their home country beyond the advantages that accrue to them as individuals. In 2014, officially recorded remittance flows to developing countries were projected to reach US\$435 billion, three times larger than the total amount of official development assistance (foreign aid).<sup>10</sup> The most populous countries receive the largest remittance flows in absolute terms (e.g. India, China and the Philippines) but smaller countries are more dependent on these external funds—in 2013, remittances accounted for 20 per cent or more of GDP in nine

<sup>5</sup> See the definition in Committee on Migrant Workers, *General Comment No 1: Migrant Domestic Workers*, UN Doc CMW/C/GC/1 (23 February 2011), [5].

<sup>6</sup> International Labour Office, 'Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection' (International Labour Office, 2013), 19–39.

<sup>7</sup> *ibid*, 24.

<sup>8</sup> *ibid*, 19.

<sup>9</sup> *ibid*, 21.

<sup>10</sup> World Bank, 'Migration and Development Brief No. 23' (World Bank, Migration and Remittances Team, 2014), 3.

countries.<sup>11</sup> Many developing countries are therefore heavily invested in generating and sustaining a stream of MDWs to countries that demand this type of low-skilled labor.

### *b. Sri Lanka as a Case Study*

Sri Lanka offers a useful context in which to understand the impact of this migration phenomenon and is used as a case study in this article. Sri Lanka is one of the main source countries for MDWs in the Middle East, where visa and employment conditions are some of the most restrictive in the world and significantly limit the right of children to family unity. It thus serves as a microcosm of many of the problems that arise for children left behind after their mothers migrate for employment abroad. However, Sri Lanka is not unique in this respect: a recent study has identified similar issues in Eastern Europe, where migrant parents have left behind 100,000 children in Moldova and 200,000 in Ukraine.<sup>12</sup>

Sri Lanka is a country of some 20.7 million people in the Indian Ocean, south-east of India.<sup>13</sup> In 2014, the United Nations Development Programme assessed the country as one of 'high human development', with a human development index of 0.75 (in a range 0–1), giving it a global ranking of 73 of 187 countries.<sup>14</sup> This signals significant progress over the past decades, but Sri Lanka is still very much a developing country.<sup>15</sup> Although it ranks well on some specific population health measures, the country is marked by low public expenditures on health as a percentage of GDP (ranking 173 of 187 countries) and on education (151 of 157 countries).<sup>16</sup> Sri Lanka's population remains largely rural (only 15 per cent live in urban centers), and agriculture accounts for nearly one-third of its labor force.

The Sri Lankan Government has long encouraged the migration of domestic workers, with large-scale migration to the Middle East steadily increasing since the 1980s 'as part of a deliberate strategy to alleviate poverty, reduce unemployment and generate access to hard currency'.<sup>17</sup> Migrant labor is now considered the principal source of foreign exchange in Sri Lanka. The World Bank has estimated that in 2014 Sri Lanka received some US\$7,202 million in official remittances, reflecting an exponential growth since the early 2000s.<sup>18</sup> This is equivalent to 9.6 per cent of the country's GDP, 86 per cent of its foreign reserves, and 50 per cent of its imports,<sup>19</sup> underpinning the claim that, financially, MDWs have been one of Sri

<sup>11</sup> *ibid*, 5. The countries are: Tajikistan 42%, Kyrgyz Republic 32%, Nepal 29%, Moldova 25%, Lesotho 24%, Samoa 24%, Haiti 21%, Armenia 21% and The Gambia 20%.

<sup>12</sup> Liza Yanovich, 'Children Left Behind: The Impact of Labor Migration in Moldova and Ukraine' (2015) (23 January) *Migration Information Source: Migration Policy Institute* 1.

<sup>13</sup> Population Reference Bureau, '2014 World Population Data Sheet' (Population Reference Bureau, 2014), 10.

<sup>14</sup> United Nations Development Programme, 'Human Development Report 2014: Sustaining Human Progress: Reducing Vulnerabilities and Building Resilience' (UNDP, 2014), Table 1, 160–63.

<sup>15</sup> In 1980, Sri Lanka's HDI was 0.569: *ibid*, 165 (Table 2).

<sup>16</sup> *ibid*, 189 (Table 8); and 193 (Table 9).

<sup>17</sup> Elizabeth Frantz, 'Jordan's Unfree Workforce: State-Sponsored Bonded Labour in the Arab Region' (2013) 49(8) *Journal of Development Studies* 1072, 1075.

<sup>18</sup> World Bank, *Annual Remittance Data, Inflows (updated as of October 2014)*.

<sup>19</sup> *ibid*; World Bank, above n 10, 10.

Lanka's most successful exports.<sup>20</sup> When account is also taken of the large sums of money sent to Sri Lanka through informal channels, the significance of foreign employment to the Sri Lankan economy cannot be gainsaid.<sup>21</sup>

It is estimated that the stock of Sri Lankans working abroad across all sectors exceeds 1.7 million people, with over 282,000 departing in 2012 alone—the highest number of annual departures on record since 1986.<sup>22</sup> There are clear demographic patterns to this migration stream.

- With respect to *gender*, for over two decades (1988–2007) the number of female departures for foreign employment greatly exceeded the number of male departures (in the early 1990s there were approximately three female departures for every male departure), giving Sri Lanka one of the highest rates of female migration per capita in the world.<sup>23</sup> Over the past few years, the gender composition of emigrants has returned to near-parity.<sup>24</sup>
- With respect to *age*, 59 per cent of Sri Lankan women migrate before 35 years of age, and are thus of 'reproductive, child bearing and child caring age'.<sup>25</sup> As noted by the UN Committee on the Rights of the Child in 2010, most of the more than one million women migrants from Sri Lanka leave behind children, half of whom are under six years old.<sup>26</sup>
- With respect to *occupation*, 42 per cent of all departing migrant workers in 2012 fell in the category of 'housemaids' (119,052 of 282,331 departures). This is a smaller proportion than previous years because there has been a steady rise over time in the number of male migrant workers, who are employed in other sectors. However, domestic work still accounts for the lion's share of women's foreign employment—86 per cent of the 138,547 departing female migrants in 2012 were housemaids, signaling the overwhelming domestic nature of the low-skilled work performed by female labor migrants from Sri Lanka.
- With respect to *destination*, 93 per cent of Sri Lanka's migrant workers are employed in the Middle East, primarily in four destination countries—Saudi Arabia, Qatar, Kuwait and the United Arab Emirates (UAE).<sup>27</sup> This tight geographic locus is reflected in the origin of remittances, which come predominantly from the six Gulf Cooperation Council (GCC) countries (i.e. Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and UAE) and other countries in the Middle East.

<sup>20</sup> Frantz, above n 17, 1076.

<sup>21</sup> Committee on Migrant Workers, *Concluding Observations: Sri Lanka*, 11th Session, UN Doc CMW/C/LKA/CO/1 (14 December 2009), [35]–[36].

<sup>22</sup> Sri Lanka Bureau of Foreign Employment, 'Annual Statistical Report of Foreign Employment 2012' (Ministry of Foreign Employment Promotion and Welfare, 2012), 3; Sri Lanka Ministry for Foreign Employment Promotion and Welfare, 'Migration Profile: Sri Lanka' (SLBFE, IOM and IPS, 2013), 13.

<sup>23</sup> Frantz, above n 17, 1076.

<sup>24</sup> For a detailed breakdown, see Sri Lanka Bureau of Foreign Employment, above n 22, Table 11.

<sup>25</sup> International Labour Organization, 'Reintegration with Home Community: Perspectives of Returnee Migrant Workers in Sri Lanka' (ILO, 2013), 10.

<sup>26</sup> Committee on the Rights of the Child, *Concluding Observations: Sri Lanka*, UN Doc CRC/C/LKA/CO/3-4 (19 October 2010), [44].

<sup>27</sup> Sri Lanka Bureau of Foreign Employment, above n 22, 'Country Basis Phase 1'.

As with all migrant workers, intersecting factors drive Sri Lankan women to leave their families for low-skilled jobs overseas. These include family poverty, unemployment and underemployment, a desire to access better healthcare and education for their families, and the need to repay debts.<sup>28</sup> Women in Sri Lanka have a significantly higher unemployment rate than men (6.4 per cent compared to 2.8 per cent) and labor force participation of women is less than half the rate of men (34.7 per cent compared to 74.4 per cent).<sup>29</sup> With a rising cost of living, many low-skilled women see no alternative but to migrate to support their families. In a 2007 study of Sri Lankan MDWs in the Middle East, nearly all 'cited financial necessity as a reason for their decision to migrate and said they had no option other than to migrate for work'.<sup>30</sup> Having typically lower levels of education than men,<sup>31</sup> these low-skilled women are not only hindered in their ability to source employment within Sri Lanka but are often ineligible for alternative migration streams such as skilled or student migration.

### *c. The Impact of Maternal Migration on Children Left Behind*

The economic benefits of migration often come at a social price. The women who migrate for domestic work tend to be of child-bearing age. Many already have children, but they are generally not permitted to travel abroad with their mothers because of visa restrictions in the receiving country. The rapid growth in low-skilled female labor migration thus has significant implications for families in developing countries, giving rise to a 'deprived generation' of young people in all major source countries.<sup>32</sup>

The harms experienced by children left behind include disruption to family relations, diversion from education as children are pressured into domestic roles formerly discharged by the absent parent, psychosocial effects of loneliness and abandonment, and heightened risk of child labor or abuse from alternative carers. A study commissioned by the Sri Lankan Government on the psychosocial issues arising from labor migration noted that a mother's migration for two or more years seriously affected a child's personality development.<sup>33</sup> Another study of 400 children found that 'the love, attention and proximity of the mother were not replaced by even the best caregivers' in the estimation of the children, with 77 per cent experiencing loneliness due to the absence of the mother.<sup>34</sup>

Similar views about the social costs of labor migration can be heard from both mothers and

<sup>28</sup> Stuart Rosewarne, 'Temporary International Labor Migration and Development in South and Southeast Asia' (2012) 18(2) *Feminist Economics* 63, 71; Nicola Piper, 'Contributions of Migrant Domestic Workers to Sustainable Development' (UN Women, 2013), 15.

<sup>29</sup> Department of Census and Statistics, 'Sri Lanka Labour Force Survey, Quarterly Report 2013, Fourth Quarter' (Ministry of Finance and Planning, 2013), v (population 15 years and over).

<sup>30</sup> Human Rights Watch, 'Exported and Exposed: Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates' (Human Rights Watch, 2007), 12.

<sup>31</sup> *ibid*, 14–15.

<sup>32</sup> Piper, above n 28, 29.

<sup>33</sup> S Hettige et al, 'Understanding Psychosocial Issues Faced by Migrant Workers and their Families' (Ministry of Foreign Employment Promotion and Welfare, 2012), 20.

<sup>34</sup> Save the Children in Sri Lanka and Kishali Pinto-Jayawardena, 'Left Behind, Left Out: The Impact on Children and Families of Mothers Migrating for Work Abroad' (Save the Children in Sri Lanka, 2006), 16.

children. From the viewpoint of mothers, it is telling that in a Sri Lankan survey of 400 families of female MDWs in 2008, almost half the mothers said they would advise other Sri Lankan women against working overseas.<sup>35</sup> The reasons they gave were that the social costs outweighed the economic benefits; children needed their mothers; and family disruption was a big cost, as was the suffering experienced abroad because of separation from children. From the viewpoint of children, consultations in high labor migration provinces in Sri Lanka in 2013 identified that one of the top seven priorities for children is not having their mothers migrate.<sup>36</sup> As the report states, '[m]any children expressed that being with their mother and enjoying her love and affection is far more important than the wealth from abroad.'<sup>37</sup> In a similar vein, the study of 400 Sri Lankan households in 2008 found that despite recognizing that their mother's sacrifice was for the collective interest of the family, and despite the efforts of their mothers to communicate with and visit their children regularly, children still wanted their mothers to return.<sup>38</sup>

Undeniably, such issues can arise from *any* parental migration, but country studies suggest, on theoretical and empirical grounds, that children are more likely to be adversely impacted when their mothers migrate<sup>39</sup> and that maternal absence is more detrimental than paternal absence.<sup>40</sup> This is because, if the mother is present in the household, she will generally be the primary caregiver, which 'closely reflects the general pattern of care giving of children across Sri Lanka and in most Asian countries'.<sup>41</sup> Despite the fact that the extended family structure in Sri Lanka offers 'ample opportunities for a child to develop stable, warm relationships with other family members', research also shows that 'the child's relationship with the mother remains a very special one and that long-term separations from the mother could result in some emotional deprivation'.<sup>42</sup> Studies from the Philippines demonstrate that the adverse impact of maternal migration on children is often associated with 'distress migration', namely, the migration of mothers from poorer households for employment abroad in the lower-paid and largely unprotected domestic work sector.<sup>43</sup> In consequence, government programs that encourage remittances by promoting the migration of women for low-skilled domestic work abroad

<sup>35</sup> Swarna Ukwatta, 'Sri Lankan Female Domestic Workers Overseas: Mothering their Children from a Distance' 27 *Journal of Population Research* 107, 122.

<sup>36</sup> Save the Children, "'The World We Want': Consultations with Sri Lankan Children on Their Priorities for Post 2015' (Save the Children, 2013), 5–10, 19–25.

<sup>37</sup> *ibid*, 20.

<sup>38</sup> Ukwatta, above n 35, 120.

<sup>39</sup> David Cox, 'Children of Migrant Workers: A Family Relationship Issue' in Graziano Battistella and Cecilia Conaco (eds), *Children and Migration: A New Challenge for World-Wide Social Services* (International Social Service Hong Kong Branch, 1990) 55, 57.

<sup>40</sup> Aree Jampaklay, 'Parental Absence and Children's School Enrolment: Evidence from a Longitudinal Study in Kanchanaburi, Thailand' (2006) 2(1) *Asian Population Studies* 93.

<sup>41</sup> Kusala Wettasinghe, Gethsie Shanmugam and Sarala Emmanuel, 'Alternative Care Giving of Migrant Workers' Children' (Terre des Hommes, 2012), 32. Similar social structures have been observed in Eastern Europe: see Yanovich, above n 12.

<sup>42</sup> Swarna Jayaweera and Malsiri Dias, 'Sri Lanka: Gender Roles and Support Networks of Spouses of Migrant Workers' in International Organization for Migration (ed), *Gender and Labour Migration in Asia* (IOM, 2009) 43, 48–9.

<sup>43</sup> CHAMPSEA Philippines, 'In the Wake of Parental Migration: Health and Well-being Impacts on Filipino Children' (Scalabrini Migration Center, 2011), 37.

challenge the human rights principle that, in actions concerning children, ‘the best interests of the child shall be a primary consideration’.<sup>44</sup>

It needs to be acknowledged that maternal migration does not *necessarily* impact adversely on children left behind—in some instances the well-being of children may be enhanced by their mother’s employment abroad. Some studies have shown that financial resources from remittances can result in increased schooling, improved child health and reduced child labor among poor families.<sup>45</sup> Nevertheless, children’s vulnerability generally stems from their age and their related stage of emotional, psychological and physical development. For each child, the effect of separation from their mother, who is often their primary caregiver, will vary according to the presence or absence of protective factors that contribute to a child’s resilience; specific care arrangements; and the support given to their carers.

The need to consider individual circumstances when assessing risk to children left behind is reflected in the conceptual framework adopted in a UNICEF commissioned study on the impact of labor migration on children in Tajikistan. It recognizes characteristics of individuals (age, gender and ability), households (size, structure, division of roles, education levels, labor capacity, income and attitudes) and the broader social context (livelihood options, societal values and service provision) as key factors affecting the impact of parental migration.<sup>46</sup> It also identifies elements of the migration experience that affect outcomes for the child, such as remittance levels, duration and frequency of migration, and level of communication with the parent abroad.<sup>47</sup> Similar factors were identified in the Child Health and Migrant Parents in South-East Asia (‘CHAMPSEA’) study of children under 12 years of age conducted in the Philippines, Indonesia, Thailand and Vietnam between 2008 and 2010.<sup>48</sup>

A child’s age at the time of a parent’s migration is a significant consideration, given the different needs of infants, young children and adolescents. The UN Committee on the Rights of the Child has defined young children as those under eight years of age and recognized that ‘[y]oung children are especially vulnerable to adverse consequences of separations because of their physical dependence on and emotional attachment to their parents/primary caregivers. They are also less able to comprehend the circumstances of any separation.’<sup>49</sup> Harvard University’s Center on the Developing Child has found that significant adversity can impair

<sup>44</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Art 3(1).

<sup>45</sup> Francisca Antman, 'The Impact of Migration on Family Left Behind' (Institute for the Study of Labor, 2012); Graziano Battistella and Cecilia Conaco, 'The Impact of Labour Migration on the Children Left Behind: A Study of Elementary School Children in the Philippines' (1998) 13(2) *Sojourn: Journal of Social Issues in Southeast Asia* 220; Oxford Policy Management, 'Impact of Labour Migration on “Children Left Behind” in Tajikistan' (UNICEF, 2011); Pablo Acosta, 'Labor Supply, School Attendance, and Remittances from International Migration: The Case of El Salvador, Policy Research Working Paper 3903' (World Bank, 2006).

<sup>46</sup> Oxford Policy Management, above n 45, ix.

<sup>47</sup> *ibid.*

<sup>48</sup> CHAMPSEA Philippines, above n 43, 2–4.

<sup>49</sup> Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood*, 40th sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006), [18].

development, particularly in the first three years, and can have a lifelong and ‘cumulative toll on an individual’s physical and mental health’.<sup>50</sup> Adversity can include prolonged separation from a mother (likely to be the child’s primary source of attachment) during infancy and early childhood,<sup>51</sup> which are critically formative stages of development in which strong physical and emotional nurturing is necessary for a child’s healthy growth and long-term well-being.<sup>52</sup>

Another factor affecting the impact of maternal migration is the extent to which children are actively involved in discussions about the proposed migration. An ILO study of 2,000 returnee migrant workers in Sri Lanka, of whom 76 per cent were women, found that only 10 per cent involved their children in discussions about employment abroad prior to migrating.<sup>53</sup> The study noted that lack of communication can lead to children feeling neglected and abandoned, resulting in frustration and possible anti-social behavior.<sup>54</sup> Other studies confirm that children are rarely consulted and sometimes not even informed when their mothers migrate for an extended period, which can leave children ‘bewildered, confused, and very distressed’, with only their own interpretations as to why their mother left, which often focus on self-blame.<sup>55</sup> Child rights organisations have thus recommended that parents and alternative care givers in Sri Lanka be educated about involving children in decision-making about parental migration and care arrangements, enhancing their understanding and preparation for separation from their parent.<sup>56</sup>

Studies also recognize the important role of the extended family, with a study from the Philippines finding that the extent of disruption to the development of children left behind ‘depends mostly on the degree of involvement of the extended family in complementing what is lacking due to parental absence’.<sup>57</sup> A Sri Lankan study also found that extended families and grandparents protected children by helping them to cope with the effects of their mother’s migration.<sup>58</sup>

In summary, the adverse impacts of maternal migration on children left behind have been corroborated by numerous studies in different localities, at different periods of time, using different research methodologies. They confirm what seems self-evident to many, namely, the vulnerability of children, particularly the young, to disruptions in their physical and emotional

<sup>50</sup> Center on the Developing Child, *In Brief: The Impact of Early Adversity on Children's Development* Harvard University <[www.developingchild.harvard.edu](http://www.developingchild.harvard.edu)>, 2.

<sup>51</sup> Wettasinghe, Shanmugam and Emmanuel, above n 41, 93.

<sup>52</sup> Save the Children in Sri Lanka and Pinto-Jayawardena, above n 34, 10.

<sup>53</sup> International Labour Organization, above n 25, 12.

<sup>54</sup> *ibid*, 12.

<sup>55</sup> Hettige et al, above n 33, 30–31.

<sup>56</sup> Wettasinghe, Shanmugam and Emmanuel, above n 41, 9. This type of involvement by children is in line with the principle established in Art 12(1) of the Convention on the Rights of the Child, namely, that children who are capable of forming their own views have the right to express their views freely in matters that affect them, and that those views should be given due weight in accordance with their age and maturity.

<sup>57</sup> Battistella and Conaco, above n 45, 237–8.

<sup>58</sup> BCV Senaratna, H Perera and P Fonseka, 'Mental Health Status and Risk Factors for Mental Health Problems in Left-Behind Children of Women Migrant Workers in Sri Lanka' (2011) 56 *Ceylon Medical Journal* 153, 157.

attachments to intimate caregivers. However, harm is not a universal experience of children left behind, and the nature and degree of any detriment will depend on the individual circumstances in which they are placed.

#### *d. Structure of this Article*

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

To this end, Part II examines the legal and policy frameworks that govern the rights of children left behind. International law provides a dense network of norms that speak to the protection of all children. At the domestic level, constitutional law, national legislation and government policies provide additional contexts for protecting these rights. Part III considers the children's rights that are most impacted by conduct occurring in the *sending* State. These include the rights to family unity, education and health, and the right to be free from child labor and abuse. Part IV examines the children's rights that are most impacted by conduct occurring in *receiving* States, although the effects are felt in sending States where the children are left behind. In this context, the impact on the children left behind is derivative in the sense that it is the violation of the human rights of migrant workers themselves that may impact adversely on their children left behind. Examples include restrictions on the ability of migrant mothers to communicate, visit or reunite with their sons and daughters. The derivative nature of these claims arises from the circumstance that human rights generally operate on a territorial basis,<sup>59</sup> and the children relevant to this study are, by definition, outside the territory of the receiving state.

Part V examines the ways in which international law and institutions can be utilized to advance the rights of children left behind by MDWs. However, the United Nations system often fails to achieve its proclaimed objectives because of the unwillingness of States to ratify relevant treaties or to implement them when they have been ratified. Nevertheless, a number of States have adopted domestic practices that address concerns raised in this article, and these form best practice models that are addressed in Part VI. Among the noteworthy practices of receiving States, we consider those that promote reunification of migrant families through permanent resettlement (such as Canada's Caregiver Program); and those that encourage circular migration as a means of balancing the labor demands of receiving States with the human needs of migrants

<sup>59</sup> Article 2(1) of the ICCPR stipulates that each State Party undertakes to respect and ensure the Covenant rights 'to all individuals within its territory and subject to its jurisdiction'. The final words suggest that States must also respect human rights extraterritorially if a person is nevertheless subject to the State's effective control, but they do not create obligations for States where there is neither territoriality nor control. See Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law* (Oxford University Press, 2nd ed, 2014), 129–38; Ralph Wilde, 'Legal "Black Hole"? Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2005) 26 *Michigan Journal of International Law* 739.

and their families. Among the noteworthy practices of sending States, we consider the leverage exerted by States such as the Philippines in bilateral negotiations with receiving States; and longer-term measures to convert low-skilled migration streams (such as domestic work) into skilled streams (such as nursing), where the risks of human rights violations are much reduced. A promising site for future developments is the regional consultative processes that include labor sending and receiving States. A brief conclusion is presented in Part VII.

## II. THE LEGAL AND POLICY FRAMEWORK

### a. *International Law*

#### International Bill of Rights

The fundamental position of the family is enshrined in international human rights law. What is commonly referred to as the International Bill of Rights—the *Universal Declaration of Human Rights* (1948) (UDHR), the *International Covenant on Civil and Political Rights* (1966) (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR)—identify the family as being ‘the natural and fundamental group unit of society’.<sup>60</sup> Article 16(3) of the UDHR and Art 23(1) of the ICCPR recognize that the family unit is ‘entitled to protection by society and the State’, while Art 10(1) of the ICESCR states that the family should be accorded the widest possible protection and assistance, ‘particularly for its establishment and while it is responsible for the care and education of dependent children’. In explicating the rights of the family, the UN Human Rights Committee has stated that:

‘The right to found a family implies, in principle, the possibility to procreate and live together ... the possibility to live together implies the adoption of appropriate measures, both at the internal level and as the case may be, in cooperation with other States, to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.’<sup>61</sup>

The special needs of children are also recognized in Art 25(2) of the UDHR, which specifies that ‘[m]otherhood and childhood are entitled to special care and assistance’, and in Art 24(1) of the ICCPR, which states that ‘[e]very child shall have ... the right to such measures of protection as are required by his status as a minor’. In interpreting the rights of the child under the ICCPR, the UN Human Rights Committee has recognized that ‘[r]esponsibility for guaranteeing children the necessary protection lies with the family, society and the State’, and

<sup>60</sup> *Universal Declaration of Human Rights*, GA Res 217A (III), UN Doc A/810 (10 December 1948), Art 16(3); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), Art 23(1); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), Art 10(1). The Covenants have been widely adopted, with 168 and 163 State parties, respectively.

<sup>61</sup> Human Rights Committee, *General Comment No 19: Article 23 (The Family)*, 39th sess (1990), [5].

while the Committee primarily allocates this responsibility to the family (particularly the parents), it indicates the importance of States being held accountable for ‘how society, social institutions and the State are discharging their responsibility to assist the family in ensuring the protection of the child’.<sup>62</sup> Article 10(3) of the ICESCR also recognizes the need for special measures of protection and assistance to be taken on behalf of children and young people, which includes being ‘protected from economic and social exploitation’, and a child’s right to education is embodied in Art 13 of this Covenant. These specific rights are discussed further in Part III.

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

### Specialized conventions

The International Bill of Rights is complemented by three specialized conventions of particular relevance to the children of MDWs: the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) (CEDAW), the *Convention on the Rights of the Child* (1989) (CRC), and the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* (1990) (ICRMW).<sup>63</sup> As explained by the UN Committee on the Rights of the Child, these specialized conventions operate in conjunction with the other major human rights treaties given the ‘indivisibility and interdependence’ of the human rights specified in each instrument.<sup>64</sup> Together, they provide an internationally accepted set of norms to guide State practice in protecting the rights of children who are most at risk of harm. The ratification status of these specialized conventions is set out for relevant States in Table 1.

These norms include the principle that the best interests of the child must be a primary consideration in all actions and decision-making concerning children; that States should take ‘appropriate measures to ensure the protection of the unity of the families of migrant workers’; and (in recognizing the common responsibility of women and men in the upbringing and development of their children) that it be ‘understood that the interest of the children is the primordial consideration in all cases’.<sup>65</sup> Oftentimes, these specialized conventions do not establish new rights for the children of MDWs, but restate standards established in the International Bill of Rights, serving to ‘codify and elaborate on the specificities of application

<sup>62</sup> Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child)*, 35th sess (1989), [6].

<sup>63</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003).

<sup>64</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003), [17] and Annex 1.

<sup>65</sup> Art 3 CRC; Art 44 ICRMW; and Art 5(b) CEDAW, respectively.

of international human rights law to these vulnerable categories’—children, women and migrant workers.<sup>66</sup>

The specialized human rights treaties have attracted very different levels of support from States through ratification and implementation. CEDAW and the CRC have been ratified by nearly the entire international community (188 and 194 State parties, respectively), whereas the ICRMW has only 47 State parties, most of which are source countries and thus not the States in which migrant protection is most keenly needed. Thus, the UN Committee on Migrant Workers has commented that the fact that many countries employing Sri Lankan migrant workers are not yet parties to the ICRMW is an obstacle to the enjoyment by those workers of their rights under the Convention.<sup>67</sup> The different attitudes of States towards the ICRMW highlights the imbalance between labor-sending and labor-receiving countries in the commitment to the rights of migrant workers.

Reasons for the failure of States to ratify the ICRMW include its breadth and complexity, the financial obligations it places on States, the view that it contradicts or adds no value to existing national migration laws, and concerns (not always justified) that it grants to migrants, particularly those with irregular status, rights that do not exist in other human rights treaties.<sup>68</sup> Additionally, some source countries fear their workers will become less attractive if they ratify or implement the ICRMW, and that they may thus lose labor markets to non-ratifying source countries. Despite this, an increasing number of State parties to the ICRMW are now transit or destination countries—such as Argentina, Azerbaijan, Egypt, Libya, Mauritania, Mexico, Morocco, Senegal and Turkey—reflecting changing patterns of labor migration and treaty ratification.<sup>69</sup> The effectiveness of the ICRMW is further constrained by the circumstance that its individual complaints mechanism has not yet entered into force, although this mechanism, even when operative, is advisory only and not binding on State parties.<sup>70</sup> This highlights the need to explore other legal, regulatory and policy measures that could assist in protecting the rights of children left behind, as discussed in Part VI below.

Limitations on the efficacy of the ICRMW underpin the continuing importance of the rights articulated in CEDAW and the CRC, and their sometimes difficult interrelationship. Importantly, Art 11(1)(c) of CEDAW specifies the right of women to free choice of

<sup>66</sup> Kristina Touzenis and Alice Sironi, 'Current Challenges in the Implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (EXP0/B/DROI/2013/5)' (European Parliament, Directorate-General for External Policies, 2013), 7.

<sup>67</sup> Committee on Migrant Workers, *Concluding Observations: Sri Lanka*, 11th Session, UN Doc CMW/C/LKA/CO/1 (14 December 2009), [4].

<sup>68</sup> International Organization for Migration, 'World Migration Report 2010: The Future of Migration - Building Capacities for Change' (IOM, 2010), 22.

<sup>69</sup> Office of the High Commissioner for Human Rights, *The Global Campaign for Ratification of the Convention on Rights of Migrants* <[www.migrantsrights.org/campaign.htm](http://www.migrantsrights.org/campaign.htm)>.

<sup>70</sup> The same is true of individual complaints mechanisms under other human rights treaties. See Part V and *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 28 February 2012, UN Doc A/RES/66/138 (entered into force 14 April 2014), Art 11, which requires State parties only to 'give due consideration' to the 'recommendations' of the Committee on the Rights of the Child.

employment, which includes migrating for work, highlighting that the interests and priorities of women and children are not always the same and that measures taken in compliance with the CRC and CEDAW may not always align. Jacqueline Bhabha identifies the risk in grouping the needs of women and children together when they may differ or even compete, stating that ‘[w]hereas children, particularly young children, need protection and the exercise of “best interest” judgments by adult decision makers ... women need an environment that enables them to act autonomously and independently’.<sup>71</sup> Yet governments frequently link the needs of the two groups, symbolized in Sri Lanka’s ‘Ministry of Child Development and Women’s Empowerment’, where responsibility for advancing women’s and children’s rights are vested in the one Ministry.<sup>72</sup>

### International labor law

International labor law provides an additional body of principles that regulate aspects of migrant domestic labor. Legally binding conventions promulgated by the International Labour Organization (ILO) include those concerned with the protection of migrant workers (Nos. 97 and 143) and the *Convention concerning Decent Work for Domestic Workers* (No. 189).<sup>73</sup> For example, Art 13 of Convention No. 143 requires each member State to take all necessary measures to facilitate the reunification of the families of migrant workers legally residing in its territory. However, the ratification of these ILO conventions is weak.<sup>74</sup> Significantly, no GCC country has ratified any of the three conventions; nor has Sri Lanka.

The three conventions are accompanied by non-binding recommendations (Nos. 86, 151 and 201, respectively).<sup>75</sup> Recommendation No. 151 explicitly provides for the reunification of families, stating in Art 13(1) that ‘[a]ll possible measures should be taken both by countries of employment and by countries of origin to facilitate the reunification of families of migrant workers as rapidly as possible.’ It also states in Art 17 that a migrant worker who has been employed in another country for at least one year should be entitled to visit the country where his or her family resides without loss of rights, or to be visited by his or her family for an equivalent period. Article 5(2)(a) of Recommendation No. 201 provides that the working hours of domestic workers under the age of 18 years should be strictly limited to ensure adequate time for family contact. More generally, Art 25(1)(c) of Recommendation No. 201 specifies that member States should establish policies and programs to ensure that the rights of domestic

<sup>71</sup> Jacqueline Bhabha, 'Women, Children and other Marginalised Migrant Groups' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 205, 209.

<sup>72</sup> Save the Children in Sri Lanka and Pinto-Jayawardena, above n 34, vii.

<sup>73</sup> *Convention concerning Migration for Employment (Revised)* (ILO No 97), opened for signature 1 July 1949 (entered into force 22 January 1952); *Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers* (ILO No 143), opened for signature 24 June 1975 (entered into force 9 December 1978); *Convention concerning Decent Work for Domestic Workers* (ILO No 189), opened for signature 16 June 2011 (entered into force 5 September 2013).

<sup>74</sup> The number of ratifications are: ILO No. 97–49; ILO No. 143–23; and ILO No. 189–16 at 5 January 2015.

<sup>75</sup> *Migration for Employment Recommendation (Revised)* (ILO No R86), (1 July 1949); *Recommendation concerning Migrant Workers* (ILO No R151), (28 June 1975); *Domestic Workers Recommendation* (ILO No R201), (16 June 2011).

workers are taken into account in relation to ‘general efforts to reconcile work and family responsibilities’.

Beyond the conventions and recommendations, the ILO’s ‘Multilateral Framework on Labour Migration’ provides a ‘soft-law’ instrument and policy tool to guide States in developing measures to protect migrant workers.<sup>76</sup> While its principles are only hortatory, the Framework recognizes the importance of research on the impact of out-migration on source countries, and encourages States to facilitate the movement of migrant workers between their home country and the country of employment for the purpose of maintaining family and social ties.<sup>77</sup>

An ongoing concern of international labor law is the elimination of child labor, which has been regulated by treaty since the interwar years and has been bolstered more recently by the widely-ratified *Worst Forms of Child Labour Convention* (ILO No. 182).<sup>78</sup> Child labor generally stems from poverty rather than the migration status of parents, and it is therefore not unique to the children of MDWs. However, in the absence of their mothers, some children (particularly girls) are at risk of being required to take on ‘adult work’, including extensive domestic responsibilities, to the detriment of their education and development. This compounds the multiple disadvantage children experience from living in low socio-economic households. It also reflects the reality that ‘[a]n almost universal feature is that domestic work is predominantly carried out by women, many of whom are migrants or members of historically disadvantaged groups’.<sup>79</sup> Being ‘left behind’ also increases the risk of a breach of Art 32 of the CRC and the ILO’s convention on a minimum working age,<sup>80</sup> both of which recognize the detrimental effect of child labor on a child’s education, development and well-being.

<sup>76</sup> Ryszard Cholewinski, 'International Labour Migration' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 283, 284; International Labour Office, 'Protecting the Rights of Migrant Workers: A Shared Responsibility' (ILO, 2009), iii.

<sup>77</sup> International Labour Organization, 'ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration' (ILO, 2006), [3.3], [12.9].

<sup>78</sup> *Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour* (ILO No 182), opened for signature 17 June 1999 (entered into force 19 November 2000).

<sup>79</sup> International Labour Office, above n 6, 39.

<sup>80</sup> *Convention concerning Minimum Age for Admission to Employment* (ILO No 138), opened for signature 26 June 1973 (entered into force 19 June 1976).

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

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

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

### *b. Constitutional Law*

The Sri Lankan Constitution offers another potential avenue for safeguarding the rights of migrant workers and their children left behind. Fundamental rights and freedoms were first introduced in the 1972 Constitution, Sri Lanka's first republican constitution,<sup>81</sup> but this constitution did not vest any court with jurisdiction to remedy breaches of these rights by the State.<sup>82</sup>

The 1978 Constitution, the second republican constitution and the one currently in force, also contains a number of fundamental rights. These are largely civil and political rights, a simulacrum of those in the ICCPR. However, the ambit of the provisions is carefully circumscribed: while some rights apply to 'all persons', many others apply only to 'citizens', notably the non-discrimination provision in Art 12(2) and the freedom of speech, assembly, association, occupation and movement in Art 14.<sup>83</sup> Some of the civil and political rights may

<sup>81</sup> V.K. Nanayakkara, 'From Dominion to Republican Status: Dilemmas of Constitution Making in Sri Lanka' (2006) 26 *Public Administration and Development* 425, 430. The 1972 Constitution followed on from the 'Soulbury' independence constitution of 1948, when Ceylon attained dominion status within the British Empire.

<sup>82</sup> Jayampathy Wickramaratne, 'The 1972 Constitution in Retrospect' in Tissa Jayatilleke (ed), (Sirimavo Bandaranaike Museum Committee, 2010) 1, 9–10.

<sup>83</sup> These freedoms were temporarily granted, for a period of 10 years, to stateless persons who were lawfully

be viewed as having direct relevance to migrant workers and their families. One instance is the freedom of citizens to return to Sri Lanka (Art 14(1)(i)); another is the authorisation of affirmative action (positive discrimination) ‘for the advancement of women, children or disabled persons’ (Art 12(4)). The 1978 Constitution goes further than its predecessor in establishing a remedy for the infringement of fundamental rights by executive or administrative action, and this is done by way of an entitlement to apply for review to the Supreme Court, the highest court in Sri Lanka.<sup>84</sup>

An additional feature of the 1978 Constitution is the inclusion of a number of Directive Principles of State Policy, which are intended to ‘guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society’ (Art 27(1)). These Principles include the objectives that ‘[t]he State shall recognize and protect the family as the basic unit of society’ and that ‘[t]he State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, moral, religious and social, and to protect them from exploitation and discrimination’.<sup>85</sup> Although these principles are non-justiciable and thus cannot be challenged in any court,<sup>86</sup> the Constitution does articulate the intention that they guide the State in its law-making and governance.

In sum, Sri Lanka’s present constitution contains limited protections for the children of MDWs. A more robust constitution was drafted in 2000, which recognized the need to expand the fundamental rights and freedoms specified in the 1978 Constitution.<sup>87</sup> The draft included recognition of the special rights of children, such as the right of every child to ‘family care or parental care or to appropriate alternative care when removed from the family environment’, and the paramountcy of the child’s best interests, which speak directly to the issues raised in this article.<sup>88</sup> However, the draft faced political opposition and has never been adopted.

### *c. Domestic Law*

The social cost of maternal migration on families and children left behind has ‘recently become one of the major concerns of policy makers and the public in Sri Lanka’,<sup>89</sup> and domestic legislation has been called in aid of the rights of children left behind. In the light of concerns about the lack of adequate alternative care arrangements for children who remain in Sri Lanka after their mothers migrate for domestic work, the Government attempted to ban the labor migration of mothers with children under five years of age in a Cabinet decision on the eve of

resident in Sri Lanka at the time the Constitution came into force: see Art 14(2).

<sup>84</sup> *Sri Lankan Constitution* (1978), Arts 17, 118, 126.

<sup>85</sup> *ibid*, Arts 27(12), 27(13).

<sup>86</sup> *ibid*, Art 29.

<sup>87</sup> For a history of reforms, see Sri Lanka Presidential Secretariat, *Constitutional Reforms since Independence* (5 January 2015) <[www.priu.gov.lk/Cons/1978Constitution/ConstitutionalReforms.htm](http://www.priu.gov.lk/Cons/1978Constitution/ConstitutionalReforms.htm)>.

<sup>88</sup> Draft Bill (No. 372) to Repeal and Replace the Constitution of the Democratic Socialist Republic of Sri Lanka (2000), Art 22, [www.priu.gov.lk/Cons/2000ConstitutionBill/Index2000ConstitutionBill.html](http://www.priu.gov.lk/Cons/2000ConstitutionBill/Index2000ConstitutionBill.html).

<sup>89</sup> Ukwatta, above n 35, 108.

International Women's Day in 2007.<sup>90</sup> Under this proposal, which failed to become law, mothers with children over five years of age required approval to migrate from a government committee, after showing that their children had access to appropriate caregivers. The proposal was strongly opposed because of the restrictions it placed on women's rights to work, including the right to choose employment under Art 11(1)(c) of CEDAW,<sup>91</sup> and its restriction on freedom of movement, including a person's freedom 'to leave any country, including his own' under Art 12(2) of the ICCPR.<sup>92</sup> As the Human Rights Committee has observed, the freedom to leave is not dependent on the purpose or duration of the absence; and any restriction on the freedom must be exceptional and satisfy the stringent conditions of Art 12(3).<sup>93</sup> The proposal was also considered to be a breach of Art 12(2) of the Sri Lankan Constitution, which states that no citizen shall be discriminated against on the grounds of sex. It was argued that the government should instead be investing in employment and educational opportunities for low-skilled women to avert the pressure on them to migrate.<sup>94</sup>

Other South Asian countries, such as Bangladesh, Nepal and India, have attempted similar restrictions. A number of problems arise from constraints on women's mobility, including the problem that over-regulation may push women into irregular migration channels, which detracts from protective measures that do exist.<sup>95</sup> For example, in August 2012 the Government of Nepal banned women under 30 years of age from working in GCC countries, although it has been reported that this restriction is bypassed by women travelling to Qatar for domestic work via India.<sup>96</sup> While India permits its female nationals under 30 years of age to engage in domestic work in Qatar, they must first obtain approval from the Ministry of Overseas Indian Affairs.<sup>97</sup> Bans on women's migration also ignore findings that, for many women, the experience of working abroad increases their self-reliance, which can help build their autonomy once they return.<sup>98</sup>

#### *d. Domestic Policy*

During the 1990s, the positive international climate created momentum for policies that promoted equal opportunities for Sri Lankan children and women.<sup>99</sup> In 1991–92 the Sri Lankan Government adopted a *Plan of Action for Children* and a *Charter on the Rights of the Child*—the latter substantively adopting the provisions of the CRC, which Sri Lanka had ratified the

<sup>90</sup> Jayaweera and Dias, above n 42, 56.

<sup>91</sup> Sri Lanka became a signatory to CEDAW in 1980, and a party in 1981.

<sup>92</sup> Sri Lanka ratified the ICCPR in 1980.

<sup>93</sup> Human Rights Committee, *General Comment No 27: Freedom of Movement* (Article 12), 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999), [8]–[18].

<sup>94</sup> Human Rights Watch, above n 30, 101.

<sup>95</sup> Piper, above n 28, 20–21.

<sup>96</sup> Amnesty International, 'My Sleep is My Break': Exploitation of Migrant Domestic Workers in Qatar' (Amnesty International, 2014), 10.

<sup>97</sup> *ibid.*, 10.

<sup>98</sup> Piper, above n 28, 4.

<sup>99</sup> Swarna Jayaweera, 'Gender, Education, Development: Sri Lanka' in Christine Heward and Sheila Bunwaree (eds), *Gender, Education and Development: Beyond Access to Empowerment* (Zed Books, 1999) 173, 174–5.

previous year. Several of the Charter's provisions are relevant to the children of MDWs, such as a child's right to maintain direct and regular contact with both parents, including through family reunification (discussed in Part III(b) below). Although the Charter is not legally binding, it is used by the Human Rights Commission and the National Child Protection Authority as guidance for their own activities and the activities of other agencies they monitor.<sup>100</sup> Implementation of the Charter is supervised by a government committee whose functions are to render advice, generate awareness, promote legislative reforms and monitor implementation of the Charter (Art 40).

The other important area of policy development in Sri Lanka is the 2009 National Labour Migration Policy. This recognizes the inherent risks of low-skilled labor migration for workers and their children, and it emphasizes the need to reduce the migration of MDWs in favor of skilled migration.<sup>101</sup> However, the Government is also driven by the conflicting policy goal of pursuing growth in remittances generated by foreign employment, which is critical to its strategy for poverty and trade deficit reduction.<sup>102</sup> At present, Sri Lanka cannot sustain growth in remittances without low-skilled migration, highlighting the tension that many labor-sending countries face between 'promoting' and 'protecting' labor migrants.<sup>103</sup>

Sri Lanka's labour migration policy was guided by the ILO's Multilateral Framework and recognizes the 'social costs of migration, in terms of impact on families and children left behind'.<sup>104</sup> Within the policy, the Government commits to safeguarding the 'vulnerable children of migrant workers'<sup>105</sup> through measures that include developing and implementing a policy framework specifically for the protection and welfare of the children of migrant workers. A feature of the policy is cross-portfolio responsibility involving the judiciary, National Child Protection Authority, Department of Probation and Childcare, and other state and civil society institutions active in the protection and welfare of children. It makes the registration of children a prerequisite for the departure of a migrant worker, allowing these children to be monitored (e.g. through house visits) to enhance the identification of children at risk and provide support services for children or caregivers in distress. This aligns with Art 27 of the CRC, which imposes an obligation on the State to assist parents and others responsible for the child in implementing the child's right to a standard of living adequate for his or her physical, mental, spiritual, moral and social development. The policy also provides for educational and health benefits, as well as access to counselling, for the children of migrant workers.<sup>106</sup> Sri Lanka's formal commitment to the CRC, which it ratified in 1991, is also reflected in its *Charter on the Rights of the Child* (developed in 1992) and National Plan of Action (2004–2008), which

<sup>100</sup> UNICEF Innocenti Research Centre, 'Law Reform and Implementation of the Convention on the Rights of the Child' (UNICEF, 2007), 19.

<sup>101</sup> Sri Lanka Ministry for Foreign Employment Promotion and Welfare, 'National Labour Migration Policy for Sri Lanka' (Sri Lankan Government, 2008), 2.

<sup>102</sup> Human Rights Watch, above n 30, 3.

<sup>103</sup> Yara Jarallah, 'Domestic Labor in the Gulf Countries' (2009) 7(1) *Journal of Immigrant & Refugee Studies* 3, 11.

<sup>104</sup> Sri Lanka Ministry for Foreign Employment Promotion and Welfare, above n 101, 2.

<sup>105</sup> *ibid*, 19.

<sup>106</sup> *ibid*, 30–31.

included ensuring adequate care and a safe, healthy environment for the children of migrant mothers.<sup>107</sup>

However, significant concerns have been raised about slow implementation of these policy commitments, with civil society organisations arguing that in practice the Government's efforts fall short of the State's duties, obligations and commitments to migrant workers and their families under international law.<sup>108</sup> A 2012 study commissioned by the Sri Lankan Government on the psychosocial issues faced by migrant workers and their families found that the National Labour Migration Policy 'does not provide adequate safeguards to minimize or ameliorate various psycho-social problems emanating from migration'.<sup>109</sup> In its submission to the UN Committee on Migrant Workers in 2013, 'Migrant Forum Lanka' identified practices that are leading to the 'commodification' of the country's migrant labor force in preference to the State's duty to protect their rights as Sri Lankan citizens and migrant workers.<sup>110</sup> These include failure to implement existing policies, such as the Sri Lankan Bureau of Foreign Employment's reintegration policy for returnee migrant workers and their families; inadequate development of alternative livelihood options, which forces many MDWs to re-migrate; and failure to assess comprehensively the causes of high female labor migration and the impact on the rights and well-being of women and their families left behind.<sup>111</sup>

### III. PROBLEMS ARISING IN SENDING STATES

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

#### a. *Failure to Give Primacy to the Child's Best Interests*

Article 3(1) of the CRC states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. The 'best

<sup>107</sup> Save the Children in Sri Lanka and Pinto-Jayawardena, above n 34, 4.

<sup>108</sup> Migrant Forum Lanka, 'Submission to the UN Committee on Migrant Workers on the Situation of International Outbound Labour Migration in Sri Lanka' (for consideration at the 18th Session of the Committee on Migrant Workers, 15-26 April 2013, Geneva) (2013), 1, 7.

<sup>109</sup> Hettige et al, above n 33, 6.

<sup>110</sup> Migrant Forum Lanka, above n 108, 1–2. Migrant Forum Lanka is a network of Sri Lankan civil society organisations, activists, lawyers and researchers working for the promotion and protection of the rights of migrant workers and their families.

<sup>111</sup> *ibid*, 3–7; Committee on Migrant Workers, *List of Issues Prior to the Submission of the Second Periodic Report of Sri Lanka*, UN Doc CMW/C/LKA/QPR/2 (29 July 2013).

interests’ principle is one of four general principles that underpin the interpretation and implementation of all children’s rights under the CRC.<sup>112</sup> It is important, therefore, to ask to what extent the principle is honored by States that operate international labor migration programs that encourage the migration of mothers, with the concomitant challenges for children left behind. This question stands apart from the more specific consideration of a child’s right to education and health, discussed below. As the UN Committee on the Rights of the Child has commented, all rights in the CRC are in ‘the child’s best interests’<sup>113</sup>—the best interests principle is thus a right on its own account and a fundamental value that informs our understanding of other specific rights.

The legal conception of the best interest of the child has several dimensions relevant to the present context. First, consideration of best interests is required not only when actions are taken in respect of an *individual* child, but also when actions are taken in respect of a group of children, or children in general. ‘Best interests’ is thus both an individual right and a collective right.<sup>114</sup> Secondly, the term ‘in all actions’ is not confined to *decisions* made about children but encompasses ‘all acts, conduct, proposals, services, procedures and other measures’, as well as omissions.<sup>115</sup> Thirdly, actions ‘concerning’ children are not merely those that affect them *directly*, but include other measures that have an effect on children, even if they are not the direct targets of the measure. However, as the UN Committee on the Rights of the Child acknowledges, all actions taken by a State can affect children in one way or another, yet States need only make a full assessment of the impact of their actions on children where that impact is ‘major’.<sup>116</sup> Fourthly, a ‘best interests’ assessment affects all implementation measures by governments, including the development of policies and the allocation of national resources.<sup>117</sup> And finally, the requirement that the child’s best interests ‘shall be a primary consideration’ requires those interests to be considered on a higher plane than other interests. It does not require that a child’s best interests trump all other considerations,<sup>118</sup> but it does require more weight be attached to those matters that best serve the child when assessing conflicting rights and interests.<sup>119</sup>

These legal principles have important implications for labor sending countries. States must have regard to the best interests of the children of migrant workers, considered individually and as a

<sup>112</sup> The other general principles are non-discrimination, maximizing survival and development, and the right to be heard. See Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003), [5].

<sup>113</sup> Committee on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013), [4].

<sup>114</sup> *ibid*, [6], [23].

<sup>115</sup> *ibid*, [17].

<sup>116</sup> *ibid*, [20].

<sup>117</sup> *ibid*, [12], [15].

<sup>118</sup> By contrast, paramountcy is required by the CRC in actions regarding the adoption of children: see Art 21.

<sup>119</sup> Committee on the Rights of the Child, *General Comment No. 14 on the Right of the Child to Have his or her Best Interests Taken as a Primary Consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013), [36]–[40].

group. That regard must extend to all government actions affecting children, such as the development of migration policies and the allocation of resources. This is all the more important because government migration policies clearly have a ‘major’ impact on children left behind, even if that impact is indirect. Moreover, while it is entirely appropriate for governments to weigh competing interests in formulating migration policy (including the developmental benefits derived from remittances of MDWs), the special situation of children—their dependency, level of maturity, legal status and voicelessness—requires additional weight to be given to their best interests.<sup>120</sup> Those interests include preserving family unity and preventing family separation. In the context of migration, the Committee on the Rights of the Child has remarked:

‘When the child’s relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.’<sup>121</sup>

The discussion thus far has focused on the actions of the State and its organs, but the Committee on the Rights of the Child has purported to give the ‘best interests’ principle a wider application. Specifically, it claims the principle has implications for decisions made by civil society entities and private sector organisations that provide services concerning children, and for actions undertaken by persons working with and for children, including parents and caregivers.<sup>122</sup> At first glance, this claim appears at odds with the terms of the Convention. Art 3(1) does not explicitly require private actors, such as parents, to consider the best interests of the child in actions concerning children because human rights obligations are primarily directed to the acts or omissions of States. Nevertheless, in its recognition in Art 18(1) that parents ‘have the primary responsibility for the upbringing and development of the child’, the CRC does state that ‘[t]he best interests of the child will be their basic concern’. International legal obligations of the State may be engaged because the State must take active measures ‘to support and assist parents and others who have day-to-day responsibility for realizing children’s rights’. This accords with the requirement that States provide parents with appropriate assistance ‘in the performance of their child-rearing responsibilities’ specified in Art 18(2) of the CRC. A failure to do so can enliven a State’s international responsibility for breaching the obligations under the Convention.

#### *b. Disruption to Family Relations*

International law proclaims the right of a child to family life and the principle of family unity. In addition to specific provisions in the UDHR, ICCPR and ICESCR discussed above, Art 8 of the CRC requires States to respect the right of the child to preserve ‘family relations’ without

<sup>120</sup> *ibid*, [39].

<sup>121</sup> *ibid*, [66].

<sup>122</sup> *ibid*, [12]. See also Committee on the Rights of the Child, *General Comment No 7: Implementing Child Rights in Early Childhood*, 40th sess, UN Doc CRC/C/GC/7/Rev.1 (20 September 2006), [13(a)].

unlawful interference; and Art 9 goes further to state that a child shall not be separated from his or her parents against their will unless it is determined by a competent authority to be necessary for the child's best interests. Additionally, Art 5(b) of CEDAW recognizes the common responsibility of men and women in the upbringing and development of their children.

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

In relation to Sri Lanka, the standard contract that governs the employment of MDWs in GCC states contains only two obligations relating to family contact and unity. The first is that the domestic worker is entitled to 'one month's paid vacation after contract completion' (which is two years), plus paid travel to return home if the contract is not renewed or a return ticket if the contract is renewed. The second term is that the employer 'is obligated to help [the MDW] post correspondence to their family' but is not required to assist with postage expenses. Even these limited provisions are frequently ignored. In a Human Rights Watch study of Sri Lankan domestic workers in Saudi Arabia, Kuwait, Lebanon and the UAE, many MDWs claimed to have experienced restrictions on communicating with their families, including a limited ability to write and receive letters through their employer.<sup>123</sup>

Sri Lanka's failure to demand stronger contractual provisions for its workers when negotiating standard contracts, and to take action against receiving States and recruitment agencies when existing contractual obligations are systematically flouted, may amount to a breach by the sending State of Arts 9 and 10 of the CRC. These articles state that children who are separated from their parents must be allowed to maintain personal relations and direct contact with both parents on a regular basis.<sup>124</sup> While the CRC does not define what is a 'regular' opportunity for family contact, it is difficult to accept that reunification between a mother and her child on a two-yearly basis satisfies that requirement. Article 4 of the CRC also requires States to undertake 'measures to the maximum extent of their available resources', including seeking international cooperation if needed, to implement the economic, social and cultural rights in the Convention. The UN Committee on the Rights of the Child has gone further to state that '[w]hatever their economic circumstances, States are required to undertake all possible

<sup>123</sup> Human Rights Watch, above n 30, 3, 72.

<sup>124</sup> Committee on Migrant Workers, *General Comment No 1: Migrant Domestic Workers*, UN Doc CMW/C/GC/1 (23 February 2011), [54].

measures towards the realization of the rights of the child, paying special attention to the most disadvantaged groups.<sup>125</sup>

The Sri Lankan Government has recognized a child's right to maintain direct and regular contact with both parents, including through family reunification, in Arts 9 and 10 of its own *Charter on the Rights of the Child*. Yet, despite the stated Charter principles, the Sri Lankan Government continues to agree to weak contractual terms for its MDWs for fear of becoming an unattractive labor source for receiving countries. This toleration of 'disadvantageous labor relations for its citizens working abroad'<sup>126</sup> affects the ability of children left behind to realize their rights. In contrast, and as discussed in Part VI(c) below, stronger negotiations by the Filipino Government have resulted in the Standard Employment Contract for Filipino Household Workers, requiring an employer to sign an undertaking that, inter alia, the worker 'be allowed to freely communicate with her family in the Philippines'.<sup>127</sup>

### c. *Impact on Children's Education*

International human rights law recognizes the right of everyone to education, which shall be directed 'to the full development of the human personality' and to strengthening respect for human rights and fundamental freedoms. The right was articulated in the UDHR in 1948, and finds further expression in the ICESCR and the CRC.<sup>128</sup> In relation to the migration of domestic workers, the obligation falls primarily on the State in which the children of MDWs reside, namely, the sending State. How does the migration of MDWs affect the realisation of the right to education?

On the one hand, research has shown that migration and the accompanying remittances can assist families to invest in their children's education, with a World Bank study in El Salvador showing that girls aged 11–17 and boys aged 11–14 were more likely to stay in school if their families were receiving remittances.<sup>129</sup> However, this study does not elaborate on whether the mother or father had migrated for employment. Other studies have shown that when the father is absent and the mother gains control over decision-making for her children, there can be positive educational outcomes due to women's tendency to invest in education, particularly for their daughters.<sup>130</sup>

On the other hand, studies have shown that a mother's absence can negatively affect a child's school attendance and participation if the father (or another primary carer) does not step

<sup>125</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003), [8].

<sup>126</sup> Michele Gamburd, *The Kitchen Spoon's Handle: Transnationalism and Sri Lanka's Migrant Housemaids* (Cornell University Press, 2000), 234.

<sup>127</sup> Embassy of the Philippines, *Employment Contract for Household Service Workers (Direct)* (23 December 2014) <[www.philippine-embassy.org.sg/forms/](http://www.philippine-embassy.org.sg/forms/)>, Point 8.

<sup>128</sup> Art 26 UDHR; Art 13 ICESCR; Art 28(1) CRC.

<sup>129</sup> Acosta, above n 45, 4.

<sup>130</sup> Leela Gulati, 'The Impact on the Family of Male Migration to the Middle East: Some Evidence from Kerala, India' in Fred Arnold and Nasra Shah (eds), *Asian Labor Migration: Pipeline to the Middle East* (Westview Press, 1986) 194, 208–9; Oxford Policy Management, above n 45, xii.

into the carer's role traditionally played by the mother.<sup>131</sup> A study of children in Thailand found that '[t]he long-term absence of the mother appears to reduce the educational chances of children left behind, whereas the long-term absence of fathers does not.'<sup>132</sup> A study in the Philippines also found that children of absent mothers performed the least well at school.<sup>133</sup>

Research in Sri Lanka confirms that labor migration may have negative educational outcomes for children left behind. A study in Sri Lanka's Eastern Province (Ampara and Batticaloa) found that 6.1 per cent of children between 11–15 years of age in migrant worker households had dropped out of school compared with only 3.1 per cent for the total sample of children surveyed.<sup>134</sup> Similarly, a 2012 study of teachers, primary carers and religious leaders in the country's highest labor migration areas (Gampaha, Kurunegala and Colombo), which targeted schools attended by children of MDWs, found that school absenteeism was common largely because of a lack of encouragement by primary carers, or children having other commitments such as caring for younger siblings.<sup>135</sup> Moreover, educational outcomes may vary according to the gender of the migrating parent. A 2013 study of the effects of parental migration on children's education showed that maternal migration lowered both the children's enrollment rates (by 15–16 percentage points) and the probability of receiving private tuition (by 14–16 percentage points), while paternal migration improved these variables.<sup>136</sup>

The impact of migration on a child's education will vary according to individual circumstances, including the household's socio-economic characteristics, the number and position of children in the household, and parental education levels and attitudes. The education level of mothers is one of the most important factors in a child's school attendance and achievement,<sup>137</sup> rather than parental migration status. However, this does not bode well for Sri Lanka because the female migrant population falls at the lower end of educational standards.<sup>138</sup> For example, of the 784,500 domestic workers in Saudi Arabia in 2009, the ILO estimates that 38.4 per cent had no formal educational qualifications, 25.9 per cent had completed only primary school, and only 10.7 per cent had secondary education or above.<sup>139</sup> The ILO has also found that 85 per cent of Sri Lankan women migrating for employment have 'dropped out from formal education without passing their GCE Ordinary Level',<sup>140</sup> which is an examination undertaken by students in the

<sup>131</sup> Piper, above n 28, 29.

<sup>132</sup> Jampaklay, above n 40, 93.

<sup>133</sup> Battistella and Conaco, above n 45, 232.

<sup>134</sup> Kusala Wettasinghe, Getsie Shanmugam and Sarala Emmanuel, 'Summary of Study: Alternative Care Giving of Migrant Workers' Children' (Terre des Hommes, 2012), 3.

<sup>135</sup> BCV Senaratna, 'Left-Behind Children of Migrant Women: Difficulties Encountered and Strengths Demonstrated' (2012) 41(2) *Sri Lanka Journal of Child Health* 71, 72.

<sup>136</sup> Vengadeshvaran Sarma and Rasyad Parinduri, 'What Happens to Children's Education When Their Parents Emigrate? Evidence from Sri Lanka' (2013) Paper No. 52278 *Munich Personal RePEc Archive*, 14.

<sup>137</sup> Oxford Policy Management, above n 45, xv.

<sup>138</sup> Michele Gamburd, 'Lentils There, Lentils Here!' Sri Lankan Domestic Labour in the Middle East' in Shirlena Huang, Brenda Yeoh and Noor Abdul Rahman (eds), *Asian Women as Transnational Domestic Workers* (Marshall Cavendish, 2005) 92, 96.

<sup>139</sup> International Labour Office, above n 6, 32.

<sup>140</sup> International Labour Organization, above n 25, vi.

final two years of high school, at ages 15–16.

Whatever the direction and strength of the social impact of female labor migration on the educational outcomes for their children, it must still be asked how the legal obligations of labor sending States, such as Sri Lanka, are implicated. Does a State fail to provide the ‘right to education’ to children within its territory if their parents and carers make private decisions that are adverse to the educational advancement of those children? The answer lies in part in the obligation of States under Art 2(1) of the ICESCR ‘to take steps’ toward ‘the full realization’ of the right to education, which are ‘deliberate, concrete and targeted’, as well as expeditious and effective.<sup>141</sup> Moreover, the right to education imposes three levels of obligation on State parties—to *respect* the right by avoiding state measures that might hinder enjoyment of the right; to *protect* the right from interference by third parties; and to *fulfil* the right by facilitating or providing it. The UN Committee on Economic, Social and Cultural Rights has explained that the obligation to *protect* requires a State to protect accessibility of education by ensuring that third parties (including parents) do not stop girls from going to school.<sup>142</sup> The obligation to *fulfil* has a facilitative dimension in so far as it ‘requires the State to take positive measures that enable and assist individuals and communities to enjoy the right to education’.<sup>143</sup> It is evident, therefore, that the right to education requires concerted State action to mitigate any adverse effects of labor migration on the education of children left behind.

In fact, the Sri Lankan Government does provide financial support for the continued education of the children of MDWs, but government scholarships are granted only to those children who pass Grade 5, and again if they reach O-level and A-level examinations.<sup>144</sup> Support is therefore limited to higher achieving students, rather than targeting those most at risk of non-attendance, and is also not available to children whose mothers migrate through unofficial channels. UNICEF Sri Lanka has identified the lack of policies targeting the educational vulnerabilities of children of MDWs as ‘an obvious policy gap’ at present.<sup>145</sup> International experience could offer models for more effective support in the Sri Lankan context—such as the government’s practice in El Salvador of matching the value of remittances made by Salvadorian migrant workers with government-funded educational scholarships that focus on early and basic education in poor rural communities, especially for young children who do not attend school.<sup>146</sup>

#### *d. Impact on Children’s Health*

International human rights law recognizes the right of everyone ‘to the enjoyment of the highest attainable standard of physical and mental health’. This right is articulated in the ICESCR and

<sup>141</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Article 13 of the Covenant)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999), [43]–[44].

<sup>142</sup> *ibid*, [50].

<sup>143</sup> *ibid*, [47].

<sup>144</sup> Frantz, above n 17, 1076.

<sup>145</sup> UNICEF Sri Lanka, ‘Country Study: Out-of-School Children in Sri Lanka’ (UNICEF, 2013) 6.

<sup>146</sup> International Labour Organization, above n 77, 79.

re-expressed in greater detail in the CRC with respect to children.<sup>147</sup> In 2013, the UN Committee on the Rights of the Child recognized that migration is one factor among many that contributes to death, disease and disability in children, and is therefore important in the fulfilment of the right to health.<sup>148</sup> But the connection between health and migration has long been acknowledged, as in the World Declaration on the Survival, Protection and Development of Children (1990), whose ten-point program of action accepted that children of migrant workers are among the ‘millions of children who live under especially difficult conditions’.<sup>149</sup>

As with education, empirical studies are ambivalent about the impact of migration on the health of children left behind, highlighting both positive and negative effects. Improved household income can lead to better nutrition and access to health services, enhancing physical health. A study in the Philippines found that children whose mothers had migrated had a lower prevalence of stunted growth.<sup>150</sup> A study in Mexico found that the migration of at least one household member improved birth weights and lowered infant mortality rates in children left behind.<sup>151</sup> However, this study did not identify which family member had migrated, and also found that these children had reduced rates of breastfeeding and vaccination.

In contrast, studies have demonstrated adverse effects of maternal migration on the mental and emotional health and well-being of children left behind. Children frequently reveal a sense of loneliness and sadness due to separation from their mothers, even when they have an understanding of the reasons for their mothers’ migration.<sup>152</sup> Children can also find it difficult to reconnect with their mothers after long periods of separation,<sup>153</sup> and often need support to re-establish a strong parental relationship. The IOM has highlighted the importance of reintegration policies that support the families of migrants, particularly as ‘the reintegration of migrants is among the most overlooked policy interventions in the migration cycle’.<sup>154</sup>

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

‘Forty-four percent of left-behind children had some form of psychopathology, with over a quarter of those under 5-years being underweight or severely underweight (29%). Association of emotional, hyperactivity, conduct problems and having a psychiatric

<sup>147</sup> Art 12 ICESCR; Art 24 CRC.

<sup>148</sup> Committee on the Rights of the Child, *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, UN Doc CRC/C/GC/15 (17 April 2013), 2.

<sup>149</sup> World Declaration on the Survival, Protection and Development of Children, agreed to at the World Summit for Children, New York, 30 September 1990, [www.unicef.org/wsc/declare.htm](http://www.unicef.org/wsc/declare.htm), Art 20(7). On the right to health in the context of migration generally, see International Organization for Migration, *Migration and the Right to Health: A Review of International Law* (IOM, 2009).

<sup>150</sup> CHAMPSEA Philippines, above n 43, 3.

<sup>151</sup> Nicole Hildebrandt and David McKenzie, ‘The Effects of Migration on Child Health in Mexico’ (2005) 6(1) *Economia* 257.

<sup>152</sup> Battistella and Conaco, above n 45, 231; Oxford Policy Management, above n 45; Save the Children in Sri Lanka and Pinto-Jayawardena, above n 34, 14–15; Piper, above n 28, 30.

<sup>153</sup> Piper, above n 28.

<sup>154</sup> International Organization for Migration, above n 68, 25.

diagnosis was strongest in children from migrant family households (odds ratio 1.62), and was exacerbated in families where the sole parent was the overseas based migrant worker.<sup>155</sup>

The study also found high levels of depression in caregivers and spouses left-behind, which is concerning given that the mental health of a child's caregiver directly affects the well-being of a child. In another Sri Lankan study of 2,000 households of returnee migrant workers, women raised concerns that 'children were not taken to clinics for periodic health examinations' and 'were not immunized on time'.<sup>156</sup> A comparative study of 253 children aged 5–10 years in the capital, Colombo, found that the mother's absence was a singular factor causing a two-fold increase in mental health problems for children.<sup>157</sup>

As with the right to education, States have three levels of obligation regarding children's right to health—to respect, protect and fulfil.<sup>158</sup> States thus have an obligation to develop, implement, monitor and evaluate policies that constitute a human right-based approach to fulfilling children's right to health. As a consequence, the 'best interests' principle should be placed at the center of all decisions affecting the health and development of children, not only where they are directed to specific individuals but also where they are directed to children as a group. In the view of the Committee on the Rights of the Child, this means that 'best interests' should guide the allocation of resources, and the development and implementation of policies that affect the underlying determinants of child health.<sup>159</sup>

In this connection, the Sri Lankan Government has recognized the importance of providing psychosocial support to the children left behind in its National Labour Migration Policy, committing to making counselling and psychological support available to migrant workers and their families at all stages of the migration process.<sup>160</sup> However, studies from as recently as 2013 have found that '[t]here is no effective counselling support available for children to cope with any chronic psychological trauma they could experience during the absence of a migrant parent.'<sup>161</sup> There is clearly some distance to go in 'achieving progressively the full realization' of a child's right to health in the context of MDWs in Sri Lanka.

#### e. *Child Labor and Child Abuse*

Maternal migration can also be associated with an increased incidence of child labor and child

<sup>155</sup> Kolitha Wickramage and Chesmal Siriwardhana, *How Far Are the 'Left Behind' Left Behind? The Psychological and Physical Wellbeing of Family Members of International Labour Migrants* Geneva Health Forum <<http://ghf.g2hp.net/2014/02/25/>>, 'Results'.

<sup>156</sup> Malsiri Dias and Ramani Jayasundere, 'Sri Lanka: The Anxieties and Opportunities of Out-Migration' in Pong-Sul Ahn (ed), *Migrant Workers and Human Rights: Out-Migration from South Asia* (International Labour Organization, 2004) 153, 175.

<sup>157</sup> Senaratna, Perera and Fonseka, above n 58, 157.

<sup>158</sup> Committee on the Rights of the Child, *General Comment No. 15 on the Right of the Child to the Enjoyment of the Highest Attainable Standard of Health (art. 24)*, UN Doc CRC/C/GC/15 (17 April 2013), 9.

<sup>159</sup> *ibid*, 3.

<sup>160</sup> Sri Lanka Ministry for Foreign Employment Promotion and Welfare, above n 101, 25.

<sup>161</sup> International Labour Organization, above n 25, 40.

abuse. As to child labor, a mother's absence can increase the risk that a child will be burdened with greater responsibility for domestic work within a household. This is especially true for girls and older siblings who may be given the care of younger children if the father or extended family do not assume additional caregiving roles. If both parents are absent and there is no extended family, possibly due to the family's earlier internal migration, an older sibling may be required to assume responsibilities as the head of a household,<sup>162</sup> withdrawing from education and taking on additional paid and unpaid labor to support the family. Numerous studies on children left behind in Sri Lanka have found that older children, particularly girls, drop out of school primarily to take on household chores and care for younger siblings.<sup>163</sup> Children of MDWs may also drop out of school to enter the labor market.<sup>164</sup>

These conditions increase the risk that a State will contravene Art 32(1) of the CRC, which recognizes the right of children to be protected from any work that is likely to interfere with their education or be harmful to their health or development. Depending on a child's age, some additional domestic duties may not be inimical to their health or development, but these bounds may be exceeded if the child has to take on all the responsibilities of an absent mother. While child labor is more closely linked with poverty than parental migration status, the State has a positive obligation to monitor children of MDWs, particularly those identified as being at risk, to ensure this situation does not arise.

With respect to child abuse, studies also demonstrate that the children of MDWs face a heightened risk of physical and sexual abuse. In 2013, the Sri Lankan Bureau of Foreign Employment reported on the abuse of children left behind, based on records from the police's Women's and Children's Bureau. While the mother's migration could not be established definitively as the cause of abuse, the study found a correlation between the number of reported abuses and the districts with the highest numbers of female labor emigrants.<sup>165</sup>

There are two common circumstances in which children left behind may be subject to a heightened risk of abuse. First, children may be left in the care of abusive fathers or other relatives.<sup>166</sup> Organisations working with survivors of sexual abuse in Sri Lanka have found that many girls who are survivors of incest have mothers who work abroad and have left them in the care of alcoholic fathers or stepfathers.<sup>167</sup> These findings are repeated in numerous

<sup>162</sup> Battistella and Conaco, above n 45, 237.

<sup>163</sup> Wettasinghe, Shanmugam and Emmanuel, above n 41, 42; Sarma and Parinduri, above n 136, 16; Nirasha Perera and Madhubhashini Rathnayaka, 'Sri Lanka's Missing Mothers: A Working Paper on the Effects of Mother Migration on Children' (Save the Children Sri Lanka, 2013), 18.

<sup>164</sup> Swarna Jayaweera, Malsiri Dias and Leelangi Wanasundera, 'Returnee Migrant Women in Two Locations in Sri Lanka: Study Series No. 26' (Center for Women's Research, Sri Lanka, 2002), 21.

<sup>165</sup> Perera and Rathnayaka, above n 163, 13.

<sup>166</sup> Anjani Trivedi, 'Sri Lanka Struggles to Contain a Growing Epidemic of Child Abuse', *TIME Magazine* 13 August 2013 <<http://world.time.com/2013/08/13/>>. However, findings from other studies challenge the perception that fathers are abusive and neglect children in the absence of the mother. Although women generally adopt the role of primary carer, fathers remaining behind are often attentive and caring towards their children: Wettasinghe, Shanmugam and Emmanuel, above n 134, 4; Save the Children in Sri Lanka and Pinto-Jayawardena, above n 34, 20.

<sup>167</sup> Trivedi, above n 166.

qualitative and quantitative studies,<sup>168</sup> with one study of 22 reported incest cases showing that in half the cases the mother was in the Middle East.<sup>169</sup>

The second circumstance is that children may be left with new caregivers who, although not abusive in their own right, do not exercise the same level of supervision and control as the child's mother. For example, a study from China (where there are an estimated 58 million children left behind) linked a rise in sexual abuse among these children to the fact that 70 per cent were left in the care of grandparents, who were reportedly less watchful over the children and more reluctant to give them sex education, leaving the children uninformed and vulnerable to abuse.<sup>170</sup> In Sri Lanka, studies have shown that children left behind are generally cared for by grandmothers who are often 'too feeble to play the part of a caregiver and attend to the children's needs'.<sup>171</sup> The ILO's national study in 2013 found that 32 per cent of issues faced by the children of migrant parents—including exposure to accidents, teenage marriage and lack of emotional support—were due to negligence by the primary caregiver.<sup>172</sup> Similarly, a comparative study of children aged 5–10 years in Colombo found that '[n]eglect is the commonest adversity faced by children [of MDWs] with or without emotional and physical abuse, but incidents of sexual abuse by fathers or other male relatives are also reported.'<sup>173</sup>

What are the legal obligations of a State faced with situations of child abuse or neglect within the households of the children left behind by MDWs? Under international law, the State has a positive obligation to protect the rights of individuals from breaches by the acts or omissions of government officials or organs of the State,<sup>174</sup> but it also has an obligation to adopt measures to prevent breaches by private actors. This principle of due diligence has been used by regional human rights courts, UN treaty bodies and UN special rapporteurs 'as a measurement of state responsibility for the acts of private individuals in the field of human rights law'.<sup>175</sup> It requires States to have taken reasonable preventative measures if they are to avoid attribution of responsibility for the conduct of private actors. Thus, a State could be held accountable if it systematically fails to prevent human rights violations by non-State actors: while the 'actual violence stems from private individuals ... passivity on the part of the state can amount to acquiescence'.<sup>176</sup>

State parties to the CRC are required to protect children from sexual abuse and exploitation (Art 34), and from all forms of abuse (physical, mental and sexual) and negligent treatment by

<sup>168</sup> Perera and Rathnayaka, above n 163, 12; Senaratna, above n 135, 71; International Labour Organization, above n 25, 40.

<sup>169</sup> Perera and Rathnayaka, above n 163, 12.

<sup>170</sup> Sha Liu, 'Sexual Abuse of Children 'Left Behind' by Migrant Worker Parents on Rise', *Global Times* (Beijing), 19 June 2012 <[www.globaltimes.cn/content/715754.shtml](http://www.globaltimes.cn/content/715754.shtml)>. A similar phenomenon has been observed in Eastern Europe: see Yanovich, above n 12.

<sup>171</sup> International Labour Organization, above n 25, 13.

<sup>172</sup> *ibid.*, 39.

<sup>173</sup> Senaratna, Perera and Fonseka, above n 58, 154.

<sup>174</sup> See e.g. Art 2 ICCPR.

<sup>175</sup> Maria Eriksson, *Defining Rape: Emerging Obligations for States under International Law?*, Örebro Studies in Law (Örebro University, 2010), 232.

<sup>176</sup> *ibid.*, 231.

those responsible for their care (Art 19). The obligation requires governments to adopt measures to identify, monitor and address cases where a child left behind is at risk of abuse. Studies suggest that strategies used to identify and protect vulnerable people in general should be employed when children are left behind by migrating parents,<sup>177</sup> including legislative and administrative measures; support programs for children and carers; prevention strategies; and pathways for the identification, assessment, referral, investigation, treatment and review of cases where a child is maltreated.<sup>178</sup> The UN Committee on the Rights of the Child has also stated that, as required by Art 39 of the CRC, if rights are breached, ‘there should be appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration’.<sup>179</sup>

The Sri Lankan Government has acknowledged the need for measures to support caregivers in delivering more effectively on their child-rearing responsibilities. It has also identified the provision of ‘effective protection and services to migrant workers and their families left behind’ as one of the key objectives of its National Labour Migration Policy.<sup>180</sup>

#### IV. PROBLEMS ARISING IN RECEIVING STATES

Restrictive immigration practices and poor employment conditions in receiving countries affect the ability of children to realize a number of rights, including their right to family unity. The difficulties stem from the structure of employer-based visas, the practice of confiscating passports, restrictions on communication with family, and the effects of abusive and traumatic experiences on the ongoing capacity of MDWs to parent effectively. It is relevant to note that, of the most popular destination countries for Sri Lankan MDWs in the Middle East, two (Saudi Arabia and Lebanon) have been ranked in the top quartile for vulnerability to enslavement, while a third, Kuwait, is close at heel.<sup>181</sup> The UN Committee on Migrant Workers has noted that ‘hundreds of thousands of Sri Lankan women [are] working abroad as domestic helpers and many of them [are] underpaid and treated as virtual slaves.’<sup>182</sup> This signals the heightened risk of human rights violations facing many MDWs in the Middle East, with consequences for their children.

<sup>177</sup> Oxford Policy Management, above n 45, xvi–xvii.

<sup>178</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Art 19.

<sup>179</sup> Committee on the Rights of the Child, *General Comment No 5: General Measures of Implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003), [24]. Sri Lanka Ministry for Foreign Employment Promotion and Welfare, above n 101, 4.

<sup>181</sup> Hope for Children (Australia), ‘The Global Slavery Index 2014’ (Hope for Children Organization, 2014), Table 2, 140–43. The Index states (at 10) that modern slavery ‘involves one person possessing or controlling another person in such a way as to significantly deprive that person of their individual liberty, with the intention of exploiting that person through their use, management, profit, transfer or disposal.’

<sup>182</sup> Committee on Migrant Workers, *Concluding Observations: Sri Lanka*, 11th Session, UN Doc CMW/C/LKA/CO/1 (14 December 2009), [27], echoing concerns expressed by the UN Committee on Economic, Social and Cultural Rights in 1998.

### *a. Dependency on Employer-Based Visas*

The ‘kafala’ (sponsorship) system operates in GCC states and ties MDWs to their employers for the duration of their contract, usually two years. Of the four visas available under the kafala system, MDWs are granted a ‘house visa’.<sup>183</sup> The employer assumes all economic and legal responsibility for the worker, who cannot change jobs or leave the country (sometimes, even the house) without the permission of their employer, which in many cases is denied.<sup>184</sup> The system essentially ‘absolves the state of its responsibility’<sup>185</sup> towards migrant workers and gives rise to exploitative conditions that make it near impossible for MDWs to demand their rights to communicate with or visit their children during the two year contract. The failure of States to take appropriate measures to protect family unity by ensuring opportunities for family-related mobility breaches Art 10 of the CRC, which expresses the right of children whose parents reside in different countries, and their parents, to move between those countries to enable them to maintain contact or be reunited as a family.

To leave a GCC state, an MDW requires an exit visa. This in itself can be considered a breach of Art 12(2) of the ICCPR, which states that ‘[e]veryone shall be free to leave any country’. This breach is heightened within the kafala system, under which an exit visa is not granted without the consent of the worker’s employer. Furthermore, employers can have MDWs deported at any time,<sup>186</sup> which further restricts their ability to demand basic rights, such as maintaining a direct relationship with their children, through the local legal system. Even if an MDW could break her contract to return home, the cost usually exceeds US\$2,000, which is more than a year’s salary and thus unaffordable for most MDWs.<sup>187</sup> Hence, the realisation of the right to family reunion becomes arbitrary and solely dependent on the goodwill of the individual employer.

### *b. Confiscation of Passports*

The withholding of passports by employers is extremely common and well-documented in the Middle East,<sup>188</sup> but the practice is contrary to Art 21 of the ICRMW, which proclaims it unlawful for anyone other than a public official duly authorized by law to confiscate a person’s identity documents. While none of the GCC States is party to the ICRMW (see Table 1), the practice is illegal under domestic law in the UAE and under civil regulations in Lebanon, which is another common destination country for Sri Lankan MDWs.<sup>189</sup> It also violates Art 18 of the

<sup>183</sup> Rooja Bajracharya and Bandita Sijapati, 'The Kafala System and Its Implications for Nepali Domestic Workers' (2012) March(No.1) *Policy Brief: Centre for the Study of Labour and Mobility* 1, 11, Jarallah, above n 103, 9.

<sup>184</sup> Bajracharya and Sijapati, above n 183, 3, 6–7.

<sup>185</sup> Amrita Pande, “‘The Paper that You Have in Your Hand is My Freedom’: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon’ (2013) 47(2) *International Migration Review* 414, 415.

<sup>186</sup> Frantz, above n 17, 1072.

<sup>187</sup> *ibid* 1077–8.

<sup>188</sup> *ibid* 1078, Human Rights Watch, 'Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East' (Human Rights Watch, 2010), 2, Human Rights Watch, above n 30, 69.

<sup>189</sup> Human Rights Watch, above n 30, 70.

Jordanian passport law, although research has found that the practice remains routine in Jordan.<sup>190</sup> Similarly, studies in Qatar have found that many employers hold the passports of MDWs for the duration of their employment despite being required to return passports once residence procedures are completed.<sup>191</sup> This impacts on the right to family reunion, restricting the ability of MDWs to reunite with their children, yet it continues to be overlooked by authorities in receiving countries, and acquiesced in (although not endorsed) by governments in source countries.

### *c. Restricted Communication with Families*

As previously discussed, the employer-based visa system and the weak provisions in standard contracts give employers in receiving States the power to limit an MDW's ability to communicate freely and regularly with her children. Studies have found that these restrictions are very much the norm<sup>192</sup> and clearly deny children the right to have regular contact with their mothers, as required by international law. Even where receiving States have formally granted greater protections to migrant workers, such as Jordan's extension of its labor laws to domestic workers in 2008, enforcement is often limited by the unwillingness of all parties to extend regulatory scrutiny to the 'inviolable space' of the private home.<sup>193</sup>

Studies from Sri Lanka have identified '[f]requent and regular communication with the migrant parent' as essential to a child's mental well-being,<sup>194</sup> and also confirm that 'being able to speak to a mother or father over the phone [is] beneficial for the children left behind.'<sup>195</sup> However, as Amnesty International reports, Sri Lankan MDWs in Middle Eastern countries such as Qatar often face severe restrictions on communication, including their ability to make mobile phone calls.<sup>196</sup> Amnesty International's study found that mobile phones were regularly confiscated or denied, with recruitment agents reporting that they take women's mobile phones on arrival.<sup>197</sup> Furthermore, as found in a 2009 study by IOM, even with access to mobile phones and email, contact between MDWs and their families generally took place only about once a month.<sup>198</sup> Another study of 400 households in Sri Lanka found that domestic workers kept in touch mainly by land phone and post, having limited access to modern forms of electronic communication including the internet; in fact, none of the respondents in that survey kept in touch with their family by email.<sup>199</sup> Human Rights Watch has also documented cases of Sri Lankan women who were not allowed to contact their families after the 2004 Indian Ocean tsunami (killing around 230,000 people, including 35,000 Sri Lankans),<sup>200</sup> nor permitted to receive phone calls from

<sup>190</sup> Frantz, above n 17, 1083.

<sup>191</sup> Amnesty International, above n 96, 12.

<sup>192</sup> Frantz, above n 17, 1078.

<sup>193</sup> *ibid*, 1078–9.

<sup>194</sup> Wettasinghe, Shanmugam and Emmanuel, above n 134, 5.

<sup>195</sup> Jayaweera and Dias, above n 42, 88.

<sup>196</sup> Amnesty International, above n 96, 6.

<sup>197</sup> *ibid*, 32–3.

<sup>198</sup> Jayaweera and Dias, above n 42, 88.

<sup>199</sup> Ukwatta, above n 35, 123, 128.

<sup>200</sup> Thomas Holzer and James Savage, 'Global Earthquake Fatalities and Population' (2013) 29(1) *Earthquake*

their children or have their letters posted.<sup>201</sup> As one Sri Lankan MDW in Saudi Arabia was told, '[f]or two years, you will have no contact with your family.'<sup>202</sup>

Amnesty International's report on Qatar also highlights the frequent restrictions placed on MDWs' freedom of movement, among other violations.<sup>203</sup> Studies have reported that women were not permitted by their employers to return to Sri Lanka after learning of their own children's deaths during the 2004 tsunami.<sup>204</sup> A 2013 ILO survey of 2,000 Sri Lankan migrant worker returnees, three-quarters of whom were women, found that 74 per cent had their passports withheld by their employer and 72 per cent were prevented from leaving their workplace altogether.<sup>205</sup>

#### *d. Continuing Effects of Abuse and Trauma*

Abuse and trauma experienced by MDWs in receiving states can have a lasting impact on the capacity of those women to parent their children on their return. In so far as the immigration policies of receiving States facilitate such abuse, or acquiesce in it, there is a potential breach by the State of its human rights obligations to the MDWs.<sup>206</sup>

MDWs are largely unprotected under domestic law in many receiving States. A study by the ILO in 2005 revealed that, of 65 countries surveyed, only 19 had laws governing work in private households, and even then domestic workers were often afforded lower protection than other categories of workers.<sup>207</sup> The abusive conditions in which MDWs work are well-documented, particularly in the Middle East.<sup>208</sup> Weak protection mechanisms in labor migration policies and programs allow these abuses to continue in this predominantly informal and unregulated sector. A particular concern, identified by the UN Committee for Migrant Workers, is the psychological, physical and sexual abuse and harassment experienced by many women MDWs at the hands of employers, recruitment agents and intermediaries.<sup>209</sup> Being trapped in abusive conditions has frequently led to instances of suicide or suicide attempts, with obvious ramifications for the mental health and well-being of their children at home.

*Spectra* 155, 159.

<sup>201</sup> Human Rights Watch, above n 30, 72, 74.

<sup>202</sup> *ibid*, 72.

<sup>203</sup> Amnesty International, above n 96, 6.

<sup>204</sup> Human Rights Watch, above n 30, 72, 74.

<sup>205</sup> International Labour Organization, above n 25, vi.

<sup>206</sup> Whether there is also a breach by receiving States of their obligation under the CRC to make the best interests of the child a primary consideration is more difficult to assess. The children in question are not within the territory or subject to the jurisdiction of the receiving State. See Part III(a).

<sup>207</sup> International Labour Office, 'A Global Alliance Against Forced Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work' (International Labour Office, 2005), 50.

<sup>208</sup> See eg Amnesty International, 'Abusive Labour Migration Policies: Submission to the UN Committee on Migrant Workers' Day of General Discussion on Workplace Exploitation and Workplace Protection, 7 April 2014' (Amnesty International, 2014).

<sup>209</sup> Committee on Migrant Workers, *General Comment No 1: Migrant Domestic Workers*, UN Doc CMW/C/GC/1 (23 February 2011), [13(g)].

The Sri Lankan Government reports that 50 MDWs return to Sri Lanka ‘in distress’ daily,<sup>210</sup> and unofficial figures are likely to be significantly higher. The effects of traumatic experiences can have significant long-term consequences for an MDW’s mental and physical health, seriously affecting her capacity to resume a parenting role upon return. An ILO study of Sri Lankan returnees found that exploitative experiences of migrant workers in host countries leave physical and emotional scars, which are then brought home by the returnees.<sup>211</sup> It emphasized the necessity of counselling for migrant workers and their families upon return,<sup>212</sup> with such support likely to assist an MDW to manage the effects of trauma and resume a care-giving role. However, mental health professionals have indicated that it is likely that, at present, most MDWs who suffer trauma and other acute stress related symptoms do not access mainstream mental health services.<sup>213</sup>

## V. UNITED NATIONS SUPERVISION

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

### *a. Universal Periodic Review by the Human Rights Council*

The Human Rights Council is a subsidiary organ of the United Nations General Assembly, responsible for the promotion and protection of human rights around the globe. Its mandate extends to all 193 member States of the United Nations, and it fulfils its responsibilities in part through the conduct of universal periodic review of the fulfilment by each State of its human rights obligations and commitments.<sup>214</sup> Most States have now been subjected to two such reviews—for example, Sri Lanka in 2008 and 2013. The outcome report for each country provides an assessment of its human rights record, incorporating the views of diverse stakeholders.

Universal periodic review has brought attention to human right abuses against migrant workers in labor *receiving* countries. In 2012–13, issues raised through the process included

<sup>210</sup> Human Rights Watch, above n 30, 2.

<sup>211</sup> International Labour Organization, above n 25, 63.

<sup>212</sup> *ibid.*

<sup>213</sup> Hettige et al, above n 33, 51.

<sup>214</sup> Human Rights Council, GA Res 60/251, UN GAOR, 60th sess, UN Doc A/RES/60/251 (15 March 2006).

discrimination against and exploitation of migrant workers, including abuse and denial of salaries, in Saudi Arabia;<sup>215</sup> risks under the visa sponsorship system, including confiscation of passports, in the UAE;<sup>216</sup> and the abuse of women migrant domestic workers (the majority from South and South-East Asia) in Jordan.<sup>217</sup> Similarly, the universal periodic review of labor sending countries has facilitated the public recording of concerns about the treatment of migrant domestic workers. In 2012, the Human Rights Council heard from human rights treaty bodies about ‘reported abuses faced by Sri Lankans who migrate for work, especially women’;<sup>218</sup> and from Filipino human rights NGOs about concerns that ‘the Philippines was complicit in the violations of the rights of Filipino women migrant workers in light of its promotion of labour migration in employment sectors in countries with inadequate legal protection’.<sup>219</sup>

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

If universal periodic review is to have traction in the present context, it is perhaps best achieved through suasion. There are numerous examples of the process being used successfully in child’s rights advocacy. An example is the successful promotion by Save the Children of a suite of child-focused recommendations, which were adopted by the Government of Nepal following its universal periodic review in 2011.<sup>220</sup>

### *b. Review of State Reporting by Treaty Bodies*

A second monitoring mechanism arises from the obligation in each human rights treaty to

<sup>215</sup> Human Rights Council, Working Group on the Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights, Saudi Arabia*, 17th sess, UN Doc A/HRC/WG.6/17/SAU/2 (9 November 2012), [61].

<sup>216</sup> Human Rights Council, Working Group on the Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights, United Arab Emirates*, 15th sess, UN Doc A/HRC/WG.6/15/ARE/2 (9 November 2012), [46].

<sup>217</sup> Human Rights Council, Working Group on the Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights, Jordan*, 17th sess, UN Doc A/HRC/WG.6/17/JOR/2 (31 July 2013), [44].

<sup>218</sup> Human Rights Council, Working Group on the Universal Periodic Review, *Compilation Prepared by the Office of the High Commissioner for Human Rights, Sri Lanka*, 14th sess, UN Doc A/HRC/WG.6/14/LKA/2 (13 August 2012), [54].

<sup>219</sup> Human Rights Council, Working Group on the Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights, Philippines*, 13th sess, UN Doc A/HRC/WG.6/13/PHL/3 (12 March 2012), [91].

<sup>220</sup> Diarra Diop, ‘Child Rights Governance: Universal Periodic Review, Successful Examples of Child Rights Advocacy’ (Save the Children, 2014), 8–9.

submit a periodic report to the body established by that treaty to monitor compliance. For example, Art 44 of the CRC provides that State parties must submit to the Committee on the Rights of the Child a report on measures they have adopted to give effect to convention rights within two years of becoming bound by the convention, and every five years thereafter. Following a process of review, the ‘concluding observations’ of the treaty body summarize each State’s compliance with the treaty and note areas of concern, and this material is itself an input (along with the reports of similar treaty bodies) into the Human Rights Council’s universal periodic review.

One example of the dialogue that can ensue between stakeholders arose from Sri Lanka’s State report to the UN Committee on the Rights of the Child in 2010. The Committee asked whether the Government had taken steps to assess the ‘physical, psychological and social impact that large-scale female labor migration has on children’ and whether it had a strategy to prevent the separation of children from their mothers and safety net programs for the children of migrant workers.<sup>221</sup> The Government responded that it lacked the necessary resources to assess comprehensively the impact on children, that children are generally cared for by the women’s extended family, and that safety net programs are implemented in areas of high migration.<sup>222</sup> The Committee considered this response to be unsatisfactory and reiterated several concerns—the impact that ‘massive labour migrations of women have on the rights and well-being of children’; insufficient efforts to create alternative employment opportunities; inconsistent implementation of safety net programs; and insufficient coordination of childcare authorities to monitor the well-being of these children.<sup>223</sup>

Another example concerns Sri Lanka’s first State report to the UN Committee on Migrant Workers in 2008. The Committee’s concluding observations expressed regret that Sri Lanka provided no information on the impact of migration on children in Sri Lanka,<sup>224</sup> and encouraged the State to conduct new studies on the subject. Four years later, in anticipation of Sri Lanka’s second State report, the Committee sought information about whether the State ‘has carried out a comprehensive assessment to identify the causes of high female labour migration and the physical, psychological and social impact of migration on the rights and well-being of children and families left behind’.<sup>225</sup> The second report has not yet been submitted.

However, the treaty monitoring mechanisms are not necessarily robust. Their weaknesses have been said to include late or superficial state reporting, a backlog of reviews, under-funding, and

<sup>221</sup> Committee on the Rights of the Child, *List of Issues Concerning Additional and Updated Information related to the Combined Third and Fourth Periodic Reports of Sri Lanka*, UN Doc CRC/C/LKA/Q/3-4 (19 July 2010), [6].

<sup>222</sup> Committee on the Rights of the Child, *Written Replies by the Government of Sri Lanka to the List of Issues*, UN Doc CRC/C/LKA/Q/3-4/Add.1 (7 September 2010), [23].

<sup>223</sup> Committee on the Rights of the Child, *Concluding Observations: Sri Lanka*, UN Doc CRC/C/LKA/CO/3-4 (19 October 2010), [44].

<sup>224</sup> Committee on Migrant Workers, *Concluding Observations: Sri Lanka*, 11th Session, UN Doc CMW/C/LKA/CO/1 (14 December 2009), [49].

<sup>225</sup> Committee on Migrant Workers, *List of Issues Prior to the Submission of the Second Periodic Report of Sri Lanka*, UN Doc CMW/C/LKA/QPR/2 (29 July 2013), [21].

the questionable expertise of committee members.<sup>226</sup> For example, on the first of these criticisms, Sri Lanka ratified the CRC in 1991. Its initial report, due by 1993, was submitted in 1994, and of the four quinquennial reports due subsequently, only two have been submitted—one in 2002 and another in 2010.

A further limitation is that a committee's recommendations are only advisory and do not bind State parties. Nevertheless, it is important not to underestimate the significance of the process. A treaty body's recommendations have moral force within the international community, and States often work to improve their human rights practices as a result of the concluding observations. Moreover, periodic monitoring provides NGOs with an opportunity to submit a 'shadow' report, offering an alternative view of a State's compliance with its treaty obligations, and NGOs have been able to use this process successfully to advocate for policy reforms, as illustrated in Part V(a) above.<sup>227</sup> As Louis Brandeis famously remarked, 'Sunlight is said to be the best of disinfectants; electric light the most efficient policeman'.<sup>228</sup>

### *c. Determination of Individual Complaints by Treaty Bodies*

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

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

However, the capacity of individual complaints mechanisms to protect the rights of children left behind is limited. While all core human rights treaties allow for the possibility of individual complaints, in the case of the ICRMW the mechanism has not yet entered into force.<sup>229</sup> Even

<sup>226</sup> Philip Alston and James Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, 2000).

<sup>227</sup> The Advocates for Human Rights, *Stop Violence against Women: Enforcement Mechanisms in the United Nations* (25 December 2014) <[www1.umn.edu/humanrts/svaw/law/un/unenforce.htm](http://www1.umn.edu/humanrts/svaw/law/un/unenforce.htm)>.

<sup>228</sup> Louis Brandeis, *Other People's Money and How the Bankers Use It* (Frederick A Stokes Co, 1914), ch V.

<sup>229</sup> Only three of the required ten State parties have made the declaration needed under Art 77(1) to bring this

where complaints mechanisms are in force, they may not be widely ratified, or may not be ratified by States relevant to the situation in question. For example, only 14 States have accepted the complaints mechanism under the CRC,<sup>230</sup> and no GCC or other Middle Eastern labor receiving country has ratified the complaints mechanism under the ICCPR or the ICESCR. Where complaints are heard and upheld, the ‘communication’ from the committee to the State is advisory only, and the response is ultimately a matter for the discretion of the State concerned. However, taking a long-term view, the combined jurisprudence of all UN human rights treaty bodies is substantial and growing,<sup>231</sup> and tends to enhance the moral force of a treaty body’s findings.

#### *d. Inquiries by Treaty Bodies into Systematic Violations*

Another mechanism for reviewing human rights observance is the inquiry procedure established under some human rights treaties. The Optional Protocol establishing the complaints mechanism for the CRC (‘CRC OP3’) enables the Committee on the Rights of the Child to initiate its own inquiry into serious or systematic violations of the CRC (Art 13). This mechanism is also available under the Optional Protocol to the ICESCR.<sup>232</sup> However, again, the effectiveness of these mechanisms is limited in the context of the impact of labor migration on children left behind due to the failure of relevant States to have ratified the core instruments and their protocols (see Table 1). Inquiries procedures are further limited by the need for State parties to recognize the competence of the Committee in regard to the inquiry, with States being able to opt out of the inquiries procedure at the time of signature, ratification or accession to CRC OP3 (Art 13(7)), or at any time in the case of the Optional Protocol to the ICESCR (Art 11(8)).

#### *e. Special Rapporteurs of the Human Rights Council*

Because of these difficulties, considerable use has been made of the ‘special procedures’ of the Human Rights Council, through which independent experts are appointed with a mandate to report and advise on human rights either thematically (there are 39 of these) or with a country-specific focus (there are 14 of these). Most relevant in the present context is the Special Rapporteur on the Human Rights of Migrants, first established in 1999, who can analyze specific issues affecting the rights of migrant workers and their families. The Special Rapporteur has a mandate that is separate from the ICRMW treaty body and has the ability to

mechanism into operation.

<sup>230</sup> United Nations, *United Nations Treaty Collection: Multilateral Treaties Deposited with the Secretary-General* (25 December 2014) <<https://treaties.un.org/pages/participationstatus.aspx>>. These States are: Albania, Andorra, Belgium, Bolivia, Costa Rica, Gabon, Germany, Ireland, Monaco, Montenegro, Portugal, Slovakia, Spain and Thailand.

<sup>231</sup> Across all human rights treaty bodies, 390 decisions were made over the five-year period 2010–2014. See Office of the High Commissioner for Human Rights, *Jurisprudence Database*, [juris.ohchr.org](http://juris.ohchr.org).

<sup>232</sup> *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature 19 December 2011, (entered into force 14 April 2014). In relation to the ICESCR, see *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, opened for signature 10 December 2008, (entered into force 5 May 2013), Art 11.

deal with ‘human rights obligations for all States, independently of whether or not they are parties to specific human rights treaties’.<sup>233</sup> The recommendations arising from this type of scrutiny are not binding on States.

By way of example, in 2013 the Special Rapporteur, François Crépeau, conducted a mission to Qatar to review its laws, policies and practices with respect to migrant workers. The report contains recommendations for reform, including some with respect to MDWs, addressed to sending countries, receiving countries and the private sector.<sup>234</sup> In 2009, the previous incumbent, Jorge Bustamante, reported on the protection of children in the context of migration, including a short but thoughtful assessment of the situation of children left behind after one or both parents migrate.<sup>235</sup> And in 2004 the first holder of the office, Gabriela Rodríguez Pizarro, reported on the human rights of migrant domestic workers, noting many concerns that remain alive today. Her recommendations stressed:

‘the importance of ensuring that every migrant domestic worker has the possibility and the right to visit his or her family ... [and] that contracts should provide for the right to vacations and that agreements regulating workers’ entry and stay in the country of destination should allow them to leave the country and return to it through the issuance of multiple-entry visas.’<sup>236</sup>

## VI. STATE-BASED LABOR MIGRATION LAWS, POLICIES AND PRACTICES

As the foregoing discussion demonstrates, although both general and specialized human rights treaties offer a legal framework for understanding the human rights of migrant workers and their families, enforcement of these rights through existing UN mechanisms can be challenging. There is value, therefore, in examining examples of domestic laws, policies and practices that offer sound prospects for better protecting the children of migrant workers.

Several labor migration programs serve as useful models for the migration of domestic workers, while upholding the rights and freedoms of their children. Programs in labor receiving States include those that facilitate family reunion through the permanent migration of family members to the host state; and those that encourage circular migration, which ensures that domestic workers are not separated from their families for excessive periods. Programs in labor sending

<sup>233</sup> World Health Organization, Regional Office for the Eastern Mediterranean, 'Health and Human Rights: Protection of the Rights of Migrant Workers' (WHO, 2014), 4.

<sup>234</sup> François Crépeau, 'Report of the Special Rapporteur on the Human Rights of Migrants, Mission to Qatar, Human Rights Council, 26th sess, UN Doc A/HRC/26/35/Add.1 (23 April 2014)' (2014), 17–23.

<sup>235</sup> Jorge Bustamante, 'Report of the Special Rapporteur on the Human Rights of Migrants, The Protection of Children in the Context of Migration, Human Rights Council, 11th sess, UN Doc A/HRC/11/7 (14 May 2009)' (2009), 11–14.

<sup>236</sup> Gabriela Rodríguez Pizarro, 'Report of the Special Rapporteur on the Human Rights of Migrants, The Human Rights of Migrant Domestic Workers, Commission on Human Rights, 60th sess, UN Doc E/CN.4/2004/76 (12 January 2004)' (2004) 19.

States include government negotiation of better conditions for migrant workers with respect to communications and travel; those that enable a progressive shift from low-skilled to skilled labor migration, where the risks for children are ameliorated; and engagement in regional dialogues to improve the situation of children left behind. Each example is discussed below.

*a. Reunification and Permanent Settlement: Canada's Caregiver Program*

Canada's Caregiver Program has sought to acknowledge the need for permanent migration when attempting to fill permanent labor shortages. It has done this by developing pathways to permanent residence, which target workers in caregiving occupations that the government anticipates will experience labor shortages in the future. These include skilled and semi-skilled positions in childcare and a range of healthcare occupations such as registered nurses, nurse aides and home support workers.<sup>237</sup>

Caregivers migrating to Canada through the Program are eligible to apply for permanent residence after working in Canada for two years. However, until recently, 'it could take more than three years to process permanent residence applications made by caregivers', and only after that were they able to apply for family reunification. This created a lengthy period of separation between caregivers and family members left behind.<sup>238</sup> In an effort to facilitate speedier family reunification, the government announced a significant package of reforms in October 2014, including a commitment to process permanent residence applications by caregivers within a six month period. To achieve this, applications for permanent visas under the Program are to be capped at 5,500 annually (not including spouses and dependants), which 'is consistent with the number of caregivers coming to Canada in recent years'.<sup>239</sup> The reforms also include a commitment to reduce the backlog of 60,000 caregivers waiting for permanent residence status by admitting 30,000 caregivers and their family members as permanent residents in 2015. Significantly, the reforms remove the previous requirement for caregivers to provide live-in care in order to qualify for permanent residency, in an effort to improve 'protection against potential workplace vulnerability and abuse'.<sup>240</sup>

The Canadian Program offers a best-practice model for labor migration, which has been lauded by IOM.<sup>241</sup> It illustrates the importance of recognition, by labor receiving States, of family reunification and the role of host States in averting long periods of family separation. However, it is very much the exception. Most destination countries do not have an easy pathway to permanent residency for domestic workers. Yet it should also be borne in mind that the scale of the Canadian program is minute in comparison with the streams of low-skilled labor

<sup>237</sup> Citizenship and Immigration Canada, *News Release: Improving Canada's Caregiver Program* (31 October 2014) Government of Canada <<http://news.gc.ca/web/article-en.do?nid=898729>>.

<sup>238</sup> Citizenship and Immigration Canada, *CIC Newsletter: Major Reforms To Caregiver Program Announced By Canadian Government* Government of Canada <[www.cicnews.com/2014/11/major-reforms-caregiver-program-announced-canadian-government-114044.html](http://www.cicnews.com/2014/11/major-reforms-caregiver-program-announced-canadian-government-114044.html)>.

<sup>239</sup> Citizenship and Immigration Canada, above n 237.

<sup>240</sup> *ibid.*

<sup>241</sup> International Organization for Migration, above n 68, 16.

migration from Asia to the Middle East. The sheer size of MDW migration to the Middle East makes the prospect of systematic pathways for family reunification remote. Permanent family reunion would require wholesale reform of migration laws to allow the integration of MDWs and their families into GCC States. It also makes the assumption that families of low-skilled workers would want to relocate to countries in the Middle East. This assumption should not go unchallenged given the differences in language and culture, and the possibility that they would be marginalized or discriminated against in their new home.

### *b. Circular Migration: Lessons from Seasonal Labor Programs*

Circular migration has been described as ‘the fluid movement of people between countries’ undertaken voluntarily and linked to the labor needs of countries of origin and destination.<sup>242</sup> In Europe it is seen as a means of meeting the labor needs and fighting irregular migration in destination countries, while simultaneously responding to the need for development, skills transfer and mitigating brain drain in countries of origin.<sup>243</sup>

Seasonal labor migration programs—which are a prominent example of circular migration—have been used for many years to fill local labor shortages, especially in agriculture and horticulture, where seasonal harvesting creates discrete periods of peak labor demand. Seasonal migrants have moved from North Africa to France, from Poland to Germany, from the Caribbean to Canada, and from Pacific Islands to Australia and New Zealand.<sup>244</sup> A key feature of seasonal labor migration programs is the required return of the worker to his or her country of origin for a significant period each year. While these programs can still give rise to concerns about the social impact of migration on children left behind, the opportunity they provide for more frequent and more extended family reunion makes them qualitatively different from the migration of MDWs from Sri Lanka to the Middle East.

Consider a study of the impact of seasonal migration on the early childhood development of preschool children in Nicaragua, where nearly half of all sampled households relied on seasonal migration to complement and diversify their incomes.<sup>245</sup> The study recognized that seasonal migration can have human and social costs due to lack of parenting and the potential to disrupt the development of children left behind. Nevertheless, it found there was generally no adverse

<sup>242</sup> International Organization for Migration, 'Glossary on Migration: International Migration Law No. 25' (IOM, 2011), 19.

<sup>243</sup> Commission of the European Communities, 'On Circular Migration and Mobility Partnerships between the European Union and Third Countries' (COM(2007) 248 final, Commission of the European Communities, 2007), 2.

<sup>244</sup> Piotr Plewa, 'The Politics of Seasonal Foreign Worker Admissions to France 1974-2010, EUI Working Paper RSCAS 2010/63' (European University Institute, 2010); Marek Okólski, 'Seasonal Labour Migration in the Light of the German-Polish Bilateral Agreement' in OECD Federal Office of Immigration Integration and Emigration (ed), *Migration for Employment: Bilateral Agreements at a Crossroads* (OECD, 2004) 203; Christopher Worsick (ed), *Canadian Issues: Temporary Foreign Workers* (The Metropolis Project, 2010); Therese MacDermott and Brian Opeskin, 'Regulating Pacific Seasonal Labour in Australia' (2010) 83(2) *Pacific Affairs* 283.

<sup>245</sup> Karen Macours and Renos Vakis, 'Seasonal Migration and Early Childhood Development' (2010) 38(6) *World Development* 857.

effect from the seasonal migration of fathers, and that when the mother migrated there was a positive effect on early childhood development, possibly because the income benefits from the mother's migration outweighed any negative effects of separation.<sup>246</sup> In this particular study, the adults migrated to other areas in Nicaragua or Central America, and so were in relatively close proximity to their children, with an average period of separation of only three months. Elsewhere, researchers have suggested that the period of separation is a factor in explaining the contrasting negative effects of circular migration found in studies from the Philippines.<sup>247</sup> In the study by Battistella and Conaco, Filipino children of primary school age had been separated from their mothers for long periods, averaging more than four years.<sup>248</sup>

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

‘It is also worth considering whether a maximum length of absence should be imposed on the scheme to ensure that workers are not separated from their families for extended periods of time—for example, visas to work in Australia could be capped at six months within any 12-month period so that workers would be sure to spend at least half the year in their home communities.’<sup>249</sup>

That rule was adopted when Australia's seasonal worker program was introduced for Pacific workers in 2009—the visa underpinning the program grants an entitlement to work for up to six months, and permits total stays of up to seven months, in any year.<sup>250</sup>

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

However, this type of arrangement could be offered in appropriate cases as an option to MDWs who have significant family commitments in their home country, rather than imposed as a

<sup>246</sup> *ibid*, 866. See also Halahingano Rohorua et al, 'How do Pacific Island Households and Communities Cope with Seasonally Absent Members?' (2009) 24(3) *Pacific Economic Bulletin* 19, 21.

<sup>247</sup> Rohorua et al, above n 246, 21–22.

<sup>248</sup> Battistella and Conaco, above n 45.

<sup>249</sup> Nic Maclellan and Peter Mares, 'Labour Mobility in the Pacific: Creating Seasonal Work Programs in Australia' in Stewart Firth (ed), *Globalisation and Governance in the Pacific Islands: State, Society and Governance in Melanesia* (ANU Press, 2006) 137, 159.

<sup>250</sup> Special Program visa (subclass 416) for the Seasonal Worker Program, Department of Immigration and Border Protection, Australian Government.

mandatory condition for participating in the scheme. In either case, both the positive and negative impacts of circular migration programs may take years to materialize, given the long-term nature of the development process, including ‘potential longer-term negative effects of continual absence of family members on family and community relations’.<sup>251</sup>

### *c. Communication and Visitation: Government Leverage in the Philippines*

The Philippines has gone further than most source countries in translating policy commitments to migrant workers and their families into binding legislation, such the *Migrant Workers and Overseas Filipinos Act 1995*.<sup>252</sup> That Act, as amended, incorporates rights for Filipino migrant workers into domestic law, including a provision in s 4 that the government will only deploy Filipino workers to countries in which their rights are protected. The legislation stipulates the guarantees that a receiving country is required to make for the purpose of protecting the rights of overseas Filipino workers. These are that the receiving country: (a) has existing labor and social laws protecting the rights of workers, including migrant workers; (b) is a signatory to and/or a ratifier of multilateral conventions, declarations or resolutions relating to the protection of workers, including migrant workers; and (c) has concluded a bilateral agreement or arrangement with the Philippines government on the protection of the rights of overseas Filipino workers. In addition, the receiving country must show that it is taking ‘positive, concrete measures to protect the rights of migrant workers in furtherance of any of the guarantees’. If a receiving country cannot show clearly that these guarantees exist, no permit can be issued to deploy workers to that country.

The Philippines continues to send its workers to GCC countries, but stronger negotiations by the Philippines than other labor sending countries has resulted in better employment outcomes for its workers in the Middle East, including significantly higher wages for domestic workers in some destination countries.<sup>253</sup> It has also been reported that efforts to increase the skills of migrant workers in order to move away from low-skilled labor migration led to ‘a 15 percent decrease in the share of low-skilled workers going to the UAE, and a sharp increase in the deployment of newly hired professionals and semi-skilled workers, such as in sales’ between 1997 and 2008, according to the Philippine Overseas Employment Administration.<sup>254</sup>

The Philippines has also taken strong measures to facilitate connections between families and migrant workers, recognizing that frequent communication between children and migrant parents improves the well-being of children. In migrant families, sound family relationships are

<sup>251</sup> David McKenzie and John Gibson, 'The Development Impact of a Best Practice Seasonal Worker Policy: Policy Research Working Paper 5488' (World Bank, 2010), 21.

<sup>252</sup> *Migrant Workers and Overseas Filipinos Act 1995* (Philippines), Republic Act No. 8042 as amended by Republic Act No. 10022.

<sup>253</sup> In 2008, Filipino domestic workers earned \$200–400 per month in Lebanon, while Bangladeshis earned \$125 and Sri Lankans between \$120–150: Rakkee Timothy and SK Sasikumar, 'Migration of Women Workers from South Asia to the Gulf' (UN Women, 2012), 39.

<sup>254</sup> Froilan Malit and Ali Al Youha, 'Labor Migration in the United Arab Emirates: Challenges and Responses' (2013) (18 September) *Migration Information Source: Migration Policy Institute* 1, 7.

maintained ‘not by presence but by constant communication’.<sup>255</sup> In one study of Filipino children under 12 years of age with one or both parents working overseas, predominantly in the Middle East, it was found that ties between the parents and their children ‘were maintained through regular communication, mostly through the use of mobile phones and ... text messaging’.<sup>256</sup> It found that regular communication greatly assisted transnational households to adjust to family separation, and that access to technology such as mobile phones and the internet helped migrant workers to continue parenting from abroad.<sup>257</sup> The study also found that 47 per cent of overseas migrant workers from the Philippines contacted their families daily, and 25 per cent weekly, but that mothers who were in domestic work had less regular communication with their families because of restrictions imposed by employers.<sup>258</sup> Another study identified that ‘feelings of abandonment expressed by left-behind children of migrant mothers have been found to decrease when mothers continue to show their care through frequent intimate communication and close supervision over their left-behind offspring.’<sup>259</sup>

To support communication between MDWs and their families, the Philippines Government has demanded that overseas employers allow MDWs to communicate freely with their families in the Philippines, enforced through undertakings in the Standard Employment Contract for Filipino Household Service Workers.<sup>260</sup> Similarly, in its negotiations with the UAE, the Philippine Overseas Employment Administration (a government agency that seeks to protect Filipino migrant workers) has demanded that its domestic workers have the right to use and own a mobile phone.<sup>261</sup> Likewise, the Overseas Workers Welfare Administration (a government agency that attends to the welfare of Filipino migrant workers) has initiated the Tulay Program, which provides information and communication technology training to overseas Filipino workers and their families to facilitate communications and ensure that families remain in contact, particularly by utilising the internet.<sup>262</sup>

Another noteworthy feature of the regulatory environment in the Philippines is the exemption from travel taxes that has been granted by Presidential Decree to migrant workers, their spouses, and dependants aged 21 years or below.<sup>263</sup> Such measures can facilitate family reunion by reducing the cost of travel for transnational families. However, the cost of airfares may still be

<sup>255</sup> Episcopal Commission for the Pastoral Care of Migrants and Itinerant People, Scalabrini Migration Center and Overseas Workers Welfare Administration, ‘Hearts Apart: Migration in the Eyes of Filipino Children’ (Scalabrini Migration Center, 2004), 64.

<sup>256</sup> CHAMPSEA Philippines, above n 43, 2.

<sup>257</sup> *ibid*, 6.

<sup>258</sup> *ibid*, 18.

<sup>259</sup> Theodora Lam et al, ‘Securing a Better Living Environment for Left-Behind Children: Implications and Challenges for Policies’ (2013) 22(3) *Asian Pacific Migration Journal* 421, 426.

<sup>260</sup> Embassy of the Philippines, above n 127, cl 8.

<sup>261</sup> Ramona Ruiz, ‘UAE Recruiters Warned to Pay Minimum Wage for Filipino Domestic Workers’, *The National* (Abu Dhabi), 17 December 2012 <[www.thenational.ae/news/uae-news/uae-recruiters-warned-to-pay-minimum-wage-for-filipino-domestic-workers](http://www.thenational.ae/news/uae-news/uae-recruiters-warned-to-pay-minimum-wage-for-filipino-domestic-workers)>.

<sup>262</sup> CHAMPSEA Philippines, above n 43, 7; International Labour Organization, *Good Practices Database: TULAY or Bridge Education Program, Philippines* (31 October 2013) ILO, Labour Migration Branch <[www.ilo.org/dyn/migpractice/migmmain.home](http://www.ilo.org/dyn/migpractice/migmmain.home)>.

<sup>263</sup> *Presidential Decree No. 1183, Amending and Consolidating the Provisions on Travel Tax of Republic Act No. 1478 as Amended*, 21 August 1977 (Philippines).

prohibitive, and States should therefore consider subsidizing airfares of MDWs to encourage more frequent family reunion, or alternatively require employers to pay the return airfare of MDWs at more frequent intervals than once every two years.

#### *d. Switching Streams: Enhancing Skilled Migration*

A number of source countries have recognized that the protection of the rights of migrant workers and their families is improved significantly when the nature of the migration flow changes from unskilled to skilled labor. In its National Labour Migration Policy, the Sri Lankan Government acknowledged that the possession of skills is a key element in protecting migrant workers.<sup>264</sup> Yet its migrant worker labor force remains largely unskilled—64 per cent of departing migrant workers fell in that category in 2012, which is a small improvement on the 70 per cent of unskilled workers in 2007.<sup>265</sup> As IOM recommends, ‘[i]n the Sri Lankan context it is necessary to provide opportunities for high levels of skills training for women migrant workers such as care of children, the elderly and the sick, as well as in “non-traditional” skills that will ensure better remunerative employment and less economic exploitation.’<sup>266</sup> Having higher skills is also likely to improve a migrant worker’s prospects of securing employment upon return but, at present, most Sri Lankan MDWs do not acquire marketable skills abroad.<sup>267</sup> Without professional experience and development while overseas they ‘cannot secure reasonably well paid employment back in the country’.<sup>268</sup>

The Philippines has gone beyond executive statements of policy to make a legislative declaration to enhance the skills of its migrant workers, in recognition that ‘the most effective tool for empowerment is the possession of skills by migrant workers’.<sup>269</sup> However, the legislative undertaking that ‘as soon as practicable, the government shall deploy and/or allow the deployment only of skilled Filipino workers’ was made in 1995,<sup>270</sup> and two decades later a significant portion of Filipino migrant workers remain low-skilled.<sup>271</sup>

Nonetheless, the Philippines and other countries such as Tonga have strong out-migration streams that focus on providing skilled nurses, carers and health care workers to developed countries, to respond to energetic international recruitment campaigns to fill critical shortages in industrialized countries.<sup>272</sup> Governments in source countries invest in training female nurses and allied professionals, who are then able to attract skilled jobs overseas. This improves

<sup>264</sup> Sri Lanka Ministry for Foreign Employment Promotion and Welfare, above n 101, 8.

<sup>265</sup> Sri Lanka Bureau of Foreign Employment, above n 22, Table 84.

<sup>266</sup> Jayaweera and Dias, above n 42, 109.

<sup>267</sup> Gamburd, above n 138, 106.

<sup>268</sup> S Hettige, 'Globalization, Labour Migration and Social Protection in Sri Lanka' (Paper presented at the RC19 2009 Conference: Social Policies: Local Experiments, Travelling Ideas, Montreal, 20-22 August 2009), 13.

<sup>269</sup> *Migrant Workers and Overseas Filipinos Act 1995* (Philippines), Republic Act No. 8042 as amended by Republic Act No. 10022, s 1(g).

<sup>270</sup> *Migrant Workers and Overseas Filipinos Act 1995* (Philippines), Republic Act No. 8042, s 2(g).

<sup>271</sup> Graziano Battistella and Maruja Asis, 'Country Migration Report: The Philippines 2013' (International Organization for Migration and Scalabrini Migration Center, 2013), 52.

<sup>272</sup> Mireille Kingma, 'Nurses on the Move: A Global Overview' (2007) 42(3) *Health Services Research* 1281.

outcomes for the migrants' children when compared to low-skilled migration, such as domestic workers, because better wages and employment conditions improve the opportunities for communication and family reunion.<sup>273</sup> The opportunity for skilled employment also reduces the likelihood that the daughters of these women migrant workers will take up employment in domestic work abroad, providing an opportunity to break the generational cycle of low-paid, low-skilled work experienced by poor families.

A concomitant problem that arises for source countries that promote skilled migration is that skilled workers may choose not to return because of higher wages and standards of living in the host country, contributing to the 'brain drain' that is experienced in many developing countries. This is more likely to occur when the receiving country is developed, democratic, respectful of migrant rights, and supportive of migrants' integration into society, as with the Canadian Caregiver Program discussed above. Brain drain is less of a risk in receiving countries where the integration of skilled migrants is not supported or encouraged, and the primary motivation of the worker is to earn higher wages over a finite period in order to secure an improved standard of living in their home country.

An example of a best practice model of temporary skilled labor migration, which attempts to address the issue of 'brain drain, is the labor agreement between the Philippines and Germany signed in March 2013. The '*Agreement Concerning the Placement of Filipino Health Care Professionals in Employment Positions in the Federal Republic of Germany*' establishes bilateral arrangements for the 'government-to-government placement of Filipino health professionals for temporary employment in Germany', reflecting what the Filipino Government states is a 'firm commitment to provide for an orderly system for the recruitment of Filipino health care professionals to Germany' and one which demonstrates its 'commitment to promote their welfare and protection'.<sup>274</sup> One key area covered in the agreement is cooperation between the two countries in preserving, promoting and developing the welfare of Filipino workers; another is the commitment by both States to support the sustainability of human resource development in the Philippines. The Filipino Labor and Employment Secretary has stated that 'mechanisms to ensure the sustainability of trained and qualified health care professionals in the Philippines through [human resource development] cooperation are very important given the concerns of the Philippine health sector on their active migration'.<sup>275</sup>

The deployment of skilled workers to meet labor demands in professional industries places source governments in a stronger position to demand better conditions for their workers because the governments of receiving countries require foreign workers to meet their commitments to provide social services to their own populations. For example, the agreement between the Philippines and Germany stipulates that Filipino health care professionals in Germany must not

<sup>273</sup> Studies from the Philippines have found that employment in skilled and protected sectors not only enables migrant workers to gain higher wages, but also reduces restrictions on maintaining regular contacts with their families in the Philippines: CHAMPSEA Philippines, above n 43, 4.

<sup>274</sup> Philippines, Department of Labor and Employment, 'DOLE Welcomes Labor Agreement with Germany on Health Care Professionals', *News Release*, 19 March 2013.

<sup>275</sup> *ibid.*

be employed under less favorable working conditions than those for comparable German workers. While this practice may not be capable of immediate application in Sri Lanka because of the skills base of its working-age population, it provides a model for state investment in human capital accumulation in the medium to long term. Moreover, this illustration shows the potential benefits of careful bilateral negotiations with labor receiving States. The UN Committee on Migrant Workers has urged Sri Lanka to continue its efforts to negotiate more secure employment opportunities and terms and conditions for women in vulnerable sectors through bilateral agreements in countries where discriminatory treatment and abuse are more frequent.<sup>276</sup>

#### e. *Regional Cooperation*

Most international migration takes place within regions that are linked by geographical, historical, linguistic, cultural or economic ties. This is true of Asian migration, where 72.4 per cent of the 59.3 million people who immigrated to an Asian country (including a Middle Eastern country) in 2000-02 moved there from another Asian country.<sup>277</sup> The practical importance of regional migration has underpinned the growth, since the 1980s, of collaborative arrangements among States for addressing migration issues through regional consultative processes.<sup>278</sup>

Two regional consultative processes that specifically address labor migration from Asia are the Colombo Process established in 2003 (formally known as the Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia),<sup>279</sup> and the Abu Dhabi Dialogue established in 2008.<sup>280</sup> Sri Lanka is a member of both processes. The processes provide an opportunity to set minimum employment standards that are consistent across labor sending States, and thus reduce a government's fear of becoming a less attractive labor source than countries that make less onerous demands on behalf of their workers. It also allows the pooling of resources to examine issues common to the region, including the long term impact of labor migration on all those affected by it.

There is significant potential for regional consultative processes to improve labor migration practices for the benefit of the children left behind. For example, in 2011 the Fourth Ministerial Consultation of the Colombo Process recommended that member States promote increased opportunities for family reunion. It also highlighted the role of international agencies in

<sup>276</sup> Committee on Migrant Workers, *Concluding Observations: Sri Lanka*, 11th Session, UN Doc CMW/C/LKA/CO/1 (14 December 2009), [28], [40].

<sup>277</sup> Richard Bedford, 'Contemporary Patterns of International Migration' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 17, 30. See also United Nations Development Programme, above n 3, 21–4.

<sup>278</sup> Karoline Popp, 'Regional Processes, Law and Institutional Developments on Migration' in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 366, 366–7.

<sup>279</sup> See [www.colomboprocess.org](http://www.colomboprocess.org). It comprises 11 members from labor sending countries and 8 observers from labor receiving countries (including five in the Middle East).

<sup>280</sup> Its members comprise the 11 labour sending members of the Colombo Process and seven destination countries.

supporting studies on ‘the impact on families of migrants left behind in countries of origin’.<sup>281</sup> In addition, in 2014 the Third Ministerial Consultation of the Abu Dhabi Dialogue committed member States to significant improvements for migrant workers, which can have consequential benefits for children left behind.<sup>282</sup> These measures included expanding the pool of skilled migrants; enhancing information and orientation programs for migrant workers; protecting workers’ rights; and strengthening oversight of private recruitment agencies.

However, to date, the regional consultative processes have not borne enough fruit for the children of MDWs. The regional dialogues remain focused on measures that promote the migration of domestic workers, to the economic benefit of sending and receiving States. This can be seen in the concluding statement of a recent meeting of senior officers under the Colombo Process, which emphasized prosperity and ‘adding value’ to regional labour migration through cost-effective recruitment, promoting standard employment contracts, and promoting cheaper and faster remittances.<sup>283</sup> Although progress on these issues is not inimical to the interests of children left behind, it reinforces the need for regional consultative processes to make a broader assessment of the social impact of the MDW phenomenon on children, families and communities in labor sending countries, and to make those concerns central to their deliberations.

## VII. CONCLUSION

The rights of the children of MDWs most at risk of violation are those associated with family life, education, health, well-being and freedom from abuse. Existing international instruments and national policies provide comprehensive legal and policy frameworks for understanding these rights. However, as Bhabha states, the main problem is not a normative vacuum or a doctrinal impasse but ‘a failure of political will to provide the tools necessary for implementation on the ground of the sound policy measures in force primarily on the books’.<sup>284</sup>

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

<sup>281</sup> International Organization for Migration, 'Migration with Dignity: Report of the Fourth Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia ('Colombo Process')' (International Organization for Migration, 2011), 50, 53.

<sup>282</sup> Abu Dhabi Dialogue, *Kuwait Declaration*, Third Ministerial Consultation of the Abu Dhabi Dialogue, 27 November 2014. See also 'Gulf, Asia Approve Steps to Protect Foreign Workers', *The Daily Star* (Lebanon), 28 November 2014, online.

<sup>283</sup> Colombo Process, 'International Labour Migration for Prosperity: Adding Value by Working Together - Concluding Statement of the Senior Officials' Meeting' (7 May 2014).

<sup>284</sup> Bhabha, above n 71, 231.

abuse or neglect. As summed up by the Global Commission on International Migration:

‘migration policies have little chance of producing positive outcomes unless they are complemented by appropriate policies in the many other areas that have an impact on, and which are impacted by, international migration. In short, the issue of human mobility cannot be dealt with in isolation.’<sup>285</sup>

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

<sup>285</sup> Global Commission on International Migration, 'Migration in an Interconnected World: New Directions for Action' (GCIM, 2005), 9.