

# Sending Countries and the Rights of Women Migrant Workers: The Case of Guatemala

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## I. INTRODUCTION

Women from developing countries migrate to escape lives full of poverty and disadvantage. Many women come to countries like the United States, Canada, and the United Kingdom, legally and illegally, to take up positions as domestic servants and factory workers to improve their position in life. These women migrants are often subjected to grueling work conditions; many report having their freedom restricted and their documents seized by smugglers and employers. Women migrants may also find themselves forced into prostitution to pay back egregious smuggling fees. They are often lied to about the possibilities of work abroad and arrive at their destination without the means to support themselves. The purpose of this Note is to acknowledge and examine the human rights violations suffered by women migrants and to offer recommendations for how states can better protect these rights.

The recognition of the human rights of migrant workers has greatly improved over the last fifteen years.<sup>1</sup> The international legal framework to protect migrant workers' rights was initially developed by the International Labour Organization ("ILO"). This framework includes a series of conventions, such as the Convention Concerning Migration for Employment, and the Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, which call on countries to respect the rights of migrants to seek employment abroad and to be free from abuse and discrimination by their employers.<sup>2</sup> On December

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1. Juhani Lönnroth, *The International Convention on the Rights of All Migrant Workers and Members of Their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation*, 25 INT'L MIGRATION REV. 710, 710-13 (1991).

2. See ILO, *Convention Concerning Migration for Employment (Revised)*, Gen. Conf. 32d Sess., Convention No. 97 (July 1, 1949) [hereinafter *Migration for Employment Convention*]; ILO, *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, Gen. Conf. 60th Sess., Convention No. 143 (June 24, 1975). Other ILO conventions and documents protect the rights of migrant workers. See ILO, *Recommendation Concerning Migrant Workers*, Gen. Conf. 60th Sess.,

18, 1990, the U.N. General Assembly took account of these and other rights of migrant workers when it adopted and opened for signature the International Convention for the Protection of the Rights of Migrant Workers and Members of Their Families ("CMW").<sup>3</sup> In the preamble to the CMW, the states parties declare their intent "to establish norms which may contribute to the harmonization of the attitudes of States through the acceptance of basic principles concerning the treatment of migrant workers . . ."<sup>4</sup> The states parties also affirm their conviction that "the rights of migrant workers and members of their families have not been sufficiently recognized everywhere and therefore require appropriate international protection."<sup>5</sup> Thirteen years after its adoption, the CMW entered into force on July 1, 2003.<sup>6</sup>

The major human rights provisions of the CMW apply equally to documented and non-documented workers, who are to be protected by both sending and receiving countries where possible.<sup>7</sup> Within article 7 of the CMW, states parties pledge to respect and ensure the migrant workers' rights enumerated therein without distinction on the basis of, *inter alia*, sex, race, national origin, and nationality.<sup>8</sup> Among the rights the Convention provides for are the right to leave any state, including one's state of origin;<sup>9</sup> "the right to life";<sup>10</sup> the right to be free from "torture or [from] cruel, inhuman or degrading treatment or punishment";<sup>11</sup> and the right to be free from being held in slavery or servitude or from performing forced or compulsory labor.<sup>12</sup>

Turning the legal "paper" protection of these rights into concrete and effective policies requires states parties to expand their understanding of migration to include women migrant workers. Because the international arena has historically focused on the needs of male migrant workers, accounting

Récommandation No. 151 (June 28, 1975); ILO, *Convention Concerning Abolition of Forced Labour*, Gen. Conf. 40th Sess., Convention No. 105 (June 25, 1957); ILO, *Recommendation Concerning Migration for Employment*, Gen. Conf. 32d Sess., Recommendation No. 86 (July 1, 1949); ILO, *Convention Concerning Forced or Compulsory Labour*, Gen. Conf. 14th Sess., Convention No. 29 (June 28, 1930).

3. *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. GAOR, 45th Sess., Supp. No. 49A, at 261, U.N. Doc. A/45/49 (1990) (entered into force July 1, 2003) [hereinafter CMW].

4. *Id.* pmb1.

5. *Id.*

6. *Id.*

7. "Sending countries" are those countries from which migrants originate and "receiving countries" are those countries acting as hosts to migrant workers.

8. See CMW, *supra* note 3, art. 7. The CMW also states that:

The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

*Id.* art. 1, ¶ 1.

9. *Id.* art. 8. This right is subject only to the restrictions provided by law that "are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present part of the Convention." *Id.*

10. *Id.* art. 9.

11. *Id.* art. 10.

12. *Id.* art. 11.

for the needs of women only as the wives of these workers,<sup>13</sup> migration policies have tended to ignore the specific circumstances surrounding women's migration. Understanding the migration patterns and needs of women workers—which can differ substantially from those of men as this Note will illustrate—will enable countries to adopt migration policies that protect the human rights of all of their citizens.

In addition to the need to shift states' understanding of migrant worker rights as encompassing both male and female migration, the protection of these rights can only be fully achieved by recognizing the role of sending countries as rights-protectors. Typically, discussions of migrant rights have focused on the role of receiving countries. The rights of non-nationals originated in debates on the "property and procedural rights of aliens, especially foreign investors" and "whether aliens were entitled to national treatment . . . or whether there was a higher minimum international standard of fair treatment."<sup>14</sup> These debates led to a limited General Assembly Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live in 1985.<sup>15</sup> Because migration for work has been and continues to be primarily a phenomenon of movement from largely rural, developing countries to largely industrial, developed countries,<sup>16</sup> the focus on receiving countries' obligation to protect the rights of migrants has been a logical one. Under the CMW, receiving countries are responsible for fully informing migrants of the conditions of their admission and stay, and guaranteeing equal access to all educational, health, and other social assistance programs.<sup>17</sup>

However, sending countries have a very important role to play in protecting the rights of migrant workers and can take substantial measures to protect these rights. As of January 2005, the majority of countries to ratify the CMW were sending countries.<sup>18</sup> Article 1 of the CMW establishes that it applies to "the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the state of employment as well as return to the state of origin or the state of habitual residence."<sup>19</sup> The CMW goes on to specify that sending countries can protect the rights of migrant workers by, *inter alia*, equipping migrants with information about opportunities for and legal methods of migration, providing consular services for migrants abroad, policing dangerous smuggling and traffick-

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13. See ILO, *Migrant Workers*, 87 INT'L LAB. CONF. 10, ¶ 21 (1999) [hereinafter *Migrant Workers*].

14. Joan Fitzpatrick, *The Human Rights of Migrants*, at 1–2 (paper before the Conference on International Legal Norms and Migration, May 23–25, 2002) (on file with the Harvard Human Rights Journal).

15. *Id.* at 2 (citing G.A. Res. 40/144, U.N. GAOR, 40th Sess., Supp. No. 53, at 252, U.N. Doc. A/40/53 (1985)).

16. See Lönnroth, *supra* note 1, at 716–21.

17. CMW, *supra* note 3, arts. 37, 38, 43.

18. See *id.*, Status of Ratifications, available at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty25.asp>.

19. CMW, *supra* note 3, art. 1, ¶ 2.

ing practices, and working with neighboring countries to create temporary visa programs.

This Note will argue that international and regional legal regimes obligate sending states to implement migration policies that protect the human rights of women migrant workers. In doing so, this Note will focus on the migration patterns and policies of a particular sending country, Guatemala, to illustrate the steps that can be taken to protect the rights of women migrant workers. Guatemala has ratified the CMW and other relevant human rights instruments and has already taken significant steps to protect its migrant workers.<sup>20</sup> Guatemala also has a long history of out-migration, largely attributable to decades of civil war. Thirty-six years of conflict between indigenous peoples and the Guatemalan government led not only to millions of refugees fleeing the violence, particularly in the 1980s and 1990s,<sup>21</sup> but also hobbled the Guatemalan economy so significantly that many families have had no choice but to seek work elsewhere.<sup>22</sup> By ratifying the CMW, Guatemala acknowledged its role as a protector of migrant rights.<sup>23</sup> This Note will explore the work that Guatemala has done and should continue to do to ensure that the human rights of women migrant workers are given the full force and protection of the state.

This Note is divided into five Parts including this Introduction. Part II describes the political, economic, and social history that has set the stage for current migration patterns and policies. Part III describes the migration experience of Guatemalan women and highlights the dangers and consequences associated with smuggling and trafficking, employer abuses, and detention centers. Part IV identifies the ways in which Guatemala has responded to its international and regional obligations in four major areas affecting women migrants: safe and legal migration, equal protection, remittances and reintegration, and economic opportunity at home. Finally, Part V offers recommendations for how Guatemala can further reform its migration policies to protect the human rights of women migrant workers.

20. In 2003, Guatemala established an ad hoc committee composed of members of the Labor Ministry and the Department of Consular Affairs of the Foreign Affairs Ministry to design a plan for the implementation of the CMW. See *Protection of Migrants, Report of the Secretary-General*, U.N. GAOR, 58th Sess., ¶ 28, U.N. Doc. A/58/121 (2003) [hereinafter *Protection of Migrants*].

21. Inter-Am. Comm'n on Hum. Rts., *Fourth Progress Report of the Rapporteurship on Migrant Workers and Their Families*, in ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 2002 ¶ 284, at <http://www.cidh.org/annualrep/2002eng/chap.6.htm> (last visited Feb. 28, 2005) [hereinafter *Fourth Progress Report*].

22. See World Bank, *Poverty in Guatemala* 36–37, Report No. 24221-GU (Feb. 20, 2003), at [http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/05/000094946\\_03032104003172/Rendered/PDF/multi0page.pdf](http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2003/04/05/000094946_03032104003172/Rendered/PDF/multi0page.pdf). See also *Fourth Progress Report*, *supra* note 21, ¶¶ 279–80.

23. Although there are a number of laws and policies in place in Guatemala to regulate the migration of workers into Guatemala, the focus of this paper will be restricted to the government's protection of its citizens who migrate out of the country.

## II. GUATEMALA

Like so many other sending countries, Guatemala is a developing country with a history marked by civil war, economic strife, and the oppression of women and indigenous populations. This history illuminates the difficult process the country has undergone to institutionalize human rights protections. Understanding this history contributes to a clearer understanding of why women migrate in search of work, often risking danger to do so. This Part introduces the reader to the country's painful political history, the extent of its national poverty, and the social and economic status of Guatemalan women.

### *A. History of Conflict*

From 1944 to 1954, following years of military rule, Guatemala underwent a socialist revolution.<sup>24</sup> The governments of President Juan Jose Arévalo and President Jacobo Arbenz established democratic systems in the country, abolished the forced labor of indigenous people, provided a minimum wage and basic rights to laborers, and promoted equality.<sup>25</sup> Guatemala's socialist agenda was cut short in 1954, when President Arbenz's government was overthrown in a coup backed by the U.S. government.<sup>26</sup> Over the next two decades, military leader after military leader pursued brutal campaigns of repression against the indigenous and working class populations.<sup>27</sup> Civil war broke out in 1960 and passed through several phases before the warring parties agreed to a peace accord in 1996.<sup>28</sup> Although the conflict initially centered on a group of army officers rebelling against the government, its longest phase involved intense fighting between primarily indigenous, guerrilla fighters and the Guatemalan military.<sup>29</sup> Following a series of negotiations and peace agreements in the 1990s, the war officially came to an end in 1996 with the signing of peace accords between guerrilla groups and the Guatemalan government.<sup>30</sup>

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24. See SUSANNE JONAS, *OF CENTAURS AND DOVES: GUATEMALA'S PEACE PROCESS* 18 (2000).

25. *Id.*

26. As part of the socialist reforms, the Arévalo and Arbenz governments expropriated unused land owned by the United Fruit Company ("UFC"), a U.S. corporation that owned the largest proportion of land in the country. The land was expropriated to address the problem of landlessness experienced by the rural, primarily indigenous, poor, and to redistribute this land for agricultural use. The UFC complained to the U.S. government, decrying the reforms as communist and, thereby, invoking the U.S. government's greatest fears of losing control in the region. See *id.* at 19; see also LINDA GREEN, *FEAR AS A WAY OF LIFE* 177 n.17 (1999):

Allen Dulles was head of the CIA at the time, while his brother John Foster Dulles, was a board member of United Fruit. . . . Soon after [political pressure was exerted on the Eisenhower administration] a plan called "Operation Success" was conceived to overthrow the reformist Arbenz administration [and] subsequently launched by the CIA.

27. See JONAS, *supra* note 24, at 19.

28. See World Bank, *supra* note 22, at 36.

29. See *id.*

30. See CENTER FOR REPRODUCTIVE LAW AND POLICY, *AN UNFULFILLED HUMAN RIGHT: FAMILY PLANNING IN GUATEMALA* 23 (2000).

During the war, over 200,000 Guatemalans were killed or “disappeared” and 600 villages were destroyed.<sup>31</sup> Over half of the victims were Mayan, targeted by the government’s “scorched-earth” campaign in the early 1980s.<sup>32</sup> Over one million Guatemalans were displaced internally and as many as 200,000 refugees fled to Mexico.<sup>33</sup> Thousands more fled to the United States, organizing themselves into poor immigrant communities in cities such as Los Angeles.<sup>34</sup> Although Guatemala has made efforts to recover from the effects of decades of war and repression, the country remains deeply scarred. Like many countries in Latin America that endured similar conflicts, Guatemala faces the difficult challenges of institutionalizing human rights protection, rebuilding its economy, and addressing wide-scale inequalities.

### B. Recognition of Human Rights

A new constitution was passed in 1985 that granted new civil and social rights to Guatemalan citizens.<sup>35</sup> Among the rights recognized were the right to equal treatment; the right to life, liberty, and personal security; and the right to work.<sup>36</sup> The 1985 Constitution also established the Office of the Ombudsman for Human Rights, an autonomous national institution that receives and responds to thousands of human rights complaints each year.<sup>37</sup> In 2002, the Guatemalan Congress elected Sergio Morales to a five-year term as the Human Rights Ombudsman,<sup>38</sup> whose job it is to investigate complaints and issue public or private recommendations to state officials to deal with violations.<sup>39</sup> The Human Rights Ombudsman Office is responsible for oversight of human rights practices in Guatemala, a role previously held by the United Nations Verification Mission in Guatemala (“MINUGUA”) established in 1994.<sup>40</sup>

31. See World Bank, *supra* note 22, at 8.

32. The scorched-earth campaign was an effort by the government of General Efraín Ríos Montt to wipe out the indigenous highland population: “The aim of these genocidal policies was not only to eliminate the guerrillas’ popular support base but also to destroy the culture, identity, and communal structures of the indigenous populations.” JONAS, *supra* note 24, at 24.

33. *Id.*

34. See PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 52–53 (2001).

35. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA [Political Constitution of the Guatemalan Republic] [hereinafter GUATEMALA CONSTITUTION].

36. *Id.* arts. 2–4.

37. *Id.* ch. 5, art. 274.

38. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, GUATEMALA: COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003 (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27900.htm> [hereinafter STATE DEPARTMENT REPORT 2003].

39. See Inter-Am. Comm’n on Hum. Rts., *Fifth Report on the Situation of Human Rights in Guatemala*, ch. II, ¶ 35, OEA/Ser.L/V/II.111 (Apr. 6, 2001), at <http://www.cidh.oas.org/countryrep/Guate01eng/TOC.htm>. Recently, Morales has been involved in efforts to reduce attacks against human rights defenders, proposing a “U.N.-led commission to investigate possible links between illegal clandestine groups or security forces and attacks on human rights defenders and organized crime.” See STATE DEPARTMENT REPORT 2003, *supra* note 38. His office has also helped developed human rights courses to be incorporated into military training. *Id.*

40. See STATE DEPARTMENT REPORT 2003, *supra* note 38. On November 15, 2004, the United Nations formally closed MINUGUA. See Kieran Prendergast, Secretary-General’s Message to the Closing

The Peace Accords signed in 1996 call for accountability for human rights violations committed during the war; protection of indigenous and women's rights; and reform of the health, education, and social services.<sup>41</sup> One of the documents produced as part of the peace process, the Agreement on Social and Economic Aspects and Agrarian Situation, calls on the government to revise national laws and regulations, to, *inter alia*, eliminate discrimination against women in economic, social, cultural, and political spheres.<sup>42</sup> In this Agreement, the government committed itself to protecting the right of women to work and to enacting laws to protect the rights of domestic workers.<sup>43</sup> Another document, the Agreement on Identity and Rights of Indigenous Peoples ("Indigenous Rights Agreement"), obliges the government to eliminate discrimination against indigenous peoples.<sup>44</sup>

### C. Poverty

Guatemala is the largest country in Central America but it is also one of the poorest.<sup>45</sup> The World Bank estimates that 56% of Guatemalans live in poverty and approximately 16% live in extreme poverty.<sup>46</sup> Seventy-seven percent of poor residents are chronically poor (as opposed to transiently poor) and 81% of the poor and 93% of the extreme poor live in rural areas.<sup>47</sup> Seventy-six percent of Guatemala's indigenous people (who account for 43% of the country's population) are poor, compared to 41% of the non-indigenous

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Ceremony of the United Nations Verification Mission in Guatemala (MINUGUA) (Nov. 15, 2004), available at <http://www.un.org/apps/sg/sgstats.asp?nid=1179>. Delivering the Secretary-General's remarks, Under-Secretary-General for Political Affairs Prendergast said that MINUGUA "stands as an example of U.N. peace-building, with valuable lessons for operations in other parts of the world" but that "wide-ranging social inequalities" and "[d]iscrimination across ethnic, cultural and linguistic lines remains disturbingly prevalent." *Id.*

41. See CENTER FOR REPRODUCTIVE LAW AND POLICY, *supra* note 30.

42. Agreement on Social and Economic Aspects and Agrarian Situation, May 6, 1996, Presidential Peace Commission of the Government of Guat.—Unidad Revolucionaria Nacional Guatemalteca, art. 13(h), reprinted in *Letter dated 24 May 1996 from the Secretary-General addressed to the President of the General Assembly*, U.N. GAOR, 50th Sess., Annex, U.N. Doc. A/50/956 (1996) [hereinafter Social and Economic Agreement]. According to the World Bank:

The Peace Accords represented a turning point for Guatemala's development path . . . . Key areas of emphasis related to economic development and poverty reduction include: a focus on human development, a program for the modernization of the democratic state, and strengthening and promoting participation. The rights of the indigenous and women were also highlighted as cross-cutting themes throughout the accords, in an attempt to reverse the historical exclusion of these groups.

World Bank, *supra* note 22, at iv.

43. Social and Economic Agreement, *supra* note 42, art. 13(e).

44. *Agreement on Identity and Rights of Indigenous Peoples*, § II.A, reprinted in *Letter dated 5 April 1995 from the Secretary-General to the President of the General Assembly and to the President of the Security Council*, U.N. GAOR, 49th Sess., Annex, U.N. Doc. A/49/882 (1995) [hereinafter *Indigenous Rights Agreement*].

45. World Bank, *supra* note 22, at 36.

46. *Id.* at 8. According to the World Bank, the extreme poverty line equals the yearly cost of a food basket that provides minimum basic caloric needs; the full poverty line adds an allowance for non-food items to the extreme poverty line. *Id.* at 7–8.

47. *Id.* at ii.

population.<sup>48</sup> The country suffers from staggering inequality, with the “top quintile accounting for 54% of total consumption” and the country’s indigenous population claiming “less than a quarter of total income and consumption.”<sup>49</sup> Forty-four percent of children under five are malnourished; life expectancy rates, infant mortality rates, and maternal mortality rates are among the worst in Latin America; and the country’s illiteracy rate is 31%.<sup>50</sup> The Guatemalan unemployment rate is estimated to be 7.5%,<sup>51</sup> while the underemployment rate is estimated to be 50%.<sup>52</sup> According to the United Nations Development Programme (“UNDP”), Guatemala currently ranks 121 out of 177 countries in human development, a measurement based primarily on life expectancy, education, and living standards.<sup>53</sup>

#### D. *The Status of Women*

On the whole, Guatemalan women have far fewer educational, economic, and employment opportunities than their male counterparts. Patriarchy is a tremendous barrier to the realization of women’s rights in Guatemala: “Men are traditionally taught and enabled to play the dominant role in the family, while women are expected to be submissive and obedient.”<sup>54</sup> Guatemalan men had the legal power to deny their wives the opportunity to engage in activities outside of the home until 1998.<sup>55</sup> Until 1999, women were only allowed to work outside of the home if doing so would not conflict with their household and childcare duties.<sup>56</sup> Adding to the power imbalance between men and women, “women’s responsibilities within the family . . . frequently amount to a double or triple workday, involving childcare and education, housecleaning and cooking, and care for ill or elderly family members—as well as participation in income generation or food production.”<sup>57</sup>

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48. *Id.* In 2003, MINUGUA reported generally on the situation of indigenous people in Guatemala: Guatemala’s indigenous people continue to suffer widespread ethnic, racial and cultural discrimination, while lacking access to basic social services and experiencing disproportionate levels of poverty, including extreme poverty. The ethnic diversity of the nation thus remains largely underrecognized as one of its defining characteristics and greatest assets.

*United Nations Verification Mission in Guatemala, Report of the Secretary General*, U.N. GAOR, 58th Sess., ¶ 37, U.N. Doc. A/58/267 (2003).

49. World Bank, *supra* note 22, at ii.

50. *Id.*

51. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK—2004: GUATEMALA*, available at <http://www.cia.gov/cia/publications/factbook/geos/gt.html#Econ> (last updated Feb. 10, 2005).

52. *Consideration of Fifth Periodic Report of States Parties: Guatemala*, U.N. CEDAW, § 2.2, U.N. Doc. CEDAW/C/GUA/5 (2002).

53. UNDP, *HUMAN DEVELOPMENT REPORT 2004: CULTURAL LIBERTY IN TODAY’S DIVERSE WORLD* 141.

54. CENTER FOR REPRODUCTIVE LAW AND POLICY, *supra* note 30, at 27.

55. The Inter-American Commission on Human Rights invalidated article 114 of the Guatemalan Civil Code upon finding that it violated articles 1.1, 2, 17, and 24 of the American Convention on Human Rights. See HUMAN RIGHTS WATCH, *FROM THE HOUSEHOLD TO THE FACTORY: SEX DISCRIMINATION IN THE GUATEMALAN LABOR FORCE 48* (2002), available at <http://www.hrw.org/reports/2002/guat/>.

56. *Id.*

57. CENTER FOR REPRODUCTIVE LAW AND POLICY, *supra* note 30, at 27.



From 1998 to 1999, women made up 35.2% of the working population.<sup>58</sup> As of 2000, women comprised 74% of the service sector and 98% of the domestic service workforce.<sup>59</sup> Workers in the domestic service industry receive less protection from the Guatemalan Labor Code, which exempts the industry from requirements to provide workers eight-hour maximum workdays (domestic workers can be legally obligated to work for fourteen hours per day), a day of rest, a minimum wage, and a written employment contract.<sup>60</sup> According to Human Rights Watch, a major reason for the unequal treatment of domestic workers in the Labor Code is the government's unwillingness to interfere with the privacy of the home.<sup>61</sup> Women domestic workers are frequently discriminated against when they become pregnant and are subject to dismissal and the employer's refusal to provide prenatal health care.<sup>62</sup>

The other workforce sector dominated by women is the *maquiladora* sector. *Maquilas* ("assembly plants") are factories primarily in the business of apparel manufacturing.<sup>63</sup> Some have applauded "[t]he maquila boom . . . as an important source of employment for women, bringing not only economic improvements, but also enhanced freedom and greater opportunities for advancement to their lives."<sup>64</sup> Despite this praise, Human Rights Watch reported in 2002 on the "widespread sex discrimination" in the *maquilas*, which employ "some 80,000 workers, approximately 80 percent of whom are women."<sup>65</sup> This discrimination takes the form of pregnancy testing as a condition of employment, denial of maternity benefits, and denial of access to health care.<sup>66</sup> Furthermore, *maquilas* often fail to register workers with the national social security system although required to do so by law.<sup>67</sup> "Although factories can be fined and even closed down for this blatantly illegal practice, ineffective monitoring by the social security system itself means that most factories never suffer any consequences."<sup>68</sup>

Violence against women is another extremely serious form of gender oppression taking place in Guatemala. Last year, 20,000 cases of domestic violence were reported.<sup>69</sup> As violent crime surges through the country, over 1180

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58. HUMAN RIGHTS WATCH, *supra* note 55, at 48–49.

59. *Id.* at 49–50 (women make up 17% of the industrial workforce and 8% of the agricultural workforce).

60. *Id.* at 19, 66–67 (citing Labor Code, art. 164). Articles 161 and 162 of the Labor Code establish that the wage of a domestic worker is to be decided between the employer and the worker, according to the Ministry of Labor. *Código de Trabajo, Decreto Número 1441* [Labor Code, Decree 1441], in *DIARIO OFICIAL* NO.14, TOME CLXII (June 16, 1961), *entered into force* Aug. 16, 1961.

61. HUMAN RIGHTS WATCH, *supra* note 55, at 20.

62. *Id.* at 73–74, 78–79.

63. *Id.* at 3 ("U.S. apparel companies subcontract with *maquilas* located in Guatemala—many foreign-owned, some Guatemalan—to assemble and package pre-cut fabrics and ship them to the United States for retail sale.")

64. *Id.* at 54.

65. *Id.* at 3.

66. HUMAN RIGHTS WATCH, *supra* note 55, at 54.

67. *Id.*

68. *Id.*

69. Susan Ferriss, *Killings Blamed on Lax System; Victims' Kin Accuse Guatemala of Ignoring Violence Against*

women have been murdered since 2001.<sup>70</sup> The majority of these murders, many of which involved rape and bodily mutilation, have gone unsolved.<sup>71</sup> Faced with dismal employment opportunities and the risk of violence, Guatemalan women have chosen to seek out opportunities for economic and social stability in neighboring lands as such opportunities do not yet exist at home.

### III. THE MIGRATION OF GUATEMALAN WOMEN

Guatemalan women migrate differently, in many respects, from their male counterparts. This Part explores those differences by examining the patterns of migration for women migrant workers and the particular human rights violations they experience. The focus on women migrants is based on a concern and belief that the current migration policies of sending countries overlook the needs particular to women. As further developed in Part IV, the argument is not that the rights of women migrants are more important than the rights of male migrants, but rather that the historical tendency to understand migration for work as a male phenomenon has led to the development of policies less able to address some of the specific needs of women migrants. To better understand the challenges facing sending countries that seek to protect these rights, this Part looks at the reasons for and the patterns of Guatemalan women's migration and the dangers women face as a result of smuggling, trafficking, and employer abuses.

#### A. *The Why and How of Women's Migration*

Although specifics are unknown, significant numbers of Guatemalan women have migrated north to Mexico and the United States over the past two to three decades.<sup>72</sup> In her assessment of migrant domestic workers globally, the majority of whom are women, the U.N. Special Rapporteur observed that:

The profiles of these workers are very different; many have husbands and children, while others are very young and see this type of work as the only decent employment option. Some are highly educated, others have a basic education, others still are illiterate. Common to all is the desire and hope to find a decent means of improving their own and their families' living conditions.<sup>73</sup>

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Women, ATLANTA J.-CONST., May 30, 2004, at 5B.

70. *Id.*

71. *Id.*

72. HONDAGNEU-SOTELO, *supra* note 34, at 52.

73. *Specific Groups and Individuals: Migrant Workers: Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 2003/46*, U.N. ESCOR, 60th Sess., Agenda Item 14(a), ¶ 14, U.N. Doc. E/CN.4/2004/76 (2004) [hereinafter *U.N. Special Rapp. 2004*].

“Poverty, lack of job opportunities and social services, discrimination, and political violence are among the main factors that have driven the exodus of Guatemalan migrant workers,” according to the Inter-American Commission on Human Rights (“IACHR”) Special Rapporteur for Migrant Workers and Their Families.<sup>74</sup> In particular, inadequate services in education, health, pensions, and housing, especially in rural areas, encourage women to migrate.<sup>75</sup> Male migration has typically been the result of “community conflicts—many of which involve disputes over land ownership, water resources, and farming rights—shortages of capital, and disputes between workers and employers”; such disputes “have forced thousands of Guatemalan workers to seek work outside the country.”<sup>76</sup>

Large numbers of Guatemalan women have sought domestic work in Los Angeles since the 1980s.<sup>77</sup> Guatemalan women in Los Angeles live in poor communities without legal status, unlike many of the more established Mexican communities.<sup>78</sup> The story of Maria Eugenia Martinez helps to illustrate some of the reasons why Guatemalan women migrate to these communities.<sup>79</sup> Ms. Martinez, thirty-nine years old, left her eight children and her home in Huehuetenango in northern Guatemala to search for work in Los Angeles. Ms. Martinez’s children reported that their mother had left to gain financial independence from her abusive husband. She sent money home to pay for her children’s high school expenses, not covered by the state, to pay for a lien against her mother’s house that she had incurred to finance her journey, and to save enough money to open her own business when she returned. Having made it to Los Angeles with the help of a smuggler, Ms. Martinez

struggled to stay employed, taking the bus to Las Vegas for weeks at a time to clean office buildings between jobs in Los Angeles garment factories. She last worked at a factory downtown trimming threads off finished clothing, a task she dubbed “trimiando,” for which she earned less than \$80 a week. But she saved enough money to send home. When [her second eldest son] was married last year in El Terrero, she paid for the wedding. When she learned he had a child on the way, she began shopping for baby clothes.<sup>80</sup>

In June 2004, Ms. Martinez was picked up by U.S. immigration officials and “dropped off at the Tijuana border gate after dark with a few other deportees.”<sup>81</sup> Desperate to get back into the United States, Ms. Martinez put her

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74. *Fourth Progress Report*, *supra* note 21, ¶ 279.

75. *Id.* ¶ 281.

76. *Id.*

77. See HONDAGNEU-SOTELO, *supra* note 34, at 53.

78. See *id.* at 52–54.

79. Leslie Berestein, *Rugged Routes, Deadly Risks; Migrants Push East to Avoid Fortified Border, with Tragic Results*, SAN DIEGO UNION-TRIB., Sept. 29, 2004, at A1.

80. *Id.*

81. *Id.*

life in the hands of a smuggler who led her through the Imperial Valley desert, where she died of dehydration and exhaustion.<sup>82</sup>

Another native of Huehuetenango, Marta Matias, migrated to southwest Florida in 1989 at the age of twenty, using money gained from the sale of some of her mother's land.<sup>83</sup> When she arrived, Ms. Matias lived in a two-story house, inhabited by some fifteen people, and made \$5 per day picking oranges. According to Ms. Matias, if she had to, she would go through all of the abuse she has endured during her time in the U.S. again because of the life she would be able to provide for her future children, one that she believes she would not have been able to provide in Guatemala.<sup>84</sup>

In many cases, migration occurs in two phases—internal and international. Internal migration takes the form of movement from rural areas to cities, primarily to Guatemala City, the country's capital.<sup>85</sup> The majority of the domestic workers in Guatemala appear to migrate from rural indigenous villages to urban households.<sup>86</sup> Internal migration is often the first step toward international migration as workers build networks in urban areas that may provide access to better job opportunities abroad. Approximately ten percent of Guatemala's resident population works abroad.<sup>87</sup> The primary destinations for international migration out of Guatemala are Mexico and the United States.<sup>88</sup> The IACHR Special Rapporteur on Migrant Workers reports that Guatemalan women who migrate to Mexico work as domestic workers or in the hotel industry.<sup>89</sup> The U.S. government estimates that there are 372,000 Guatemalans living in the United States, primarily in California, Illinois, New York, and Texas; however, the Guatemalan government puts the figure closer to 1.2 million.<sup>90</sup>

More specific information is not known about the majority of Guatemalan women who migrate in search of work, partly because many women migrate illegally, but also because "women who migrate on their own have received little attention in international migration in Latin America."<sup>91</sup>

82. *See id.*

83. Miriam Pereira, *Balancing Cultures*, NEWS-PRESS (Fort Myers, Fla.), Aug. 17, 2003, at 1A.

84. *See id.*

85. *See Fourth Progress Report*, *supra* note 21, ¶ 279.

86. HUMAN RIGHTS WATCH, *supra* note 55, at 52.

87. *Fourth Progress Report*, *supra* note 21, ¶ 293.

88. *Id.* ¶ 278.

89. *Id.* ¶ 283.

90. *See id.* ¶ 285. Passage of the 1986 Immigration Reform and Control Act allowed 63,000 Guatemalan migrants to take advantage of regularization programs between 1989 and 1996. *Id.* This discrepancy is most likely attributable to the flow of undocumented workers and the differences between U.S. and Guatemalan accounting of these workers.

91. Geertje Lycklama à Nijeholt, *The Changing International Division of Labour and Domestic Workers: A Macro Overview (Regional)*, in 1 THE TRADE IN DOMESTIC WORKERS: CAUSES, MECHANISMS AND CONSEQUENCES OF INTERNATIONAL MIGRATION 3, 6 (Noeleen Heyzer et al. eds., 1994).

### B. *Smuggling and Trafficking*

The goal of providing for their children's education or their own economic survival often leads women into situations where they become vulnerable to many of the dangers and consequences that can result from migration. For all Guatemalan migrants, the primary dangers are those associated with smuggling and trafficking. In this context, the smuggling of persons refers to cases where smugglers charge migrants a fee for the service of taking them across borders illegally. In Guatemala, "[o]ne form of transport used [by smugglers] are small, unstable boats that leave Guatemala, avoid border controls, and then disembark along the Mexican coast . . . . Sometimes they travel in refrigerated trucks, which poses additional risks on account of the low temperatures."<sup>92</sup> Trafficking, on the other hand, refers to cases where individuals are forced across borders involuntarily. In the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, trafficking is defined as the "recruitment, transportation, transfer, harbouring, or receipt of persons" by force, abduction, fraud, or coercion, for forced or coerced labor, servitude, slavery, or sexual exploitation.<sup>93</sup>

Guatemalan women face particular dangers in the hands of smugglers. Women migrants often resort to smuggling channels to emigrate, unaware of the risks involved:

The high hopes that organized crime agents can create for desperate mothers and the vulnerability of undocumented migrant women make them easy prey for the agents and expose them to high-risk situations in the context of irregular migration. In many cases, this combination involves detention, debt bondage, falling into the hands of smugglers and being threatened into performing degrading or slavery-like labour . . . .<sup>94</sup>

The accumulation of heavy debt burdens and inaccurate information often combine to make women who utilize smuggling mechanisms extremely vulnerable to being forced into prostitution: "[W]omen are recruited for jobs as receptionists, hostesses or barmaids, and are even issued with legitimate permits

92. *Fourth Progress Report*, *supra* note 21, ¶ 354 (citation omitted).

93. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., 62d plen. mtg., Annex II, art 3(a), U.N. Doc. A/RES/55/25/Annex II (2000). The U.S. Trafficking Victims Protection Act defines "severe forms of trafficking in persons" to include:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Trafficking Victims Protection Act, 22 U.S.C. § 7102(8) (2004).

94. *Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference: Note by the Secretary-General*, U.N. GAOR, Preparatory Comm., 2d Sess., Agenda Item 6, ¶ 24, U.N. Doc. A/CONF.189/PC.2/23 (2001) [hereinafter *World Conference Report*].

to undertake such work, yet upon their arrival in the host country find themselves working in the sex industry."<sup>95</sup> Smugglers confiscate women's travel documents and threaten to report them to immigration officials, adding to their intense vulnerability.

Violence against women is a serious consequence of smuggling and trafficking of women migrants. During the 2002 visit of the Special Rapporteur on Migrants to Guatemala, staff from the Migrants' House in Tecún Umán reported that "criminal gangs, including some migrant smugglers and traffickers, together with corrupt government officials, have taken advantage of migrants who arrived in the locality"; among the "several abuses [were] holdups, mistreatment, robberies, rapes, and assassinations."<sup>96</sup> Sadly, corrupt government officials in Guatemala and Mexico work to enable the criminal abuse of migrants.<sup>97</sup> The IACHR Special Rapporteur also found that the number of Guatemalan citizens missing in Mexico has been increasing, noting that eighty-one cases of missing migrants were reported between November 2001 and November 2002 according to the Defense Office for Uprooted and Migrant Populations, an agency of the Guatemalan Ombudsman's Office.<sup>98</sup> The U.N. Special Rapporteur noted a need to pay attention to discrimination against migrant women in detention centers and has called for greater "attention to rapes in custody and other forms of sexual violence against undocumented women belonging to minority groups, as well as the fact that such violations go unreported."<sup>99</sup>

### C. Employer Abuses

Another form of serious abuse against women migrants occurs in the workers' places of employment. The U.N. Special Rapporteur reported on the employer-inflicted abuses experienced by migrant women domestic workers globally:

Many female migrant domestic workers end up being sexually abused by the employer, his children or family members, or by other domestic workers living in the same house. Many are obliged to remain in the rapist's house and are repeatedly sexually violated. . . . [E]mployers have manufactured evidence against female domestic workers, accusing them of theft and other crimes merely so as not to have to pay for their travel home at the end of their contracts. When these women are charged, they are very often not

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95. See *Migrant Workers*, *supra* note 13, ¶ 23.

96. *Fourth Progress Report*, *supra* note 21, ¶ 301.

97. In 2001 the Tecún Umán Migrants' House received 7,544 migrants, of whom 2,899 reported having been robbed, swindled, or attacked by common criminals or having suffered abuses of authority, bribery, mistreatment, or arbitrary arrest at the hands of Guatemalan and Mexican officials. In addition, the same sources claimed to have reliable information about allegations of collusion between officials and gangs of smugglers and thieves. *Id.*

98. *Id.* ¶ 342.

99. *World Conference Report*, *supra* note 94, ¶ 28.

assisted by lawyers or interpreters during the trial and it is very difficult for them to be able to defend themselves, particularly if they have no support from their consulates.<sup>100</sup>

The IACHR Special Rapporteur has reported that “most notorious abuses . . . include exhausting working days, payment below the legally established minimum wage, mass sackings, the refusal of employers to pay wages or to provide the workers with minimal infrastructure . . . and, in general, a lack of protection in the workplace.”<sup>101</sup> Guatemalan women who choose to migrate for work may also be subject to a “double discrimination” as a result of their dual status as women and as migrants.<sup>102</sup>

#### IV. STATE PROTECTION OF MIGRANT WOMEN’S RIGHTS

The provisions of the International Convention for the Protection of the Rights of Migrant Workers and Members of Their Families (“CMW”) set the standard for what actions states should take to protect the rights of migrant workers leaving and entering their borders. This Part will explore the CMW’s prescriptions for sending states, such as Guatemala, to protect the rights of their migrant workers abroad, and in particular, their women migrant workers. In so doing, this Note does not argue that the burden of rights protection of migrant workers falls most heavily on the sending state. On the contrary, receiving states are in the best position to ensure that migrant workers receive treatment equal to that afforded nationals,<sup>103</sup> receive due process of law,<sup>104</sup> and are granted access to social services in the host country.<sup>105</sup> In addition, this Note recognizes that sending states’ ability to comply with certain CMW provisions, such as those dealing with consular services,<sup>106</sup> may depend heavily on the cooperation of receiving states. In the present case, Guatemala has primarily had to negotiate with Mexico and the United States, both of which have significant economic and political advantages over Guatemala. Sending countries’ ability to protect migrant workers’ rights are undoubtedly limited by these conditions. However, this Part seeks to illustrate that sending countries do not have to be paralyzed by these limitations. They can and should play an active role in protecting the rights of their migrant workers by adopting measures applicable to sending states as called for by the CMW.

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100. *U.N. Special Rapp. 2004*, *supra* note 73, ¶¶ 27, 29.

101. *Fourth Progress Report*, *supra* note 21, ¶ 399.

102. *World Conference Report*, *supra* note 94, ¶ 22. As described by the ILO, “women migrant workers suffer from double discrimination in employment: first because they are foreigners and hence subject to the same discrimination as male migrant workers; and second because they are women and as such often victims of entrenched traditional attitudes in their country of origin or of employment. . . .” *Migrant Workers*, *supra* note 13, ¶ 367.

103. *See* CMW, *supra* note 3, art. 25.

104. *See id.* art. 18.

105. *See id.* arts. 27–30.

106. *See id.* art. 65.

Before exploring these actions, another important argument about migrant worker protections should be addressed. Some readers may be distressed by the application of CMW provisions to sending states because of the risk that increased regulation of migration might seriously undermine the efforts of migrant workers to improve their livelihoods by migrating for work illegally. Although no data is available on how Guatemala's increased regulation of migrant workers would affect the numbers of migrants able to leave the country for work, the number of illegal migrants could decrease, particularly if the Guatemalan government succeeds in significantly reducing the number of smuggling and trafficking channels. However, the goal of recognizing sending states' role in protecting migrant worker rights is not the same as either the goal of reducing migration or of preventing illegal migration. In fact, one of the key motivations behind the development of the CMW was to recognize the rights of non-documented migrants throughout the migration process, from sending state to receiving state.<sup>107</sup> The real concern is that the rights of migrant workers are being seriously compromised by certain conditions within the control of sending states and that these states, particularly states that have ratified the CMW, can act to protect their citizens, primarily by providing them information and support. When states acknowledge that their citizens have certain human rights and affirm the existence of these rights by joining the international community in protecting them, states should be prepared to institute real change, when necessary, to ameliorate conditions within their borders that lead to the abuse of these rights.

The most basic human rights of migrant workers under the CMW are the right to liberty and security,<sup>108</sup> the right to life,<sup>109</sup> and the right to be free from torture and cruel, inhuman, or degrading treatment or punishment.<sup>110</sup> Also recognized by the CMW is the right of migrant workers to be informed by sending states of their rights under the CMW and of the migration procedures of receiving states.<sup>111</sup> Under the CMW, states shall also be responsible for

the formulation and implementation of policies regarding . . . migration . . . [; a]n exchange of information, consultation and cooperation with competent authorities of other States . . . [; and t]he provision of appropriate information, particularly to employers, workers and their organizations on policies, laws and regulations relating to migration and employment.<sup>112</sup>

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107. See Lönnroth, *supra* note 1, at 720–21.

108. CMW, *supra* note 3, art. 16.

109. *Id.* art. 9.

110. *Id.* art. 10.

111. *Id.* art. 33.

112. *Id.* art. 65. Specifically, state responsibilities include:

The provision of information and appropriate assistance to migrant workers . . . regarding requisite authorizations and formalities and arrangements for departure, travel, arrival, stay, re-



In sum, sending countries have an obligation to facilitate the safe departure, journey, and reception of their migrant workers<sup>113</sup> by implementing migration procedures, collaborating with other states to improve migratory flows, providing migrants with informational and consular services, and preventing abuse against migrants. This Part looks at the steps that a particular sending country—Guatemala—has taken to protect the human rights provided to women migrants under international, regional, and national law.

### A. *Right to Equal Treatment*

At the outset, it should be noted that the CMW requires that all migrant workers and members of their families be afforded the same rights without distinction on the basis of sex or marital status.<sup>114</sup> In addition, the Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”)<sup>115</sup> calls on states to adopt prohibitions on sex discrimination,<sup>116</sup> to modify social and cultural patterns of conduct to eliminate prejudice and practices that are based on the inferiority of women,<sup>117</sup> to provide women with rights equal to those of men in the fields of employment<sup>118</sup> and family benefits,<sup>119</sup> and to recognize the difficulties facing rural women in particular, and to take appropriate measures to eliminate discrimination in rural areas.<sup>120</sup>

Guatemala guarantees its citizens a right to equality in its 1985 Constitution.<sup>121</sup> The recently passed Law for the Dignity and Integral Promotion of Women prohibits discrimination on the basis of gender, religion, economic status, and ethnicity; as well as violence against women.<sup>122</sup> Within the Office of

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munerated activities, exit and return, as well as on conditions of work and life in the State of employment and on customs, currency, tax and other relevant laws and regulations.

*Id.*

113. *Migration for Employment Convention*, *supra* note 2, art. 4.

114. CMW, *supra* note 3, art. 7. The International Covenant on Civil and Political Rights also requires equality before the law. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 26, 999 U.N.T.S. 171 (acceded to by Guatemala on Aug. 5, 1992).

115. Convention for the Elimination of All Forms of Discrimination Against Women, *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. Guatemala ratified CEDAW on Aug. 12, 1982; see <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Feb. 28, 2005).

116. CEDAW, *supra* note 115, art. 2.

117. *Id.* art. 5.

118. *Id.* art. 11.

119. *Id.* art. 13.

120. *Id.* art. 14. Regionally, Guatemala is obligated to provide equal protection under the American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 24, 1144 U.N.T.S. 123, 9 I.L.M. 673, [hereinafter American Convention], and to allow women to be free from discrimination and stereotypes under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, *adopted* June 9, 1994, art. 6, 33 I.L.M. 1534 (entered into force Mar. 5, 1995) [hereinafter Belém Convention].

121. GUATEMALA CONSTITUTION, *supra* note 35, art. 4.

122. See CENTER FOR REPRODUCTIVE LAW AND POLICY & ESTUDIO PARA LA DEFENSA DE LOS DERECHOS DE LA MUJER, WOMEN OF THE WORLD: LAWS AND POLICIES AFFECTING THEIR REPRODUCTIVE LIVES, LATIN AMERICA AND THE CARIBBEAN, PROGRESS REPORT 2000, ¶ 48, at [http://www.crlp.org/pdf/wowlac\\_pr00\\_guatemala.pdf](http://www.crlp.org/pdf/wowlac_pr00_guatemala.pdf) (last visited Feb. 28, 2005).

the Human Rights Ombudsman is the Office for the Defense of Women's Rights.<sup>123</sup> This office has "a general mandate to promote and monitor the implementation of gender equality in all spheres: social, political, economic, and cultural."<sup>124</sup> This office is charged with bringing "national law into full compliance with international human rights norms, as well as implementation of peace accord commitments with respect to human rights."<sup>125</sup> In 1995, the Indigenous Rights Agreement laid the groundwork for the Office for the Defense of Indigenous Women's Rights.<sup>126</sup>

Discrimination against women migrants often results from a failure to acknowledge that women migrants may require different services than do men (discussed in Part III *supra*). A "general" policy that only addresses the needs of male migrants is a form of discrimination that sending countries should work to eliminate. The following Sections explore the steps taken by the Guatemalan government to protect the rights of migrant workers, identifying those migration policies that are likely to meet the needs of female migrants and those that are not.

### B. Migration Laws and Policies

In recent years, the Guatemalan government has demonstrated its commitment to enabling safe migration by passing legislation to establish and guide national migration policies and procedures. In December 1998, the Guatemalan government passed its current Migration Law, Decree 95-98.<sup>127</sup> Among the aims of the law, as stated in its preamble, are "regulating [Guatemala's] ties with other countries in accordance with international principles, rules and practices [and] the need to standardize and modernize migratory procedures to guarantee freedom of movement to the 'inhabitants of the world.'"<sup>128</sup> Under the law, the Interior Ministry has the supreme authority over migration issues. The Ministry's authority is delegated to the General Migration Directorate ("DGM").<sup>129</sup>

The DGM's responsibilities under the Migration Law are extremely broad. These responsibilities include: "[O]verseeing compliance with migration rules"; "designing and implementing migration policies"; "ensuring that nationals . . . depart from Guatemalan territory in compliance with the law"; issuing passports; keeping records on migration; suggesting migration checkpoints; and penalizing and reporting lawbreakers.<sup>130</sup> Regulations issued after the

123. HUMAN RIGHTS WATCH, *supra* note 55, § IV.

124. *Id.*

125. *Id.*

126. See *Indigenous Rights Agreement*, *supra* note 44, § II.B.1(b). See also JONAS, *supra* note 24, at 75. The Office for the Defense of Children's Rights and the Office for the Defense of Uprooted Persons and Migrants are also located in the Ombudsman's Office. See *Fourth Progress Report*, *supra* note 21, ¶ 35.

127. See *Fourth Progress Report*, *supra* note 21, ¶ 302.

128. *Id.* pmbl.

129. *Id.* ¶ 303.

130. *Id.*

Migration Law charge the DGM with the additional responsibility of “updating and publishing information about international instruments and domestic rules applicable to migration.”<sup>131</sup> The Migration Law also prohibits the “illegal passage of persons,” defined as facilitating the illegal exit of migrants, and makes the offense punishable by a non-commutable prison term of five to eight years.<sup>132</sup>

The Migration Law establishes the National Migration Council (“NMC”) to advise the Interior Minister on migration policy.<sup>133</sup> Meeting monthly, the NMC is a consultative body comprised of the Director General of Migration (of the DGM office), the Interior Minister, the Foreign Affairs Minister, the Director General of the Guatemalan Tourism Institute, and the Attorney General.<sup>134</sup> The Migration Law also gives the NMC power to request opinions or assistance from public or private agencies (national or international) to help carry out its mission.<sup>135</sup> Governmental Agreement 732-99, issued in September 1999 to modify the regulations governing the Migration Law,<sup>136</sup> also requires Guatemala’s career consuls to “offer[ ] information and answer[ ] questions about migration issues in foreign countries; issue[ ] passports and special travel permits; extend[ ] visas and temporary residence permits; [and] send[ ] the DGM weekly reports on the passports and visas they issue . . . .”<sup>137</sup>

The Defense Office for Uprooted and Migrant Populations, an agency under the Guatemalan Ombudsman’s Office (described in Part II.B *supra*), also plays a role in the national effort to protect migrant rights.<sup>138</sup> This office has the same basic functions as the Human Rights Ombudsman—to investigate human rights complaints and to issue public and private recommendations for improving human rights protections. This office opened “Migrant Service Offices” in El Carmen and El Naranjo, Mexico in 2002.<sup>139</sup>

Guatemala has collaborated with other states to facilitate the departure, journey, and reception of its migrant workers. Guatemala is a member of the Central American Commission of Migration Directors (“OCAM”), a regional mechanism for the enforcement of migration laws and the protection of migrants’ rights.<sup>140</sup> In 1998, the government signed the OCAM Framework Agreement—Agreement No. 4, “Migratory and Free-Movement Issues” (CA-4)—with Nicaragua, El Salvador, and Honduras.<sup>141</sup> This agreement seeks to provide greater freedom of movement and temporary stays without passports

131. *Id.* (citing Governmental Agreement 529-99 and Governmental Agreement 732-99).

132. *Fourth Progress Report, supra* note 21, ¶ 348.

133. *See id.* ¶ 305.

134. *Id.*

135. *See id.*

136. *Id.* ¶ 302.

137. *Fourth Progress Report, supra* note 21, ¶ 307.

138. *See id.* ¶ 308.

139. *Id.*

140. *See id.* ¶¶ 289, 291.

141. *Id.* ¶ 291.

or visas for nationals of member countries throughout the region.<sup>142</sup> In 1999, the government gave the Foreign Affairs Ministry authorization to enter into agreements and treaties regarding migration.<sup>143</sup> As these laws and policies demonstrate, Guatemala has put in place national policies and institutions, as well as international agreements, to facilitate and monitor the safe migration of its citizens. The next Part will discuss what the government has done to comply with its own policies, and how these policies might help women migrants.

### C. Protecting and Enforcing Migrant Rights

The Guatemalan government has taken several steps to comply with its obligations under the CMW and other international<sup>144</sup> and regional instruments<sup>145</sup> to provide migrant workers with the information and support they need to migrate safely. However, because a significant number of migrants who leave Guatemala each year are "temporary workers" who "cross the border into Mexico in search of work on rural estates in Chiapas and other border states,"<sup>146</sup> Guatemala's efforts to protect migrant rights target these migrants,<sup>147</sup> most of whom are men.<sup>148</sup> Governmental efforts to protect the rights of temporary migrants have included public denunciations of the workers' "mistreatment at the hands of employers and the Mexican authorities alike";<sup>149</sup>

142. *Fourth Progress Report*, *supra* note 21, ¶ 291.

143. *Id.* ¶¶ 302, 306.

144. In addition to the CMW obligations to provide information, Guatemala is required to provide free informational services to assist migrant workers under the Migration for Employment Convention. See *Migration for Employment Convention*, *supra* note 2, art. 2. The provision of accurate information and employment counseling to women migrants also helps Guatemala fulfill its obligations under CEDAW, which requires states to take "measures . . . to ensure the full development and advancement of women" in the economic field. CEDAW, *supra* note 115, art. 3. Other international instruments ratified by Guatemala that call on the government to provide this kind of assistance to women migrants are the International Covenant on Economic, Social, and Cultural Rights, which recognizes the right to work and vocational assistance, and the right to an adequate standard of living, and the Universal Declaration of Human Rights, which also recognizes the right to an adequate standard of living. International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, arts. 6, 11, 993 U.N.T.S. 3 (accessed to by Guatemala on Aug. 19, 1988); Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., art. 25, U.N. Doc. A/810 (1948).

145. Under the American Convention on Human Rights, to which Guatemala is a party, individuals have the right to humane treatment, the right to seek and be granted asylum, and the right to judicial protection. American Convention, *supra* note 120, arts. 5, 22, 25. The American Declaration on the Rights and Duties of Man also recognizes the right to work and fair pay. American Declaration of the Rights and Duties of Man, art. 14 (1948), *reprinted in Organization of American States, Basic Documents Pertaining to Human Rights in the Inter-American System*, at 17, OAS Doc. OEA/Ser.L/V/II.82, doc.6 rev.1 (1992). Under the Belém Convention, Guatemala is obliged to provide women with "the recognition, enjoyment, exercise and protection of all human rights and freedoms contained in regional and international human rights instruments" and the free and full exercise of civil, political, economic, social and cultural rights. Belém Convention, *supra* note 120, arts. 4, 5.

146. *Fourth Progress Report*, *supra* note 21, ¶ 399 (estimating the number of temporary workers crossing into Mexico each year between 80,000 to 150,000).

147. See *id.* ¶ 400.

148. See *id.* ¶ 297.

149. *Id.* ¶ 399.

a campaign to register all agricultural workers;<sup>150</sup> and an investment in new labor inspection offices and “computer systems for keeping detailed records of the numbers of temporary workers recruited to work on estates in Chiapas.”<sup>151</sup> The government has also attempted to “register and control the individuals who recruit workers for farms in Mexico” and to induce these agents to hand over lists of workers they employ.<sup>152</sup> According to the Special Rapporteur on Migrant Workers and Their Families of the Inter-American Commission on Human Rights (“IACHR”), following his visit to Guatemala in March 2002,

[t]he Ministry of Labor and Social [Security] has carried out a publicity campaign [in Spanish and several indigenous languages] in the mass media (radio), and using posters and information cards, to inform migrants about their rights and the dangers associated with migration, and to recommend that temporary workers obtain proper documents and report abuses committed by their employers or officials in Mexico to the Guatemalan authorities.<sup>153</sup>

In February 2002, the government also established an Ad Hoc Group on Temporary Migrant Agricultural Workers in Mexico “to create coordination mechanisms to regularize the flow of farm workers.”<sup>154</sup> While the effort that has gone into protecting agricultural workers is clearly important and helps a group that is historically underserved, women migrant workers’ needs are unlikely to be met by programs targeting temporary agricultural workers. Unlike in the case of temporary workers, there have been no special attempts to register Guatemalan women migrants (or their employers) who seek work in domestic services or in the hotel industry abroad.<sup>155</sup>

Initiatives that may be able to address the needs of both male and female migrants are those that make consulate services more accessible. For example, Guatemala has established “a number of consulates in areas close to the border, such as Comitán, Tapachula, Ciudad Hidalgo, and Chetumal,” whose mission is “to attend to the needs of the Guatemalan population, particularly in connection with allegations of abuses by employers and/or officials.”<sup>156</sup> The government has also implemented a program in which mobile consulates travel around major U.S. cities to attempt to address the needs of Guatemalan citizens abroad, supplementing regular consulates based in cities with many Guatemalan migrants, such as Los Angeles, San Francisco, Miami, Washington, D.C., Houston, and New York.<sup>157</sup> Other initiatives in place in-

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150. *Id.* ¶ 400.

151. *Fourth Progress Report, supra* note 21, ¶ 400.

152. *Id.*

153. *Id.*

154. *Id.* ¶ 401.

155. *See id.* ¶¶ 283, 398–403.

156. *Fourth Progress Report, supra* note 21, ¶ 401.

157. *Id.* ¶ 403.

clude those “to promote coordination between embassies and consulates and the communities of Guatemalan migrants.”<sup>158</sup> Finally, the International Office of Migration (“IOM”), an international NGO, has also helped Guatemala establish an IOM office “to assist migrants expelled from Mexico on the border of Tecún Umán.”<sup>159</sup>

The Guatemalan government has achieved only limited success in controlling smuggling and trafficking. One reason why attempts to control smuggling and trafficking have been unsuccessful is government corruption. According to the IACHR Special Rapporteur, “the massive presence of people attempting to get across the border and into Mexico has also helped encourage corruption within state agencies, such as the National Civil Police, and, on occasions, the General Migration Directorate (“DGM”).”<sup>160</sup> The Special Rapporteur further observed that “the dangers of [border areas] are often heightened by the presence of corrupt officials who also rob, mistreat and extort migrant workers [and that] [f]requently, the criminals in these areas can operate with absolute impunity because they are in collusion with and receive protection from government employees.”<sup>161</sup>

## V. RECOMMENDATIONS

The Guatemalan government has made great strides to protect the human rights of its migrants. With the entry into force of the CMW, the Guatemalan government has an opportunity to build upon its past efforts and implement policies to make migration safer and more fruitful for women migrants, a group whose needs have historically been overlooked. The following recommendations are an effort to expand upon the work that Guatemala has done to protect migrant workers, with a focus on addressing the needs of women migrants.

### A. Create a Commission for Migrant Women

By creating a separate body responsible for monitoring the needs of women migrants, the Guatemalan government will be better equipped to address these needs when developing migration policies and programs. This body, which could be called the “Commission for Migrant Women,” could be located within the Interior Ministry and given the function of surveying the country’s migration policies to determine whether they meet the needs of men and women equally; where there is uneven coverage of women’s rights, the Commission would formulate alternative policies. To aid in the development of these policies, the Commission could gather information on the needs of Guatemalan migrant women workers through interviews in Gua-

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158. See *Protection of Migrants*, *supra* note 20, ¶ 28.

159. *Id.* ¶ 26. The IOM works on migration issues in four capacities: humanitarian migration; migration for development; technical cooperation; and migration debate, research, and information provision. See *Migrant Workers*, *supra* note 13, ¶ 71.

160. *Fourth Progress Report*, *supra* note 21, ¶ 298.

161. *Id.* ¶ 299.

temala, Mexico, and the United States. The Commission might also conduct research on other sending countries to determine what policies they have put in place to protect the rights of their migrant women workers, and consider whether any of these policies could be implemented in Guatemala. For example, the Commission could determine whether a standardized employer-employee contract would further the rights of women migrant workers. If the Commission determined that such a contract would be suitable, it would then design the contract and make it widely available to women considering migration abroad.

### *B. Improve Informational and Consular Services*

The Commission for Migrant Women, the DGM, and the Foreign Affairs Ministry could devise a comprehensive campaign to inform Guatemalan women about their rights under the CMW; existing migration procedures in Guatemala, Mexico, and the United States; and what conditions and opportunities they can expect to find in destination countries. To date, Guatemala has primarily targeted such efforts at agricultural workers. A new campaign could expand upon previous efforts to reach women who are considering migration to work in domestic services or in the hotel or *maquila* industries. Coupled with the investigative work being done by the Commission for Migrant Women, the campaign should be able to provide women with concrete evidence about the effects of becoming indebted to smugglers, the potential for employer abuse, and the possibilities of encountering sexual violence and robbery on their journeys. The campaign should inform women of the channels that are available for them to seek protection and refuge. Possible delivery mechanisms for the campaign could include informational sessions in rural communities, billboards, and radio announcements at home and abroad. As part of this effort to improve informational services, the Commission for Migrant Women and the DGM could collaborate to determine where and how misleading information about migration opportunities is being disseminated and should work to combat these campaigns. The DGM would enforce penalties for the dissemination of misleading propaganda and should provide individuals with ways to report misleading propaganda.

While the Foreign Affairs Ministry has made significant strides in providing consular protections to its migrants abroad, it should seek to expand these efforts and ensure that women migrants have access to these services. The placement of visible and well-known consuls abroad is essential to providing women migrants with a safe haven from smuggling, trafficking, and employer abuse.

### *C. Improve Mechanisms To Combat Smuggling and Trafficking*

The Guatemalan Congress should seek to pass more specific criminal laws that address the problems of smuggling and trafficking. Currently, Guatemalan laws are written in very broad terms and focus more on the movement

of foreign nationals into the country rather than the movement of its citizens outside the country. The government should train its migration officials to better identify these illegal mechanisms and to pursue investigations of these crimes.<sup>162</sup> Furthermore, the government should put in place better complaint procedures for victims of smuggling and trafficking to help the government prosecute these criminals and should provide victims protection when necessary. The government should demonstrate that it takes the crimes of smuggling and trafficking seriously by passing harsher sentences and prosecuting these crimes in court. In addition, the Guatemalan Congress, the DGM, and the Foreign Affairs Ministry should follow the recommendation by the IACHR Special Rapporteur to “study ways to combat burgeoning crime in the borderland in order to prevent innocent people from being attacked and robbed and to fight the impunity enjoyed by a number of groups that conduct illegal activities.”<sup>163</sup>

#### *D. Train Guatemalan Officials To Protect Rights of Women Migrants*

To fight gender violence, the DGM will have to work to combat corruption. “[T]he Special Rapporteur believes that there is an urgent need for a code of conduct for officials and private guards, to fill the gap found in many countries.”<sup>164</sup> The DGM should collaborate with the Human Rights Ombudsman to investigate complaints of abuse by Guatemalan officials and to train officials to respect human rights.

#### *E. Maintain a Registry of Migrants and Employers*

The DGM and the Foreign Affairs Ministry should expand their efforts to register migrants abroad and should do more to register migrant workers before they leave the country. In particular, a targeted effort to track women migrants working abroad would enable the Foreign Affairs Ministry to provide more complete consular services to vulnerable women in receiving countries.<sup>165</sup> In addition, keeping a registry of employers would also help to monitor those employers that have a history of abusing their workers. These employers could be kept on a watch list, which should be made public to alert women to these complaints.

The Commission for Migrant Women and the DGM should seek to protect Guatemalan women migrants from employer abuse by instituting a complaint procedure for women who have suffered at the hands of their em-

162. *See id.* ch. 6, § J, ¶ 10.

163. *Id.* ch. 6, § J, ¶ 8.

164. *World Conference Report*, *supra* note 94, ¶ 28.

165. For example, Sri Lanka registers all migrant domestic workers before they leave the country, recording each worker's name, the country of destination, and the name and address of the employer. *U.N. Special Rapp. 2004*, *supra* note 73, ¶ 15 n.4. Because many Guatemalan women migrate illegally, this strategy would be difficult to implement. These women will undoubtedly seek to avoid Guatemalan authorities. Thus, such a strategy is likely to be most effective for women migrating legally.



ployers. This information should be made public for all women considering migrating abroad. This information could also be transmitted to the Foreign Affairs Ministry, which could, in turn, relay the information to officials in the employers' countries, who could investigate the complaints.

*F. Make Visas Available for Women Workers*

To the extent possible, the Commission for Migrant Women and the DGM should seek to provide Guatemalan women with the necessary documentation and migration channels so that women migrants do not find themselves subjected to the abuses of smuggling and trafficking channels. The Foreign Affairs Ministry should seek to negotiate agreements with Mexico and the United States to provide for more visa opportunities for those jobs held primarily by women migrants. The Guatemalan government could work with Mexico and the United States to create a temporary worker status for domestic workers, much like the program in place between Guatemala and Mexico for agricultural workers.

*G. Expand Job Opportunities for Women at Home*

Finally, the Guatemalan government should seek to improve women's job opportunities at home by promoting private and public investment in service industries and other industries that employ women. The government should provide domestic workers and maquiladora workers in Guatemala with the same protections as all other workers, including the right to a minimum wage, regulated workdays, and benefits.

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As a sending country, Guatemala has worked hard to provide protections for its migrant workers throughout the process of migration. As a poor country, Guatemala is extremely constrained in what it can do for its migrant workers, many of whom migrate under the government's radar. However, this Note has attempted to illustrate that, despite these constraints, sending countries such as Guatemala should recognize that they have an important role to play in the protection of migrant workers' rights. Where sending countries have been less focused on women migrant rights, this Note has provided reasons for governments to address women migrants' needs separately and has offered recommendations for policy changes that promote the safe migration of women for work abroad.