

## **Migrant Farm Workers Are Humans Too: Migrant Workers' Rights Under International Human Rights Law**

That is all they are--agricultural workers, people who pick tobacco and apples and pears and tomatoes, people good for paying taxes too. Who wants more of these people in this country, when they can get them for ten months a year and then send them packing when the season [is] over?<sup>1</sup>

For CML 3399

By 366 4181

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<sup>1</sup> Cecil Foster, *Slammin Tar* (1998) 415.

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## Part I: Introduction

At a time when the United States is considering building a wall to keep out migrant workers<sup>2</sup>, and Ontario denies farm workers the right to unionize in order to defend industrial “family” farms, it may seem quixotic to speak of the need to protect migrant worker rights. However, the fight for their rights is important for all of us. The rights of all depend on the recognition of the rights of the most vulnerable, and the denial of migrant worker rights may lead to a lowering of all workers rights as employers realize they can hire workers and deny them rights. Migrant workers are humans but not citizens. So, what rights do they possess as humans and as workers under international human rights law? What obligations do governments have towards migrants?

This paper will argue states have obligations to “respect, protect, and fulfill” migrant worker human rights through both legislation and actions. It will also argue that these obligations extend to ensuring that farm worker can realize their rights even in situations of third party rights-infringements. Migrant workers possess a wide spectrum of rights from the right to life and equal treatment before the law, to the rights more likely to be denied under domestic law, rights to form unions, to strike and to move freely within a country. The distribution of these rights is complicated by the issue of “illegality” or “lack of status” of many migrants.

Part II will set out the background of migration and migrant workers conditions, Part III will lay out the international legal framework of migrant rights. There have been several important recent developments that have helped to refine these rights: The Migrant Workers' Convention<sup>3</sup>, and an Inter-American Court of Human Rights Advisory Opinion on the Legal

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<sup>2</sup> Associated Press, “Mexico outraged by US scheme” *The Globe and Mail* (December 20, 2005), online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20051220.wwall1220/BNStory/International>>.

<sup>3</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Dec. 18, 1990, 30 I.L.M. 1517, 1523 (entered into force July 1, 2003), available at <[http://www.unhchr.ch/html/menu3/b/m\\_mwctoc.htm](http://www.unhchr.ch/html/menu3/b/m_mwctoc.htm)> [MWC].

Status and Rights of Undocumented Migrants<sup>4</sup>, ILO reports, and extensive work by special rapporteurs. Customary and *jus cogens* norms have emerged that recognize equality before the law and non-discrimination as non-derogable and *erga omnes*. human rights for everyone, and everyone includes migrant workers.<sup>5</sup> The coming into force of the Convention on the Rights of Migrants also promises more protections for migrant workers.

Part IV will analyze state responsibility for the realization of migrant rights. Because much of the discrimination against migrant workers occurs in a context of private interactions, states must play a role in monitoring and insuring the enjoyment of rights. In part V, the analysis will turn to a case study on the Canadian Seasonal Agricultural worker program (SAWP). If migrant workers can utilize international human rights law to fight for rights of equality and the right to form unions, they will be able to protect themselves from discrimination and exploitation and better realize their fundamental right to dignity. This paper is one effort to contribute to the struggle for migrant worker rights.

## **Part II: Background Migration and Migrant Workers**

The Migrant Workers' Convention provides a general and several more specific definitions of "migrant worker":

2.1 The term "migrant worker" refers to a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

2.2. ...

(b) The term "seasonal worker" refers to a migrant worker whose work by its character is dependent on seasonal conditions and is performed only during part of the year;

(g) The term "specified-employment worker" refers to a migrant worker:

(iii) Who, upon the request of his or her employer in the State of employment, engages for a restricted and defined period of time in work whose nature is transitory or brief; and who is required to depart from the State of employment either at the expiration of his or her authorized period of stay, or earlier if he or she no longer undertakes that specific assignment or duty or engages in that work;<sup>6</sup>

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<sup>4</sup> Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003) online: <[http://www.corteidh.or.cr/serie\\_a\\_ing/serie\\_a\\_18\\_ing.doc](http://www.corteidh.or.cr/serie_a_ing/serie_a_18_ing.doc)> [OC 18].

<sup>5</sup> Ibid.

<sup>6</sup> MWC *supra* note 4.

Estimating the number of migrant workers is difficult because countries define and count migrant workers differently, and because there are many unauthorized migrant workers; however, estimates range between 60 and 80 million migrant workers out of 120 to 130 million international migrants.<sup>7</sup> Migrant workers from poor countries tend to fall into the extremes of the employment spectrum: the minority are highly skilled professionals, the majority do the “dirty, dangerous and difficult” jobs.<sup>8</sup> Migration is driven both by push factors, such as economic, political, and environmental problems, and pull factors, such as perceived better employment living conditions in receiving countries. “It is important, however, that these “push” and “pull” factors do not disguise the involuntary nature of a large portion of this labor migration.”<sup>9</sup> This is important because often migrant workers may be portrayed as a threat to local jobs<sup>10</sup>, which makes complaints about poor working conditions more difficult.

Migrant workers are seen as both beneficial and potentially harmful to the receiving country.<sup>11</sup> They are important in that they do the undesirable jobs, but they may be socially

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<sup>7</sup> *Report of the Special Rapporteur, Ms. Gabriela Rodriguez Pizarro, Submitted Pursuant to Commission on Human Rights Resolution 1999/44*, U.N. ESCOR Comm'n on Hum. Rts., 56th Sess., Agenda Item 14(a) P 15, U.N. Doc. E/CN.4/2000/82 (2000) [hereinafter *2000 Report of U.N. Special Rapporteur*]; see also Inter-Am. C.H.R., *Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families* P 63 (2002) online:

<<http://www.cidh.oas.org/annualrep/2002eng/toc.htm>>. The International Labour Organization (ILO) estimates that there are between 60 and 65 million migrant workers and between 175 and 180 million migrant workers and members of their families. *UN Convention to Protect Migrant Workers Holds First Meeting*, U.N. NEWS SERV. (U.N. News Ctr., New York, N.Y.), Dec. 11, 2003, at <http://www.un.org/News>.

<sup>8</sup> ILO, *Towards a fair deal for migrant workers in the global economy*, 1st ed. (Geneva: ILO, 92nd session 2004) at 9

<sup>9</sup> Sansdesih Sivakumaran, “The Rights of Migrant Workers One Year On: Transformation or Consolidation” (2004) 36 *Geo. J. Int'l L.* 113 [Sivakumaran].

<sup>10</sup> See *European Social Charter*, ETS No. 163 Strasbourg, 3.V.1996, s. 19.2. (prohibition of spreading negative ideas about migrants in the).

<sup>11</sup> For an analysis of the portrayal of migrant workers in Canada see Harald Bauder, Margot Corbin “Foreign Farm Workers in Ontario: Representations in the Newsprint Media” (2002) Online: <http://www.uoguelph.ca/geography/research/ffw/papers/foreign-farm-workers.pdf> [Bauder].

excluded or perceived as criminals<sup>12</sup> or perceived as lowering domestic wages<sup>13</sup> Even when the benefits of welcoming migrant workers are acknowledged, states often seek to limit the rights of migrants in order to protect sovereignty.<sup>14</sup> Exclusions from legal protections or out and out discrimination may be compounded by the intersections<sup>15</sup> of factors like gender, language, and poverty leads to greater risk of exploitation: “[s]ome groups of migrants, by virtue of their exclusion from the host society, may lack linguistic skills, knowledge of their legal entitlements, mechanisms required to access benefits, or support from sympathizers, to be able to claim their rights.”<sup>16</sup> The motivation for the discussion of migrant workers is to try to find a way to protect these most vulnerable of workers. The stronger the legal protections of migrant workers rights, the better non-migrant workers rights will be realized<sup>17</sup> and the closer the global community will come to universally recognizing human dignity.

The denial of the right to organize or participate in unions further marginalizes migrant workers. In countries from Malaysia to Canada migrant workers are not permitted or cannot effectively access their rights to organize.<sup>18</sup> Whether the risk to the worker arises from bonded

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<sup>12</sup> See Tanya Basok, Post-national citizenship, Social Exclusion and Migrants Rights: Mexican Seasonal Workers in Canada Citizenship Studies, Vol. 8, No. 1, March, 2004, 47–64 at p. 54-55 [Basok] (“Even though they used to be nicer before, people in Leamington never really liked the Mexicans. They think we are all thieves. Perhaps, some of us are,” quoting a migrant farm worker); see Patrick A. Taran, “Migration and labour solidarity” in *Migrant Workers, Labour Education 2002/4 No. 129* (London: ILO, 2002) 26, 29-30 (see for a discussion of the term “illegal alien”, which contradicts the spirit of the UDHR).

<sup>13</sup> See ILC, *Towards a fair deal for migrant workers in the global economy (International Labour Conference, 92<sup>nd</sup> Sess., 2004)*, (Geneva: ILO, 2004) at 32 (See table 2.4 for a summary of studies on the effects of migrant workers on domestic wages. It appears that migrant workers do not significantly effect domestic wages).

<sup>14</sup> See Basok, supra note 13 at 48; see below Canada’s seasonal migrant labourer programs;

<sup>15</sup> Margaret L. Satterthwaite, “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers” (2005) 8 Yale H.R. & Dev. L.J. 1.P. at 15 and 16 [Satterthwaite].

<sup>16</sup> See Basok, supra note 13 at 50.

<sup>17</sup> See Sarah Cleveland and Beth Lyon and Rebecca Smith, “Employment & International Law: Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status” 1 Seattle J. Soc. Just. 795 at 802 [Cleveland & Lyon] (Limiting protections for migrants may hurt law-abiding employers and lead to a race to the bottom of labour standards.)

<sup>18</sup> Elsa Ramos, “Migration: Industrialized countries are the main winners” in *Migrant Workers, Labour Education 2002/4 No. 129* (London: ILO, 2002) 11.

labour after the migrant is trafficked or dangerous working conditions on a farm, unions are one important way for workers to advocate for their rights.

### **Citizenship and sovereignty**

This paper is based on the assumption that migrant workers need international protection of their human rights because host domestic laws and regimes discriminate against them based on their lack of citizenship. Some theorists have argued that the issues of citizenship have been superseded: “according to the supporters of the ‘post-national citizenship’ thesis, what matters most is residence and not the legal immigration status.”<sup>19</sup> This perspective is optimistic about the willingness of states to provide services to migrants and the abilities of migrants to utilize them. On the other hand, Professor Basok argues that even where residents may have formal legal rights “the denial of social membership in a community of citizens to some categories of migrants deprives these migrants of the opportunities to acquire knowledge, learn skills, or secure support to claim the legal rights to which they are entitled.”<sup>20</sup> This theme will be returned to below in the discussion of the obligations of government. At this point, it may be noted that NGOs will play an important role in ensuring that these rights are realized, because governments lack the resources and will to protect migrant worker rights.<sup>21</sup> Migrant workers should not be seen as passive in the struggle for their rights. They are constantly involved in a negotiation with their employer in informal ways such as work slow downs and informal negotiations about work conditions with employers lobbying. A strong legal framework will help to prop up an employer tilting negotiation table.

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<sup>19</sup> Basok, supra note 13 at 49; see Sassen, S. (1996) *Losing Control? Sovereignty in an Age of Globalization* (New York, Columbia University Press). Bloemraad, I. (2000) ‘Citizenship and immigration: a current review’, *Journal of International Migration and Integration*, 1(1), pp. 9–37.

<sup>20</sup> Basok, supra note 13 at 51.

<sup>21</sup> See Basok, supra note 13 at 58-60.

### **Part III: International Migrant Worker Rights Framework**

There is a rich body of international law that, at least on paper, recognizes the human rights of migrant workers. The notion of migrant worker rights may seem anathema to state sovereignty, which is the underlying base of international law.<sup>22</sup> In international law, the 'rights of states' prevail over the 'rights of migrants' and 'states retain the right to set the conditions under which foreigners may enter and reside in their territory'.<sup>23</sup> This is the case in Canada under domestic law as well.<sup>24</sup> However, both domestic and international human rights laws provide protection for migrants and migrant workers against discrimination and exploitation.<sup>25</sup>

Here I will outline the rights of migrant workers to non-discrimination, equality, and freedom of association. I have focused on the right to equality because all of the other human rights flow from the principles of equality. I have focused on freedom of association because it is one of the best protections for the other rights migrant workers possess, especially for migrant farm workers in Canada. This section will attempt to establish that the treaty rights and obligations in the measures discussed either encode customary international law<sup>26</sup> or have crystallized new customary laws and norms.

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<sup>22</sup> UN Charter art. 2.1.

<sup>23</sup> Weiner, Myron. *The Global Migration Crisis – Challenge to States and to Human Rights* (New York: Harper Collins College Publishers, 1995) at 151; OC 18, supra note 5.

<sup>24</sup> *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711. ("The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" at para. 24).

<sup>25</sup> Jean Cohen "Changing paradigms of citizenship and the exclusiveness of the demos" (1999) 14(3) *International Sociology*, pp. 245–68 at p. 260 ("human rights discourses are now a pervasive feature of global public culture. Their effectiveness goes well beyond moralistic exhortation: they constitute an international symbolic order, a political-cultural framework, and an institutional set of norms and rules for the global system that orients and constrains states").

<sup>26</sup> Customary law is the generally accepted practices of states that are done out of a sense of legal obligation (*opinio juris*).

## ***Rights to Equality and Non-discrimination***

### **Universal Declaration of Human Rights<sup>27</sup>**

The UDHR was a great cry for, yes surprise, “universalism”. The UDHR declares: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as ... national or social origin...or other status.” Migrant workers are not explicitly mentioned in the UDHR. So are they protected? Because of the phrases of the provision, “without distinction of any kind, such as” and “**or** other status[emphasis added]” the list is an illustrative one<sup>28</sup> rather than an exhaustive list.<sup>29</sup> Therefore, migrant workers are included in the UDHR. One could also note that because migrant workers are not singled out as a non-analogous ground migrant workers are left as part of everyone. The UDHR principles are inherent in every human’s dignity,<sup>30</sup> regardless of citizenship status. Note that while, the UDHR is not binding under international law; there is a strong argument to be made that through state practice and *opinio juris* it has become customary law. For example it has been referenced in almost all international human rights treaties (ICCPR, ICESCR) and in numerous UNGA and UN Security Council declarations. Therefore, the UDHR may form the basis of the argument for non-discrimination vis a vis migrant workers.

### **International Covenant on Civil and Political Rights<sup>31</sup>**

The ICCPR provides for extensive civil and political rights that are considered to be more concrete than International Covenant of Economic, Social and Cultural rights.<sup>32</sup> The ICCPR has

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<sup>27</sup> Universal Declaration of Human Rights, G.A. Res.217A(III), U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948) [UDHR].

<sup>28</sup> Anne F. Bayefsky, “The Principle of Equality or Non-discrimination in International Law” (1990) 11 H.R.L.J. 1, at p. 5.

<sup>29</sup> For a more detailed discussion of the *travaux preparatoires* of the UDHR, See Sivakumaran, *supra* note 10 at 123-124.

<sup>30</sup> UDHR (preamble, art. 1).

<sup>31</sup> *International Covenant on Civil and Political Rights*, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [ICCPR].

<sup>32</sup> *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S 4 [ICESCR].

been ratified slightly more than the ICESCR and therefore its principles are more likely customary law.<sup>33</sup> Under Article 2, each State Party "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized within the present Convention, without distinction of any kind such as ...national or social origin..., or other status." This article echoes the UDHR by recognizing all individuals have the rights of the Convention regardless of citizenship. Moreover, the Human Rights committee has stated that "the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness ... who may find themselves in the territory or subject to the jurisdiction of the State Party. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof."<sup>34</sup> The reference to "national origin" in this Article may be construed as a rule prohibiting discrimination on the basis of nationality<sup>35</sup>, which provides more evidence that migrant workers enjoy rights under the ICCPR.

The ICCPR permits limits on rights based on citizenship rights such as participation in public affairs, voting and holding office, access to public services, and entrance to one's own country. These are rights directly tied to the status of citizenship in a democratic state and are thus justifiable under international human rights law.<sup>36</sup> The right to freedom of movement is limited to persons "lawfully within the territory of a State," which includes citizens and authorized non-nationals but not unauthorized workers.<sup>37</sup> This provision may appear to be easily

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<sup>33</sup> Office of the UN High Commissioner for Human Rights, "Status of Ratifications of the Principal International human Rights Treaties", online: UNHCHR Report <<http://www.unhchr.ch/pdf/report.pdf>> (ICCPR 152 signed, 144 ratified; ICESCR 149 signed, 142 ratified, note U.S.A. has not ratified the ICESCR).

<sup>34</sup> General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, U.N. GAOR, Hum. Rts. Comm., 80th Sess., U.N. Doc. CCPR/C/74/CRP.4/Rev/6 (2004), reprinted in *Compilation of General Comments* at 195 [General Comment 31].

<sup>35</sup> Satterthwaite, *supra* note 16 at 15 - 16.

<sup>36</sup> ICCPR arts. 25, 12(4). See Satterthwaite, *supra* note 16 at p. 17.

<sup>37</sup> ICCPR art. 12.

abused; however, it should be interpreted narrowly to permit the state to expel unauthorized migrants with due process.<sup>38</sup>

A further limitation of rights comes in the derogation clause, Article 4(1) of ICCPR, which says that states may derogate from their obligations “[i]n time of public emergency which threatens the life of the nation... to the extent strictly required by the exigencies of the situation.” The Human rights committee has emphasized that limits may only relate to the “exigencies of the situation”, which suggests that states must show proportionality and a reasonable connection between the emergency measure and the temporary infringement of the right.<sup>39</sup> Thus a general economic policy to limit competition from migrant workers would, probably, not justify derogation under the public emergency test.

In General Comment 15, the Human Rights Committee has explicitly outlined the rights of aliens to enjoy the fundamental rights of the person, expression, free association, and cultural and family life:

Aliens . . . have an inherent right to life, protected by law, and may not be arbitrarily deprived of life... Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.<sup>40</sup>

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<sup>38</sup> See the analysis of OC 18 below.

<sup>39</sup> Satterthwaite, supra note 16 at 17-18; see Sivakumaran supra note 10 at 126-130.

<sup>40</sup> General Comment 15 *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. GAOR, Hum. Rts. Comm., 27th Sess., General Comment 15, P 7, U.N. Doc. HR1/GEN/1/Rev.7 (1986) [General Comment 15].

Note that the general comment speaks of aliens, which are non-nationals, thus, the rights discussed do not depend on whether or not an alien is authorized to work in a country. This implies wide ranging protection for migrant workers. Also note the important provisions that permit

### **International Covenant on Civil and Political Rights**

The ICESCR provides for potentially wide ranging protection of equality and non-discrimination rights; however, these rights may be circumscribed in more circumstances than in ICCPR. Article 2.2 states that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, a potential limit on the enjoyment of the rights of migrant workers appears in article 2.3:

Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

This provision reflects economic realities of poverty, which constrain states' abilities to ensure adequate food and health care. It should be noted that states may only limit in terms of "economic rights". Rights like due process and non-discrimination of migrant workers could, therefore, not be justifiably curtailed. Moreover, given the guarantee of the right to join trade unions as in the ICCPR, it seems likely that these rights are not included within the rights that developing countries may limit.

### **OC 18: non-discrimination and equality as jus cogens and erga omnes norms**

In 2003, after a United States Supreme Court judgment<sup>41</sup> that rejected an unauthorized migrant worker's compensation claim for being fired for union activities, Mexico requested<sup>42</sup> an

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<sup>41</sup> Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137 (2002).

<sup>42</sup> Request for Advisory Opinion Submitted by the Government of the United Mexican States to the Inter-American Court of Human Rights [hereinafter Request for Advisory Opinion], available at <[http://www.corteidh.or.cr/seriea\\_ing/index.html](http://www.corteidh.or.cr/seriea_ing/index.html)>.

advisory opinion from the Inter-American Court of Human Rights. The judgment dealt with the issues of due process, non-discrimination and freedom of association. The court held that

the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to ... nationality, ... or any other status is unacceptable.<sup>43</sup>

Equality does not mean that states must treat everyone exactly the same; there may be exceptions for political rights, and states may remove non-citizens; however, they are barred from discriminating in their laws, policies or in the judicial process on the basis of migrant status. Discrimination is "understood to imply any distinction, exclusion, restriction or preference ... based on any ground ... and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."<sup>44</sup> Some illustrative examples of prohibitions include prohibition of enacting laws or applying administrative rules that on their face or in their implementation "discriminate against a specific group of persons because of their race, gender, color or other reasons."<sup>45</sup> The prohibition of discrimination, while considered a *jus cogens* in this case, is almost meaningless with strong domestic laws and the ability of workers to organize to fight for and defend their rights.

### ***Freedom of Association***

There is broad recognition of the right to freedom of association and formation of unions in the international treaty regime and arguably customary law. The UDHR also states that "everyone has the right to freedom of peaceful assembly and association," and "everyone has the right to form and to join trade unions for the protection of his interests."<sup>46</sup> The ICCPR declares

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<sup>43</sup> OC 18 *supra* note 5 at para. 101.

<sup>44</sup> General Comment 18, Non-discrimination, U.N. GAOR, Hum. Rts. Comm., 37th Sess., P 7, U.N. Doc. HRI/GEN/1/Rev.1 (1989), reprinted in *Compilation of General Comments*, *supra* note 42, at 147 [hereinafter *General Comment 18*].

<sup>45</sup> OC 18 *supra* note 5 at para. 103.

<sup>46</sup> UDHR (art. 20(1); art. 23(4)).

that "everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests."<sup>47</sup> Restrictions on the **right of free association** must be "prescribed by law and... necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."<sup>48</sup> These limits may appear broad (what does protection of morals mean?); however, the limits must relate to the promotion of human rights. The denial of migrant worker rights is only justifiable in circumstances where these rights conflict with public order. These limits will be returned to below in the discussion on OC 18.

The ICESCR provides more specific protections of freedom of association rights: states are obliged to "ensure the right of everyone to form trade unions and join the trade union of his choice . . . ; the right of trade unions to function freely . . . ; the right to strike . . ."<sup>49</sup> However, recall the discussion above about the limits onto these rights based on the ability of a developing country to achieve the rights.

Canada is not party to many of the ILO Conventions relevant to rights of freedom of association; however, the ILO's Declaration of Fundamental Principles and Rights at Work says expressly:

"All members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote, and to realize, in good faith and in accordance with the [ILO] Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; . . ."

Briefly, ILO Convention No. 87 on freedom of association and protection of the right to organize provides that "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of

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<sup>47</sup> ICCPR art. 22(1).

<sup>48</sup> ICCPR article 22(2).

<sup>49</sup> ICESCR art. 8.

their own choosing without previous authorization."<sup>50</sup> The U.N. High Commissioner for Human Rights includes these ILO conventions in an authoritative list of "international human rights instruments."<sup>62</sup><sup>51</sup> These ILO Conventions express a degree of consensus between workers and employers and therefore may be persuasive if not binding upon countries that have not ratified them (ie Canada and the United States).

### **Migrant Workers' Convention<sup>52</sup>**

The MWC, although not widely ratified<sup>53</sup>, does provide some guidance about potentially emerging customary norms and if it is adopted by more countries may provides much wider explicit protect than current conventions. It provides for equal treatment in employment (article 25.1), no derogation from these rights in private contracts(25.2), and a call for states parties to explicitly tackle discrimination in employment based on irregularity of status or employment (25.3). It also recognizes extensive union rights for migrant workers:

Article 26 1. States Parties recognize the right of migrant workers and members of their families:  
(a) To take part in meetings and activities of trade unions and of any other associations established in accordance with law, with a view to protecting their economic, social, cultural and other interests, subject only to the rules of the organization concerned;  
(b) To join freely any trade union and any such association as aforesaid, subject only to the rules of the organization concerned;  
(c) To seek the aid and assistance of any trade union and of any such association as aforesaid.  
2. No restrictions may be placed on the exercise of these rights other than those that are prescribed by law and which are necessary in a democratic society in the interests of national security, public order (ordre public) or the protection of the rights and freedoms of others.

While affirming the freedom of association rights, the article 26.2 may lead to excessive limits because it sets out a balancing against the rights and freedoms of others. However, this should be read conjunctively with prohibitions on discrimination in the rest of the MWC; therefore, the interpretation of limits should balance migrant worker rights and the rights of others.

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<sup>50</sup> ILO Convention No. 87, arts. 2, 11. See also ILO Convention No. 98, arts. 1, 3, 4.

<sup>51</sup> See Fact Finding and Conciliation Commission on Chile, International Labor Organization, Geneva, Switzerland (1975), para. 466.

<sup>52</sup> MWC supra note 4.

<sup>53</sup> Currently no migrant receiving country in the "developed" world has ratified. 45 States Parties have signed or ratified the MWC. Office of the United Nations High Commissioner for Human Rights, online: <<http://www.ohchr.org/english/countries/ratification/13.htm>>, December 20, 2005.

## European Treaties European Social Charter

The European Union has several regional agreements that govern movements of people through the common market. The European Social Charter guarantees “[t]he right of migrant workers and their families to protection and assistance.”<sup>54</sup> The States Parties also undertake to take positive action to *inter alia* ensure a safe journey of migrants workers and treatment not less favourable than that of nationals in various areas (remuneration, trade unions, taxes, etcetera)<sup>55</sup> It should be noted that some political rights and social obligations are only owed to migrants that are legally within the territories of the States parties. However, the underlying principle of equality is between migrants and citizens is recognized by the European Union through the

### Social Charter.

<sup>54</sup> European Social Charter supra note 11 *European Social Charter* ETS No. 163 Strasbourg, 3.V.1996, s. 19.

<sup>55</sup> With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

- 1) to maintain or to satisfy themselves that there are maintained adequate and free services to assist such workers, particularly in obtaining accurate information, and to take all appropriate steps, so far as national laws and regulations permit, against misleading propaganda relating to emigration and immigration;
- 2) to adopt appropriate measures within their own jurisdiction to facilitate the departure, journey and reception of such workers and their families, and to provide, within their own jurisdiction, appropriate services for health, medical attention and good hygienic conditions during the journey;
- 3) to promote co-operation, as appropriate, between social services, public and private, in emigration and immigration countries;
- 4) to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
  - a. remuneration and other employment and working conditions;
  - b. **membership of trade unions and enjoyment of the benefits of collective bargaining;**
  - c. accommodation;
- 5) to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
- 6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;
- 7) to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;
- 8) to secure that such workers lawfully residing within their territories are not expelled unless they endanger national security or offend against public interest or morality;
- 9) to permit, within legal limits, the transfer of such parts of the earnings and savings of such workers as they may desire;
- 10) to extend the protection and assistance provided for in this article to self-employed migrants insofar as such measures apply;
- 11) to promote and facilitate the teaching of the national language of the receiving state or, if there are several, one of these languages, to migrant workers and members of their families;
- 12) to promote and facilitate, as far as practicable, the teaching of the migrant worker's mother tongue to the children of the migrant worker.

## OC 18 and Worker rights

In OC 18 the court found that the state and individuals are not under an obligation to hire migrant workers; however, once they do they must extend worker rights.<sup>56</sup> Even unauthorized workers have extensive rights: “The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment... irrespective of his regular or irregular status in the State of employment.”<sup>57</sup> This may seem too broad because states reserve the right to deport unauthorized entrants to a country. In the context of OC 18, the court is affirming the rights of unauthorized workers to have a fair trial and to participate in union activities; however, it is doubtful that international law provides for exactly the same worker rights regardless of citizenship. An interesting example would be job training programs that excluded authorized and unauthorized migrant workers. It would be hard to argue that the *jus cogens* norm of non-discrimination would extend this far. Rather, I would argue that the state may limit rights, but it has to prove that the limit is proportional, and reasonably connected to a policy that is not merely discriminatory (ie the state cannot just deprive the rights of migrants to form unions arbitrarily, but could deny certain political rights to migrants like the vote).<sup>58</sup>

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<sup>56</sup> OC 18 *supra* note 5 at para. 135.

<sup>57</sup> *Ibid.* at para. 134.

<sup>58</sup> *Ibid.* at para. 119; see also African Commission of Human and Peoples' Rights, Communication No: 159/96 - Union Inter-Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola, decision of 11 November, 1997, para. 20 (The African Commission on Human and People's Rights held that it “does not wish to call into question... the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide... [However], it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to ... international law”).

## Part IV: Obligations of States

Now that we have outlined the legal framework that recognizes migrant worker rights to due process, non-discrimination and freedom of association and other worker protections, the discussion turns to the extent of states obligations to ensure these rights are achieved. In General Comment XV on the Right to Water<sup>59</sup>, the ESCR Committee laid out a framework of state responsibility based on the obligation to “respect, protect, and fulfill” rights. This part will look at the obligations of states to respect and protect migrant worker rights, the obligations of third parties to not breach human rights standards, and the obligations of the state to respond to third party violations and to fulfill migrant human rights.

### “Respect” and “Protect”

These are the more typical obligations of a state towards its own people: “The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water.”<sup>60</sup> States should not pass laws that prevent realization of human rights, for example discriminatory taxes, prohibitions of union participation. “The obligation to *protect* requires States parties to prevent third parties from interfering in any way with the enjoyment of the right.”<sup>61</sup> This might include monitoring of employer activities.

### Third party exploitation and responsibility

In international human rights law, the state is deemed to have obligations to its people, which inhere from individual human dignity and state responsibility. How can third parties be held liable for breaches of human rights, if they have never consented to or signed a treaty, they did not pass the laws of society and have not heard of obligation? If they are acting in the name

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<sup>59</sup> General Comment 15 may be vulnerable to criticism based on the fact that the committee defines very specific obligations for states on a new right, which may not have been contemplated at the time of accession to the ICESCR. However, for the purposes of this paper I am only concerned about the analysis of states' obligations to rights holders.

<sup>60</sup> General Comment 15, supra note 41 at para. 21.

<sup>61</sup> Ibid. at para. 23.

of the government or as an agent they may be held responsible under principles of state responsibility. In cases such as torture and war crimes, individuals may also be held responsible. Would a farm owner that fired someone because they were a different colour or a migrant or made them work too many hours be committing a human rights violation?

Currently there are very weak mechanisms under international law that would permit a claim by an individual against a non-state party for a human rights violation.<sup>62</sup> One interesting angle to explore, in another paper, would be to see whether the Alien Torts Claim Act<sup>63</sup> could be used by farm workers to sue farm owners on the basis that the farm owner had breached the jus cogens norm of non-discrimination. I would argue that the best course of legal action<sup>64</sup> is to pursue the farmer through domestic courts for the breach of domestic law. What if domestic law is unable to provide a remedy? The state may be responsible for failing to provide a remedy under the ICCPR, which obliges ratifying states "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."<sup>65</sup> The responsibility of the state also arises because the right to equality and non-discrimination is erga omnes, which extends to third parties.<sup>66</sup>

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<sup>62</sup> There is some discussion in the discourse in the areas of violence against women and corporate responsibility.

<sup>63</sup> The Alien Tort Claims Act was adopted in 1789. It asserted that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in **violation of the law of nations** or a treaty of the United States." 28 U.S.C. § 1350.

<sup>64</sup> Of course, migrant workers are often in such a precarious position that these legal remedies are unrealistic unless they receive community support. This is another reason why the right to unionize is so important. If the workers can pool their resources, they may have a chance to pursue legal remedies.

<sup>65</sup> International Covenant on Civil and Political Rights, Article 2.

<sup>66</sup> OC 18 *supra* note 5 at para. 110; see also OC 18 at para. 141, quoting *Velásquez Rodríguez case*. Judgment of July 29, 1988. Series C No. 4, para. 172; and *cf. Godínez Cruz case*. Judgment of January 20, 1989. Series C No. 5, paras. 181, 182 and 187. ("Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, or all the cases in which the State might be found responsible for an infringement of those rights).

### **“Due diligence” of states to ensure realization of rights**

In OC 18 the Inter-American court has expanded the degree of states' responsibilities to prevent rights violations to a “due diligence” standard.<sup>67</sup> This may present an easier way for migrant workers to seek a remedy because they do not have to pursue the state as a direct actor in the exploitation rather they just have to prove a failure to act with due diligence.

“Due diligence” is a potentially fatally vague term in the international human rights context. The term may be informed by the discussion of violence against domestic woman migrants. Professor Lyon writes that “[t]he Special Rapporteur on Violence Against Women expresses a growing consensus within the international human rights regime that receiving states must exercise “due diligence” to protect domestic workers against crimes of violence at the hands of their employers.<sup>68</sup>

This may be a more difficult argument to make in the context of farm workers, because it is harder to quantify the standard of due diligence that would insure safe working conditions or housing, and it is even more difficult to find an international agreement about these standards. One potential approach comes from tort law.<sup>69</sup> The standard of due diligence would be determined by a balancing of the risk and degree of harm<sup>70</sup> versus the avoidance cost of the harm. If the avoidance cost was less than the reasonably expected harm, then the state has breached the standard.<sup>71</sup> In a situation of a violation of the right to security of the person and violence against

<sup>67</sup> OC 18 at para. 141 (If the rights violator is unknown or a private citizen, the state may be liable “because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”).

<sup>68</sup> Joan Fitzpatrick & Katrina R. Kelly, “Gendered Aspects of Migration: Law and the Female Migrant” (1998) 22 *Hastings Int'l & Comp. L. Rev.* 47. at 87, referring to Radhika Coomaraswamy, “Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences” U.N. ESCOR, Comm. Hum. Rts., 52d Sess., Prov. Agenda Item 9(a), at paras. 77-85, U.N. Doc. E/CN.4/1996/53 (1996) [hereinafter Report of the Special Rapporteur on Violence Against Women], at 9-10.

<sup>69</sup> *Bolton & Others v. Stone*, [1951] A.C. 850, [1951] 1 All E.R. 1078 (H.L.).

<sup>70</sup> The degree of harm may be higher for migrants than citizens, due to the compounding forces of exploitation that affect their lives. See Part II above. A question for future research would be whether migrant workers would then require ameliorative treatment. At this time, clearly, states would not be willing to recognize this as a human rights obligation.

<sup>71</sup> An example: The State might have a duty to educate and promote awareness of equality and non-discrimination amongst employers and society. This would presumably be a fairly inexpensive process which would outweigh the risk of harm to society (there is no risk of harm).

women, this balancing might be enough. and just because there was one breach of the . However, in a context of freedom of association the balancing is more complicated because there must be a comparison to the domestic treatment of workers and there has to be a balancing based on principles of “public order”. If a workers’ rights protection does not exist for local workers, then it will be more difficult to prove a breach of “due diligence”. However, states would still be bound by their agreements through the ICCPR and other measures as discussed above.

### **“Fulfill”**

“The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide.” The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right: this could include laws and policies that permit unions and insuring that unions do not discriminate against migrant workers. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.<sup>72</sup> In the migrant worker, this might extend to the provision of language classes to permit migrant worker participation in society. It must be acknowledged that States will be most resistant to the imposition of “fulfillment” obligations. They may be concerned about having to provide welfare and social services for everyone who can cross their borders. I would suggest that the requirements of the obligation to fulfill the right to life and non-discrimination under the law will be greater than the obligation to ensure specific work conditions. This seems like a reasonable compromise, although it may risk categorizing human rights and implying they can be traded off. The best answer to this concern is that there is more international consensus against

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<sup>72</sup> General Comment 15 at para. 25.

racism in employment than on questions of work conditions; therefore, the human rights norm is better defined and more extensive.

## **Part V: Application of migrant rights framework to Canada**

This section will focus on Canada's Seasonal Agricultural Worker Program (SAWP). The SAWP program illustrates how some of the human rights work themselves out in practice. The federal government is shown to be in breach of its obligations to fulfill migrant workers' rights to freedom of association, equal protection of the law, and a clear remedy for breaches of their rights.

### **Background to the Seasonal Agricultural Worker Program**

According to the Government website, "The Seasonal Agricultural Worker Program (SAWP) allows the organized entry of foreign workers to work in agricultural labourer occupations in Canada."<sup>73</sup> The SAWP currently operates in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island." The program was begun with Caribbean workers in 1966 and expanded to include Mexican workers in 1995.<sup>74</sup> Workers may come for a maximum period of 8 months and they must leave at the end of the contract. They arrive with a temporary work visa that only allows them to work with one employer. The employer may be changed if HRSDC, the migrants national agent, the employer and the employee approve the transfer.<sup>75</sup> The employer covers the costs of the trip; "adequate clean" living accommodations, training for workers handling chemicals.<sup>76</sup> The wage rate is set by negotiations between the governments of Canada and

<sup>73</sup> Human Resources and Skills Development Canada, "Hiring Foreign Agricultural Workers in Canada", online: Hiring Foreign Agricultural Workers in Canada <<http://www.hrsdc.gc.ca/en/epb/lmd/fw/seasagri.shtml>> ("The SAWP currently operates in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia and Prince Edward Island.")

<sup>74</sup> See: Irving Andre, *The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada* (1990) 8 O.H.L.J. 243, at 255-57; Rachel Li Wai Suen, "Note: You Sure Know How to Pick 'Em: Human Rights and Migrant Farm Workers in Canada" (2000) 15 Geo. Immigr. L.J. 199.

<sup>75</sup> This is problematic when a worker wishes to leave an abusive employer. (More below).

<sup>76</sup> HRSDC, "Agreement for the Employment in Canada of Commonwealth Caribbean Seasonal Agricultural Workers" (2005) online: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/2005caribbeansawp-e.pdf>> [SAWPC]; HRSDC,

Mexico. There are provisions for the maximum hours and days worked per week in the SAWPM; however employers may “request” the worker to work more hours and they may be requested to “postpone” days off.<sup>77</sup>

### **Domestic Law versus International Obligations - Farm Worker Unions**

Under Canadian constitutional division of powers, the Provinces have the exclusive power to pass legislation related to labour in provincial agricultural contexts like the SAWP.<sup>78</sup> In most provinces, agricultural workers do have the right to form unions; however, in two of Canada’s most populated provinces, Ontario and Alberta, household domestic and agricultural workers are excluded from the labour protection. In Ontario, migrant workers are excluded from the *Labour Relations Act* (LRA) and its protections of the right to strike.<sup>79</sup> After a Supreme Court judgment that found the exclusion of farm workers from the LRA (and the denial of the right to unionize farm workers) unconstitutional<sup>80</sup>, the Provincial government passed the Agricultural Employees Protection Act, which permits “employees’ associations” but does not permit strikes or the formation of trade unions.<sup>81</sup>

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“Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico” (2005) online: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/2005mexicansawp-e.pdf> > [SAWPM].

<sup>77</sup> *Ibid.* SAWPM, article I 2: (“The normal working day is not to exceed 8 hours, but the employer may request of the worker and the worker may agree to extend his\her hours...and such requests shall be in accordance with the customs of the district and the spirit of this program, giving the same rights to Mexican workers as given to Canadian workers”); art. I 3.

<sup>78</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 92(13).

<sup>79</sup> *Labour Relations Act*, 1995, S.O. 1995, c. 1, Sched. A, ss. 3 (a), 3(b.1), 3(c). (This Act does not apply, (a) to a domestic employed in a private home; (b) to a person employed in hunting or trapping; (b.1) to an employee within the meaning of the *Agricultural Employees Protection Act, 2002* ; (c) to a person, other than an employee of a municipality or a person employed in silviculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture;

<sup>80</sup> Dunmore.

<sup>81</sup> *Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16, s. 1(2) (“The following are the rights of agricultural employees referred to in subsection (1): 1. The right to form or join an employees' association. 2. The right to participate in the lawful activities of an employees' association. 3. The right to assemble. 4. The right to make representations to their employers, through an employees' association, respecting the terms and conditions of their employment. 5. The right to protection against interference, coercion and discrimination in the exercise of their rights.” Note: that farm workers do not have the right to strike).

The federal government has tried to avoid the issue of unions, by blaming the provinces and division of powers.<sup>82</sup> Under Article 27 of the *Vienna Convention on Treaties*, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>83</sup> Thus the Canadian government is bound by the signature to the ICCPR and ICESCR to respect farm worker rights to permit unions.

Because the SAWP is a federal agreement, the federal government may require provinces that wish to participate in the program to permit unions of migrant workers. This would put a huge pressure on provinces to permit unionization of all farm workers. This seems like it would be one way for the federal government to meet its obligations under the ICCPR. In OC-18, the Court had to wrestle with similar clashes between US domestic law and international law that farm workers are faced with in Canada: “if a domestic practice or norm is more favorable to the worker than an international norm, domestic law should be applied. To the contrary, if an international instrument benefits the worker, granting him rights that are not guaranteed or recognized by the State, such rights should be respected and guaranteed to him.”<sup>84</sup> Therefore, even if domestic law does not permit farm workers joining unions, under international law the government is bound to raise their standards to international norms and permit unions.

Unions are vitally important in helping to balance out the power relations between workers and farm owners in the SAWP.<sup>85</sup> Job security is the biggest reason why migrant farm workers cannot challenge the abuses of their rights. As mention above, their seasonal employment is completely dependent on a good report from the grower. Migrant workers also cannot change employers without the permission of their current employers. This means that they

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<sup>82</sup> Reference Re: Weekly Rest in Industrial Undertakings Act (Canada), [1937] A.C. 326 (Parliament may not infringe the division of powers by signing a treaty that requires action or infringes a provincial head of power).

<sup>83</sup> *Vienna Convention on the Law of Treaties*, U.N.T.S., vol. 1155, p.331.

<sup>84</sup> OC 18 *supra* note 5 at para. 167 [OHSA].

<sup>85</sup> See United Food & Commercial Workers, “UFCW Rights for Ag Workers Stories” online: <[http://www.ufcw.ca/campaigns\\_ag\\_workers\\_stories.cgi](http://www.ufcw.ca/campaigns_ag_workers_stories.cgi)>.

risk retaliation from their employers for complaining and they are unable to leave a bad situation. The government and farmers would point out the importance of insuring that farms have adequate workers during harvest; however, almost any industry contains time sensitive risks for the employer. If anything, migrant workers are less likely to strike than other workers because they have few other options than working at the contract-stipulated farm. If Canada is going to fulfill its obligations under the ICCPR and ICESCR towards migrant workers, it will have to improve monitoring of work conditions and permit unions.

### **Safety laws and Equal protection before the law**

Looking again at Ontario, Canada, SAWP workers, like all agricultural workers, are excluded from the [Occupational Health and Safety Act](#)<sup>86</sup>. The Ontario government has touted new regulations that will expand the OHSA to agricultural workers, including migrant workers.<sup>87</sup> However, the OHSA will only apply to mushroom, greenhouse and animal farms with more than 20 employees.<sup>88</sup> The OHSA mandates training, sets up safety standards and protects the right to refuse unsafe work. It applies in almost all jobs, even police may refuse unsafe work if their vehicles are malfunctioning.<sup>89</sup> Thus it could be argued that the exclusion of migrant farm workers is a failure to apply the protection of the general safety law equally to migrant workers. This may be a challenge because all farm workers are facing similar treatment. SAWP workers would have to prove that they were a group that was being unjustifiably discriminated against based on their migrant status.

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<sup>86</sup> R.S.O. 1990, c. O.1.

<sup>87</sup> Ontario Ministry of Agriculture, Ontario, Canada.  
<<http://www.omafra.gov.on.ca/english/busdev/facts/q&aohsa.htm>>.

<sup>88</sup> OR 414/05 s. 3 coming into force June 30, 2006.

<sup>89</sup> "A guide to the Occupational Health and Safety Act – Chapter 7" online:  
<[http://www.labour.gov.on.ca/english/hs/ohsaguide/ohsag\\_7.html](http://www.labour.gov.on.ca/english/hs/ohsaguide/ohsag_7.html)>.

Another route to ground a government obligation to protect migrant workers safety in the workplace would be to argue that the government is obliged to provide “safe and healthy working conditions” under the ICESCR.<sup>90</sup> Given that the governments of Canada have legislated on workplace safety, it might be imputed that they have recognized their obligations under the ICESCR<sup>91</sup>. The denial of this protection to SAWP workers would be a breach of the government’s obligation to provide a safe workplace.

### **Grower Abuse – Government Failure to Provide Remedies**

Professor Basok’s research shows that migrant farm workers’ rights are violated by “the failure by the growers to offer their workers days of rest, vacation and public holiday pay, and decent living conditions, as well as exposure of the workers’ to occupational hazards.”<sup>92</sup> Workers are rarely able to claim these rights or speak out, due to power imbalances between grower and worker, arising from the worker selection process, which leaves workers at the mercy of the grower’s request.<sup>93</sup> There may not be a clearly defined human right to vacation or public holiday pay; however, under principles of non-discrimination, rights are arguably violated by the failure to provide a remedy for breaches of contracts.

Applying the framework from Part IV, the state has an obligation to not only respect the human rights of migrant workers, but also to take measures to protect and fulfill those rights. This could take the form at a minimum of inspections of farms to ensure that there is adequate training in the use of chemicals or that workers are not kept

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<sup>90</sup> Article 7(b): The States Parties to the present Covenant **recognize the right of everyone** to the enjoyment of just and favourable conditions of work which ensure, in particular: ... (b) **Safe and healthy working conditions.**

<sup>91</sup> This would be challenging to show due to the lack of opinio juris and the vague wording of art. 7(b) of the ICESCR

<sup>92</sup> Basok, supra note 13 at 58.

<sup>93</sup> Basok, supra note 13 at 57-58 (“At the end of the season growers fill out evaluation forms for their workers. Workers are required to report to the Mexican Ministry of Labour and Social Planning upon their return to Mexico and to hand in the evaluation forms in sealed envelopes. To a large degree, the decision taken by the Ministry of Labour on whether to re-admit the worker into the program in the following years hinges on these evaluations”).

in dangerous housing. The failure to provide a remedy is a violation of the state's obligation to recognize the human right.<sup>94</sup> Moreover, the remedy

**must be truly effective in establishing whether there has been a violation of human rights and in providing redress.** A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness.<sup>95</sup>

The inspection system that currently exists in Ontario is funded by the farmers themselves and lacks the ability to monitor let alone enforce migrant worker rights<sup>96</sup>; therefore, I would argue that Canada is in breach of its obligations to fulfill migrant worker rights.

## **Part VI: Conclusion and Challenges of Research**

Underlying all of the legal norms that have been discussed in this paper, are processes of negotiation and conflict between different economic interests (workers, employers, consumers and government) and depictions of migrant workers.<sup>97</sup> Too often, migrant worker voices are absent in this discussion. This is where NGOs can play an important role in championing and aiding migrant concerns. Any advocacy including this paper walks a careful line between demanding rights for workers and placing their opportunity to work in jeopardy, because farmers refuse to hire workers from a certain area or because migrant workers become less attractive as employees.<sup>98</sup> This writer takes comfort in the principle that the stronger migrant worker rights are in international law, the lower the risk of a race to the bottom on labour standards.

This author is optimistic about the emerging norms and protections of migrant workers. The discussion of the MWC has been brief because all of its principles have not entered into customary law; however, many of the protections it extends do exist in the ICCPR, the ICESCR

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<sup>94</sup> OC 18 *supra* note 5 at para. 108.

<sup>95</sup> *Ibid.*

<sup>96</sup> Rachel Li Wai Suen, "Note: You Sure Know How to Pick 'Em: Human Rights and Migrant Farm Workers in Canada" (2000) 15 *Geo. Immigr. L.J.* 199 at 204; see Irving Andre, "The Genesis and Persistence of the Commonwealth Caribbean Seasonal Agricultural Workers Program in Canada" (1990) 28 *O.H.L.J.* 243, at 264-65.

<sup>97</sup> Bauder *supra* note 12.

<sup>98</sup> See at p. 226.

and customary international law.<sup>99</sup> The reluctance to recognize migrant rights flows from fears about changes to society and economic threats. Improving understanding of the role migrants play will make it easier for Canadian politicians to pass legislation to protect migrant rights, but whatever public opinion they are obliged under their international law to recognize and ensure realization of the migrant workers' rights discussed through this paper. The recognition of equality and non-discrimination as *jus cogens* norms, which apply to migrant workers, has the potential to improve the realization of the human rights of all workers, for example unions for all farm workers. Finally, migrant workers may act as a warning system for citizens, because it is so easy to deny their rights. Even if Canada does not ratify the MWC, this author hopes that it will live up to its obligations to respect, protect, and fulfill migrant worker rights.

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<sup>99</sup> See generally Sivakumaran (Sivakumaran's overall thesis is that the MWC does not really break new ground. I agree generally, but think that the MWCN could break new ground; if it were ratified by enough receiving parties).