

# DOMESTIC WORKERS IN MALAYSIA: HIDDEN VICTIMS OF ABUSE AND FORCED LABOR

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I.	INTRODUCTION .....	630
II.	THE POTENTIAL GAINS AND RISKS OF INCREASING INTERNATIONAL MIGRATION .....	632
	A. <i>The Growth of International Migration</i> .....	632
	B. <i>Human Trafficking</i> .....	636
	1. <i>What Is Human Trafficking?</i> .....	636
	2. <i>How Domestic Work Can Turn into Human     Trafficking</i> .....	638
	3. <i>Using the “Exit, Voice” Paradigm to     Understand Human Trafficking</i> .....	639
III.	HUMAN TRAFFICKING IN DOMESTIC WORKERS FROM INDONESIA TO MALAYSIA .....	641
	A. <i>Migration from Indonesia to Malaysia</i> .....	641
	1. <i>An Introduction to Malaysia</i> .....	641
	2. <i>An Introduction to Indonesia</i> .....	643
	B. <i>Domestic Work – What it Entails and How It     Often Becomes Forced Labor</i> .....	643
	1. <i>Excessive Workload</i> .....	643
	2. <i>Exploitative Practices</i> .....	645
	3. <i>Psychological, Physical, and Sexual Abuse...</i>	647
IV.	LEGAL FRAMEWORKS PERTAINING TO INDONESIAN DOMESTIC WORKERS IN MALAYSIA .....	650
	A. <i>Malaysian Laws Relevant to Foreign Domestic     Workers</i> .....	650
	B. <i>Indonesian Anti-Trafficking Laws</i> .....	653
	C. <i>Indonesian-Malaysian Memorandum of     Understanding</i> .....	654
	1. <i>The 2011 MOU</i> .....	654

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2.	<i>Negotiations Between Labor Sending and Receiving Countries</i> .....	657
D.	<i>Relevant International Law</i> .....	658
1.	<i>International Human Rights Law</i> .....	658
2.	<i>International Labor Rights</i> .....	661
V.	THE CURRENT SYSTEM FOR INDONESIAN DOMESTIC WORKERS IN MALAYSIA HAS RESULTED IN ENTRENCHED FORCED LABOR .....	662
A.	<i>Current Inadequate and Non-Existent Laws Allow Human Trafficking of Domestic Workers</i> .....	662
1.	<i>Malaysian Laws Specifically Exclude Domestic Workers from Protection</i> .....	662
2.	<i>Indonesia Fails to Protect Its Citizens Working Abroad</i> .....	664
3.	<i>The New MOU Still Lacks Necessary Protections</i> .....	664
B.	<i>Current Laws that Could Offer Minimal Protections Are Not Being Enforced; the Countries' Governments Are Actively Enabling the Trafficking of These Domestic Workers</i> .....	665
1.	<i>Implementation and Enforcement of Malaysian Laws Are Lacking</i> .....	665
2.	<i>Many MOU Provisions Are Not Enforced</i> ...	668
3.	<i>Labor Recruiters Often Serve as Human Traffickers</i> .....	670
C.	<i>The Current System Inhibits Workers' Exit and Voice Options</i> .....	672
VI.	A NEW DOMESTIC WORKERS SYSTEM COULD ALLOW WOMEN TO BENEFIT FROM TEMPORARY MIGRATION, RATHER THAN BE EXPLOITED BY IT..	677
VII.	CONCLUSION .....	679

## I. INTRODUCTION

Migration in search of work and the promise of increased opportunities is a fundamental part of the human story. In recent decades a new chapter of this story has opened as women have started to enter the migrant labor force in exponentially greater numbers, and mostly as domestic workers.<sup>1</sup> Un-

1. Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1, 6 (2005).

fortunately, this has frequently not turned out to be as empowering as it should. These women are often forced to migrate by extreme poverty and need, which makes them highly exploitable. These vulnerabilities are only increased by their general lack of training and the refusal of “labor-receiving” countries to properly ensure the protection of migrant workers.<sup>2</sup>

This story is being played out thousands upon thousands of times with relation to Indonesian women migrating on two-year work visas to Malaysia. This paper explores the frequently abusive and highly exploitative system of employing such women to work in Malaysian households as domestic help, and contends that substantial reform is necessary for Malaysia to comply with international human rights standards and to remedy its human trafficking problems.

Part II of this paper is divided into two subparts. The first describes the growth of international migration and the phenomenon of its feminization, especially identifying domestic work as a main area of female migrant employment. The second subsection provides a definition and overview of human trafficking, including prevalent characteristics of human trafficking situations and a helpful paradigm for assessing when a situation reaches the level of human trafficking. Part III introduces the countries on which this paper focuses, Malaysia and Indonesia, as well as the conditions faced and treatment endured by domestic workers. Part IV outlines the relevant legal frameworks in Malaysia, Indonesia, and internationally. Part V asserts that these legal frameworks are insufficient and unenforced, disabling domestic workers’ options for redress and thereby greatly increasing the risk and occurrence of human trafficking, specifically forced labor. Finally, Part VI makes recommendations for how Malaysia and Indonesia might improve the domestic workers system in place between the two countries and suggests that with much improvement the system could eventually provide opportunities to the women involved.

This paper concludes that the current system fosters human trafficking and is in need of serious overhaul. There are both legislative and enforcement issues that must be ad-

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2. See generally *id.* (discussing the intersectionality of multiple variables that disadvantage women who migrate for work).

dressed. Both Malaysia and Indonesia need to demonstrate their recognition of the seriousness of these human rights violations and their commitment to remedying the current problems. Furthermore, transformation of this system would in fact be beneficial for both states, as well as for the thousands of women migrating between the two countries each year.

## II. THE POTENTIAL GAINS AND RISKS OF INCREASING INTERNATIONAL MIGRATION

### A. *The Growth of International Migration*

As the world grows smaller and travel and communication become increasingly easy, there are greater possibilities for populations to move abroad in search of better work and pay. Because of this, the number of individuals migrating across international borders has been growing exponentially in recent decades.<sup>3</sup>

As of 2005, there were almost 191 million international migrants in the world, and that number had grown by 121 million over the previous forty-five years, particularly between 1985 and 1990.<sup>4</sup> Most of this migration is fueled by labor moving in search of work and a chance to improve both personal and familial circumstances.<sup>5</sup> This has created a specific category of people, migrant workers, who are beginning to be recognized as a group with its own set of rights and in need of particular protections.<sup>6</sup> Immigrants make up around three percent of the world's population.<sup>7</sup> Of this group, a signifi-

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3. U.N. DEPT. OF ECON. & SOC. AFFAIRS, POPULATION DIV., TRENDS IN TOTAL MIGRANT STOCK: THE 2005 REVISION, at 1, U.N. Doc. POP/DB/MIG/Rev.2005/Doc, U.N. Sales No. 06.XIII.8 (2006) [hereinafter TRENDS IN TOTAL MIGRANT STOCK].

4. *Id.* at 1–2.

5. Int'l Labour Org. [ILO], *Towards a Fair Deal for Migrant Workers in the Global Economy*, Int'l Labour Conf., 92d Sess., Report VI, at 3 (2004), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf>.

6. International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, art. 2(1), Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003) [hereinafter CMW], available at <http://www2.ohchr.org/english/law/cmw.htm> (defining migrant worker as “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”).

7. DILIP RATHA & ZHIMEI XU, WORLD BANK, *World, in MIGRATION AND REMITTANCES FACTBOOK 2008* 16, 16 (2008) [hereinafter *World*].

cant number are temporary migrant workers who travel for short-term work contracts and are arguably even more vulnerable than individuals immigrating permanently.<sup>8</sup> The growth of international migrant workers has resulted in shifts of capital as these workers remit part or all of their earnings to family members in their home countries.<sup>9</sup> Throughout the world, remittance flows equaled U.S. \$317.7 billion in 2007, with U.S. \$239.7 billion of that going to developing countries.<sup>10</sup> Thus, despite the risks and hardships associated with migrating in search of work, individuals appear to be increasingly compelled to do so in hopes of helping their families and loved ones. If done correctly and with proper protections, the rise of temporary worker migration could provide many benefits to both host and sending countries, as well as to the immigrating individuals.

A particularly noteworthy trend in migration numbers is the increasing number of female migrants, which has led to the phenomenon known as the “feminization of migration.”<sup>11</sup> In growing numbers those entering the international migrant labor force have been women.<sup>12</sup> The migration patterns of women are changing as more single women cross borders without the purpose of joining husbands or families.<sup>13</sup> This trend exists throughout the world, but the gender shift is particularly pronounced in certain countries. In Asia, for example, the feminization of labor migration is most pronounced

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8. Xinying Chi, *Challenging Managed Temporary Labor Migration as a Model for Rights and Development for Labor-Sending Countries*, 40 N.Y.U. J. INT'L L. & POL. 497, 498 (2008) (“Half of the world’s two hundred million migrants are temporary migrant workers.”).

9. Katherine Scully, Note, *Blocking Exit, Stopping Voice: How Exclusion from Labor Law Protection Puts Domestic Workers at Risk in Saudi Arabia and Around the World*, 41 COLUM. HUM. RTS. L. REV. 825, 829 (2010).

10. RATHA & XU, *supra* note 7, at 17.

11. Aliya Haider, *Out of the Shadows: Migrant Women’s Reproductive Rights Under International Human Rights Law*, 22 GEO. IMMIGR. L.J. 429, 432 (2008).

12. TRENDS IN TOTAL MIGRANT STOCK, *supra* note 3, at 3 (“The number of female international migrants [in 2005 was] nearly equal to the number of male migrants . . . . [B]y 2005 they outnumbered male migrants in developed countries.”).

13. Haider, *supra* note 11.

among those persons moving from Indonesia, the Philippines, and Sri Lanka in search of temporary employment.<sup>14</sup>

A portion of this gender shift can be explained by a growing international demand for labor in traditionally female fields, including a significant demand for domestic workers.<sup>15</sup> This can be problematic, however, as the bulk of “women’s work” available to female migrants is in the service sector and informal or unregulated industries.<sup>16</sup> This trend means that some women who migrate legally in search of jobs find themselves in the highly dangerous position of performing unregulated (and sometimes even unlawful) work.<sup>17</sup> Furthermore, even when these women are employed in legal women’s work, it is societally undervalued and consequently undercompensated. This is especially true in the case of domestic work, where opponents of fair wages contend that domestic labor is *merely* housework which requires no skill and is part of a woman’s inherent tendencies.<sup>18</sup> Wages for women performing household and childcare jobs may be further reduced as societies continue to presume that these individuals are not the primary breadwinners of their families.<sup>19</sup> Also, domestic work is not generally captured in national economic statistics, leading to it being further undervalued. The immediate production of this work is consumed directly within the household, meaning its market exchange is not readily apparent and consequently its market value is often not recognized.<sup>20</sup>

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14. HUMAN RIGHTS WATCH, HELP WANTED: ABUSES AGAINST FEMALE MIGRANT DOMESTIC WORKERS IN INDONESIA AND MALAYSIA 9 (2004), available at <http://www.hrw.org/en/reports/2004/07/21/help-wanted?print>.

15. Satterthwaite, *supra* note 1, at 6.

16. *Id.* at 7; ILO, PREVENTING DISCRIMINATION, EXPLOITATION & ABUSE OF WOMEN MIGRANT WORKERS: AN INFORMATION GUIDE—BOOKLET 4 WORKING AND LIVING ABROAD 11 (2003) [hereinafter BOOKLET 4], available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_emp/documents/instructionalmaterial/wcms\\_116364.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_emp/documents/instructionalmaterial/wcms_116364.pdf).

17. Satterthwaite, *supra* note 1, at 7.

18. Glenda Labadie-Jackson, *Reflections on Domestic Work and the Feminization of Migration*, 31 CAMPBELL L. REV. 67, 82 (2008).

19. Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT’L & COMP. L. REV. 47, 56–57 (1998).

20. Naj Ghosheh, *Protecting the Housekeeper: Legal Agreements Applicable to International Migrant Domestic Workers*, 25 INT’L J. COMP. LAB. L. & INDUS. REL. 301, 302 (2009).

Given the unregulated nature of a large proportion of migrant women's work, it is possible for employers to have unreasonably high expectations. For domestic workers, many employers impose a "gendered standard of sacrifice and selflessness similar to standards of conduct set for housewives" as they require twenty-four-hour childcare and household work.<sup>21</sup> Such devaluation of traditionally female labor serves to marginalize a vast number of female migrant workers who cross borders to perform such jobs.<sup>22</sup> The degradation and unregulated, private nature of women migrants' work also makes it particularly susceptible to instances of human trafficking and forced labor conditions.

The feminization of migrant work is also partially due to the gender stereotypes of employers that lead them to characterize female foreign workers as cheap and docile sources of labor.<sup>23</sup> Though these gender stereotypes do vary in different parts of the world, they are amazingly widespread. Largely, employers view women as more controllable due to engrained social stereotypes and stigma, which make it acceptable in most cultures for women to be paid less and granted less autonomy than their male counterparts.<sup>24</sup> This, together with many other factors, has led to the feminization of poverty, a phenomenon whereby the majority of the poorest people in the world are women. It is reported that there are at least 1.5 billion people worldwide living on less than a dollar a day, and the bulk of them are women.<sup>25</sup> The rampant poverty among women worldwide is a driving factor in their entering the migrant labor force and accepting work that those with better options would not. However, the components that hamper female migrants' work options and earning potential also mean that the gap between the numbers of men and women entrapped in poverty is widening.<sup>26</sup>

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21. Fitzpatrick & Kelly, *supra* note 19, at 68.

22. *Id.* at 48.

23. Satterthwaite, *supra* note 1, at 6.

24. See U.N. Dep't of Econ. & Soc. Affairs, Div. for the Advancement of Women, Fact Sheet No. 1: The Feminization of Poverty, U.N. Doc. DPI/2035/A (May 2000), available at <http://www.un.org/womenwatch/daw/followup/session/presskit/fs1.htm> ("Worldwide, women earn on average slightly more than 50 percent of what men earn.")

25. *Id.*

26. *Id.*

Despite all of the adversity and danger facing female migrant workers, the number of women engaging in such work is growing. It is a relatively new option for women to travel on their own to support themselves and their families, and the trend offers great opportunity, albeit with existing hardships and risks.<sup>27</sup> Not only does international work present women with a new option for gaining financial independence, it also provides the potential to travel and see more of the world than would otherwise be possible.<sup>28</sup> In some countries, like Bangladesh, women contribute close to three-quarters of their countries' remittances, with the vast majority of that money going towards their families' health and educational needs.<sup>29</sup> As female migrant laborers continue to send increasing amounts of remittances home they will hopefully begin to change perceptions of female workers in future generations.

## B. *Human Trafficking*

### 1. *What Is Human Trafficking?*

Over the last decade the international community has become increasingly aware of the prevalence of "human trafficking." This term, however, can be misleading as it insinuates that this practice requires the forceful movement of individuals across borders for profit. However, it is important to clarify that human trafficking does not require (though does frequently entail) physically moving an individual against their will, nor does it require a person to be transported internationally; trafficking can and does happen entirely within a single country's borders.<sup>30</sup> The Polaris Project, an organization committed to eradicating slavery, explains human trafficking as a "form of modern day slavery where people profit from the control and exploitation of others."<sup>31</sup> Official understandings

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27. See Satterthwaite, *supra* note 1, at 8 (describing the combination of trends that "push" and "pull" women into international work and the associated risks).

28. BOOKLET 4, *supra* note 16, at 9.

29. Haider, *supra* note 11, at 434.

30. *Myths and Misconceptions*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview/myths-and-misconceptions> (last visited Oct. 29, 2011).

31. *Human Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/overview> (last visited Oct. 25, 2011).



of this egregious human rights violation include similar language. The United Nations defines human trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.<sup>32</sup>

The U.S. Department of State simplifies this definition in its 2010 Trafficking in Persons Report (TIP Report), and uses the term to cover activities that involve one person obtaining or holding another person in some sort of compelled service.<sup>33</sup> Under U.S. Federal Law, victims of human trafficking include “anyone forced into different forms of ‘labor or services,’ such as domestic workers held in a home or farm workers forced to labor against their will.”<sup>34</sup> The TIP Report also notes that human trafficking offenses can occur even in cases where the victim initially consented to the work or participated in a crime as a result of being trafficked.<sup>35</sup> It is estimated that as many as 12.3 million individuals are victims of human trafficking worldwide.<sup>36</sup>

There are many employment practices that are indicia of human trafficking, though not all victims suffer from the same list of abuses. The clearest indications of trafficking are those signs that an individual is not able to control their own movement or work choices. For example, victims often have little freedom to leave their work and/or living conditions as they choose.<sup>37</sup> Other indicia include excessively long working hours, especially if not allowed breaks.<sup>38</sup> Cases in which a

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32. G.A. Res 55/25, art. 3, U.N. Doc A/RES/55/25 (Nov. 15, 2004).

33. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7-8* (10th ed. 2010) [hereinafter 2010 TIP REPORT], available at <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm>.

34. *Human Trafficking*, *supra* note 31.

35. 2010 TIP REPORT, *supra* note 33, at 8.

36. *International Trafficking*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/international-trafficking> (last visited Oct. 21, 2011).

37. *Recognizing the Signs*, POLARIS PROJECT, <http://www.polarisproject.org/human-trafficking/recognizing-the-signs> (last visited Oct. 21, 2011).

38. *Id.*

worker owes a large monetary debt to their employer that they are unable to pay off is also a very clear sign of trafficking,<sup>39</sup> and one that is reminiscent of the peonage system existent in the Southern United States during the post-Civil War Reconstruction Era. Other signs include an individual's lack of control of their own finances or immigration documents, which are instead controlled entirely by their employer.<sup>40</sup>

## 2. *How Domestic Work Can Turn into Human Trafficking*

Domestic workers are not always victims of human trafficking, but due to the secluded nature of the work and the extreme power imbalances existing between the employees and their employers and recruiters, these individuals are at a high risk of trafficking.<sup>41</sup> According to the U.N. Special Rapporteur on Contemporary Forms of Slavery, Gulnara Shainian, "Domestic workers who are overworked, underpaid and subject to abuse—whether physical, emotional or sexual in nature—are effectively being treated as slaves. This form of slavery takes place in households all across the world."<sup>42</sup> Shainian notes that migrant domestic workers are particularly vulnerable to subjugation into servitude due to the intersection of the many prejudices that they face due to their sex, nationality, religion and any number of other factors.<sup>43</sup> She further warns labor-receiving countries that despite the private nature of the work and its abuses, domestic servitude is nonetheless a seri-

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39. *Id.*

40. *Id.*

41. See *infra* Part II.B (describing the working conditions and abuses of domestic workers in detail).

42. Office of the U.N. High Comm'r for Human Rights, "Slavery Exists in Households Around the World" Says UN Expert on Contemporary Forms of Slavery, (Dec. 1, 2009), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9652&LangID=e>. Very similar comments were made a year later on International Day for the Abolition of Slavery, 2010. U.N. GLOBAL INITIATIVE TO FIGHT HUMAN TRAFFICKING, *Slavery Remains Invisible in Households Around the World—UN Expert on Contemporary Forms of Slavery* (Dec. 2, 2010), <http://www.ungift.org/knowledgehub/stories/december2010/international-day-for-the-abolition-of-slavery.html> [hereinafter *Slavery Remains Invisible*].

43. *Slavery Remains Invisible*, *supra* note 42. A more detailed overview of the prejudices faced by domestic workers will be discussed later in the paper. *Infra* Part II.B.iii.

ous human rights concern.<sup>44</sup> This contention implicates labor-receiving countries in the trafficking conditions that these temporary domestic workers face within the country's borders and from whose work product the country benefits.

### 3. *Using the "Exit, Voice" Paradigm to Understand Human Trafficking*

Albert O. Hirschman's "exit, voice" paradigm can be a helpful tool for understanding how a form of work becomes human trafficking. In the earliest application of his paradigm, Hirschman examined the ways in which customers express their dissatisfaction to declining companies with which they have been associated.<sup>45</sup> According to this model, some displeased customers will choose to leave their current firm and reenter the marketplace in search of something better.<sup>46</sup> The unhappy customers' other alternative is to somehow voice their dissatisfaction; but this option is much "messier" and includes much greater variation and more manifestations.<sup>47</sup>

Though originally applied to business scenarios, Hirschman recognizes the paradigm's applicability to any number of noneconomic organizations and situations.<sup>48</sup> For example, this paradigm is used in discussing employees' actions in various labor markets.<sup>49</sup> Workers who are dissatisfied with the terms of their employment or their employer's business practices should have channels through which to express that dissatisfaction. Ideally, unhappy employees can demonstrate their dissatisfaction by leaving their employer and seeking work elsewhere. Alternatively, there should be some means for employees to indicate their dissatisfaction to their employer prior to taking the drastic step of seeking employment

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44. *Slavery Remains Invisible*, *supra* note 42.

45. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 4 (1970).

46. *Id.* at 15.

47. *Id.* at 16.

48. *Id.* at 1.

49. See Hilary K. Josephs, *Labor Law Developments in China: Measuring Progress Under China's Labor Law: Goals, Processes, Outcomes*, 30 *Comp. Lab. L. & Pol'y J.* 373, 393 (2009) (discussing dissatisfied employees' choice between "exit" and "voice" options); see also William R. Corbett, *Waiting for the Labor Law of the Twenty-First Century: Everything Old Is New Again*, 23 *BERKELEY J. EMP. & LAB. L.* 259, 276 n.87 (2002) (summarizing criticism of labor laws that constrain employees' use of "voice" options over "exit" options).

elsewhere. Both of these options give employees at least some ability to influence their own employment terms and practices.

As human trafficking is ultimately about a person's lack of control over their own person and work, this paradigm can help to identify offenses. If an individual is in compelled service, she will not be able to exit her situation if she dislikes the conditions or terms of work. Similarly, she will have no recourse by which to voice her complaints with the hope of influencing her employer's conduct. That worker therefore has no means through which to control her own employment terms and working conditions. Thus, a worker's complete lack of exit and voice options is *indicative* of forced labor and human trafficking, and the examination of an individual's exit and voice options can be instrumental in identifying a victim or group of victims.<sup>50</sup>

Upon making this examination with respect to domestic workers, it is apparent that very few options are actually open to these women and that they seem to have extremely low bargaining power with which to attempt to change the system.<sup>51</sup> This paper will examine the experience of Indonesian domestic workers in Malaysia and assert that the current system lacks the necessary exit and voice options for these women. As such, they are systematically forced to remain in work conditions that violate their human rights; they are trapped in involuntary servitude. The paper will further contend that the countries involved must change the current practices in order to stop a systematic practice that ultimately results in the state-condoned human trafficking of these women, and in order to better comply with their human rights obligations and demonstrate their potential to become viable players and leaders on the international stage.

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50. See generally Scully, *supra* note 9 (applying the "exit, voice" paradigm to domestic workers in Saudi Arabia).

51. A more in-depth examination of domestic workers' exit and voice options comes in Part IV.C of this paper.

### III. HUMAN TRAFFICKING IN DOMESTIC WORKERS FROM INDONESIA TO MALAYSIA

#### A. *Migration from Indonesia to Malaysia*

##### 1. *An Introduction to Malaysia*

Malaysian society has long been shaped by the various cultures and practices brought to the country by its many vibrant immigrant communities. The country's national population was measured to be 28.3 million as of July 2, 2010.<sup>52</sup> The country's population has grown by 1.7 million since 2006. The make-up of the Malaysian population is relatively diverse.<sup>53</sup> The majority of the population (sixty-two percent) is Bumiputera, or indigenous Malaysian, while ethnically Chinese and Indian peoples make up significant minorities (twenty-four and seven percent, respectively).<sup>54</sup> In this same survey it was found that non-citizens comprised six percent of the Malaysian population.<sup>55</sup>

Over the recent decades Malaysia has become an affluent and influential country within its region. In the third quarter of 2010, the country recorded their gross domestic product growth rate as 5.3 percent.<sup>56</sup> The unemployment rate in Malaysia is also low, at 3.3 percent, with close to eighty percent of all males participating in the work force and a little under half of all females working.<sup>57</sup>

In more recent years, international migrant workers have become an integral part of Malaysian society. The 2010 U.S.

52. DEP'T OF STATISTICS, MALAY., POPULATION DISTRIBUTION AND BASIC DEMOGRAPHIC CHARACTERISTICS: 2010 1 (2011), available at [http://www.statistics.gov.my/portal/download\\_Population/files/census2010/Taburan\\_Penduduk\\_dan\\_Ciri-ciri\\_Asas\\_Demografi.pdf](http://www.statistics.gov.my/portal/download_Population/files/census2010/Taburan_Penduduk_dan_Ciri-ciri_Asas_Demografi.pdf).

53. *Malaysia Facts and Figures—Malaysia People*, U.N. DEVELOPMENT PROGRAM, <http://www.undp.org.my/resources/malaysia-facts-and-figures/malaysia-people> (last visited Oct. 31, 2011).

54. *Id.*

55. *Id.*

56. NATIONAL PRODUCT AND EXPENDITURE ACCOUNTS THIRD QUARTER 2010, DEPARTMENT STATISTICS, MALAYSIA (Nov. 22, 2010), [http://www.statistics.gov.my/portal/index.php?option=com\\_content&view=article&id=339%3Aanational-product-and-expenditure-accounts-third-quarter-2010-updated-22112010&catid=116%3Aquarterly-gross-domestic-product&lang=en](http://www.statistics.gov.my/portal/index.php?option=com_content&view=article&id=339%3Aanational-product-and-expenditure-accounts-third-quarter-2010-updated-22112010&catid=116%3Aquarterly-gross-domestic-product&lang=en). Though their GDP growth rate decreased, and even became negative, during the latest economic downturn, it has been positive for the last year. *Id.*

57. DEP'T OF STATISTICS, MALAY., *supra* note 52.

TIP Report recorded approximately two million documented migrant workers in Malaysia in 2009 and estimated that an additional 1.9 million migrant workers were in the country without documentation.<sup>58</sup> The country has come to rely so heavily on foreign labor that, according to Human Rights Watch, it could not “run its economy without migrant workers.”<sup>59</sup> Migrant workers have become integral not only to farming and manufacturing, but also in the running of households across Malaysia, as foreign women are brought to Malaysia to serve as domestic workers.

A significant contributing force to the growing demand for domestic workers is the increasing employment opportunities for native Malaysian women. In her November 2, 2010 visit to Malaysia, U.S. Secretary of State Hillary Clinton was greeted by a number of women holding positions of power in the Malaysian government and business world.<sup>60</sup> In order for Malaysian women to enter these new and empowered positions, there must be a change in how their traditional tasks in the home are performed. For the most part, this has not been achieved by a splitting of domestic duties between women and their male partners.<sup>61</sup> Instead, the employment of migrant domestic workers has freed more educated and affluent Malaysian women to enter the formalized labor market and to engage in socially more valued work, while not requiring Malaysian men to increase their household obligations.<sup>62</sup> Thus, much of the operation of modern, urban Malaysian society is dependent upon the work of these foreign domestic laborers. Unfortunately, this dependence does not seem to have fostered a norm of appreciation of these women.

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58. 2010 TIP REPORT, *supra* note 33, at 223. Malaysia has a population of slightly over twenty-eight million, so the migrant population of almost four million makes up a significant minority. DEP'T OF STATISTICS, MALAY., *supra* note 52.

59. Stephanie Sta Maria, *Malaysia Has 'Excellent' Human Trafficking System*, HUM. RTS. WATCH (Aug. 2, 2010), <http://www.hrw.org/en/news/2010/08/02/hrw-malaysia-has-excellent-human-trafficking-system?print> (quoting Phil Robertson, Deputy Asia Director at Human Rights Watch).

60. *Townterview Hosted by Media Prima in Malaysia*, U.S. DEPARTMENT ST. (Nov. 2, 2010), <http://www.state.gov/secretary/rm/2010/11/150325.htm>.

61. Fitzpatrick & Kelly, *supra* note 19, at 65.

62. BOOKLET 4, *supra* note 16, at 11.

## 2. *An Introduction to Indonesia*

Indonesia, the fourth most populous country worldwide with a population of 240 million, is one of the poorer nations in Southeast Asia. The country suffers from high levels of un- and under-employment; together the un- and under-employed individuals in Indonesia make up around thirty percent of the country's population.<sup>63</sup> Not surprisingly, almost three percent of the country's workforce searches for temporary overseas employment, especially in Malaysia.<sup>64</sup> Sending such a large portion of its population overseas, Indonesia's economy has come to depend on the remittances that these migrant workers send home.<sup>65</sup> It is estimated that sixty-nine percent of this population heading abroad in search of work are female and that over fifty percent are children.<sup>66</sup> Indonesian non-governmental organizations (NGOs) believe that up to forty-three percent of these overseas workers are subjected to trafficking-like conditions.<sup>67</sup>

Migrant women are particularly recruited to Malaysia to work as domestic laborers. It is estimated that roughly 300,000 people are employed throughout the nation as domestic workers and that they are mostly from Indonesia, as are the majority of the migrant workers in Malaysia.<sup>68</sup>

### B. *Domestic Work – What it Entails and How It Often Becomes Forced Labor*

#### 1. *Excessive Workload*

Generally women worldwide have fewer defenses against workplace exploitation than their male counterparts since they are often less educated and more alienated from law enforcement. This is no different, and perhaps even more pro-

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63. Graeme Hugo, *Indonesia's Labor Looks Abroad*, MIGRATION INFO. SOURCE (April 2007), <http://www.migrationinformation.org/profiles/display.cfm?ID=594>.

64. *Id.*

65. *Id.*

66. 2010 TIP REPORT, *supra* note 33, at 176.

67. *Id.*

68. *Indonesia/Malaysia: End Wage Exploitation of Domestic Workers*, HUM. RTS. WATCH (May 10, 2010), <http://www.hrw.org/en/news/2010/05/10/indonesiamalaysia-end-wage-exploitation-domestic-workers?print> [hereinafter *End Wage Exploitation of Domestic Workers*].

nounced, in the case of female migrant workers, especially those who are working and living in isolated conditions such as in private homes. In such instances, employers are enabled to exploit the vulnerabilities of women migrant workers, frequently “forcing them to work long hours, often without breaks or leisure time.”<sup>69</sup> Studies by the International Labor Organization (ILO) found that it is common among domestic laborers worldwide to work over fifteen hours per day, and for families to have expectations that these workers be “on call” at any time throughout the day and night.<sup>70</sup> This demand of round-the-clock availability is particularly apparent and gendered in domestic work, where it mimics the widely held expectations of women’s responsibilities in the home.<sup>71</sup> In many countries (including Malaysia) there is no set maximum number of hours that a domestic employee can be required to work, and even when limits are established they often substantially exceed the limits for other occupations.<sup>72</sup> Additionally, domestic employees generally work every day of the week—without any time off—even in countries that purport, as does Malaysia, to regulate rest days.<sup>73</sup>

Many Malaysians who defend the practice of denying domestic workers a day off argue that allowing domestic laborers time off would result in their absconding or getting pregnant.<sup>74</sup> Some even argue that such prohibitions are for the domestic workers’ protection.<sup>75</sup> These arguments, however, are clearly flawed and paternalistic. They are certainly not

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69. Satterthwaite, *supra* note 1, at 25.

70. BOOKLET 4, *supra* note 16, at 23.

71. Satterthwaite, *supra* note 1, at 25.

72. *The Employment and Conditions of Domestic Workers in Private Households: An ILO Survey*, 102 INT’L LAB. REV. 391, 395 (1970).

73. Satterthwaite, *supra* note 1, at 25–26 (“[E]ven in [countries] where rest days are regulated, domestic workers may be exempted or subject to special rules allowing [less than] the standard number [of leisure days] applicable to other workers.”).

74. Jacqueline Ann Surin, *Soi Lek: More Maids Run Away than Are Abused*, NUT GRAPH (June 25, 2009), <http://thenutgraph.com/soi-lek-more-maids-run-away-than-are-abused/> (reporting the opinion of Datuk Seri Dr Chua Soi Lek, then deputy president of the Malaysian Chinese Association, that the number of abuse cases are small in comparison to the number of domestic workers that abscond); HUMAN RIGHTS WATCH, *supra* note 14, at 41 (“Most [labor agents, employers and government officials] had stereotypes of Indonesian domestic workers as naïve, gullible, or promiscuous.”).

75. HUMAN RIGHTS WATCH, *supra* note 14, at 42.



grounds for denying women, who are making the same tough choice to travel abroad in order to better support themselves and their families as their male counterparts, the same rights as other migrant workers.

Despite the existing limits on employers engaged in other industries, Indonesian (and other) domestic workers in Malaysia typically work sixteen or even eighteen hours a day, seven days a week.<sup>76</sup> Furthermore, these women are not only required to work long hours, but the work they are expected to complete is also quite physically demanding. Often their workloads include preparing three meals a day, cleaning every surface of the house, cleaning the car(s), washing the household's clothing (often by hand), and looking after any children or elderly family members.<sup>77</sup> A Human Rights Watch study in 2004 (published before the Malaysian and Indonesian governments signed their current formal, non-binding agreement regarding domestic workers) found that most of the workers' employment contracts allowed them one day off each week.<sup>78</sup> However, of the few dozen women interviewed, none received any extra payment for working a full seven days each week.<sup>79</sup>

## 2. *Exploitative Practices*

Despite the hard work and long hours, the pay for domestic workers globally is quite low.<sup>80</sup> Sometimes this is because the host country does not have a set minimum wage or because that minimum wage does not apply to domestic workers.<sup>81</sup> It is also common for employers simply not to pay the

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76. One Indonesian worker interviewed by Human Rights Watch for this study told her interviewer that she would wake up at 5:00 a.m. and not go to bed again until midnight or later, working the entire time she was awake. HUMAN RIGHTS WATCH, *supra* note 14, at 38.

77. *Id.* at 38–39.

78. *Id.* at 39.

79. *Id.* at 29.

80. *End Wage Exploitation of Domestic Workers*, *supra* note 68 (“Indonesian domestic workers earn shamefully low wages for their long hours of work and dedicated service to Malaysian families,” said Nisha Varia, a senior women’s rights researcher at Human Rights Watch.”).

81. For example, Human Rights Watch found in the United States that the average domestic worker received U.S. \$2.14 per hour, which was less than half of the minimum wage at that time. *See* Satterthwaite, *supra* note 1, at 24.

contracted amount to their domestic workers. Among other methods, it is frequent practice for employers to avoid paying workers directly by instead opening bank accounts in employees' names and claiming to deposit their monthly pay into those accounts.<sup>82</sup>

Defenders of this practice in Malaysia again claim that this is in the workers' best interests, as it forces them to save their money for their families at home.<sup>83</sup> However, this also prevents these migrant workers from sending remittances home throughout their period of work. Holding pay until the end (sometimes in checking accounts that workers are unaware of and are unable to access) also enables employers to pay less than they had agreed upon, as the laborers are not always able to calculate the full amount that they are owed.<sup>84</sup> It also creates situations where women stay in dangerous or abusive situations because they can only successfully claim their pay at the end of the contract.<sup>85</sup>

Domestic workers also have fees and other reductions taken from the amount that they are paid. In particular, employers deduct from their domestic worker's earnings the recruitment fees they paid, sometimes equaling up to three or even six months of an individual's earnings.<sup>86</sup> The 2011 TIP Report stated that some employers of domestic workers in Malaysia engage in this practice.<sup>87</sup> Workers' determination to pay off these debts creates something akin to bondage systems, and reduces their ability to leave poor employment conditions.<sup>88</sup> Once these recruitment and other fees are deducted, Indonesian workers are earning as little as U.S. \$89-133 per month, generally over a two-year contract.<sup>89</sup> Some employers

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82. *Id.*; HUMAN RIGHTS WATCH, *supra* note 14, at 42.

83. HUMAN RIGHTS WATCH, *supra* note 14, at 42.

84. *See id.* at 43 (describing the case of a worker whose employer paid her the equivalent of U.S. \$526.31, despite an agreement that she should earn U.S. \$1947.37 for two years of work).

85. *Id.* at 44.

86. 2010 TIP REPORT, *supra* note 33, at 223.

87. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT: JUNE 2011 (11th ed. 2011) [hereinafter 2011 TIP REPORT], available at <http://www.state.gov/g/tip/rls/tiprpt/2011/>.

88. Sta Maria, *supra* note 59.

89. *End Wage Exploitation of Domestic Workers*, *supra* note 68.

use their payment methods (or their lack of payment) to control and exploit their domestic workers.

Workers also often face limitations of their mobility and communication. To some extent this is inevitable due to the nature of these women's work within a private home, and it is certainly exacerbated by their excessive workloads. But in many cases, employers go still further and confine domestic workers to their houses or apartment buildings, even locking them inside when the employers leave home.<sup>90</sup> This can be extremely traumatic for these women and can even have a psychological impact on them as they fear fire or some other emergency happening while they are trapped inside their employer's home with no means of escape.<sup>91</sup>

### 3. *Psychological, Physical, and Sexual Abuse*

Working in private homes, domestic laborers are often subjected to language and abuse of a type that would not be allowed in a public workplace. Threats of deportation are made to control workers, and denigrating, racist, and abusive language is often directed at these women.<sup>92</sup> In Malaysia, stigmas are associated with both foreign domestic workers and with Indonesians generally, thus feeding the derogatory way in which many employers view these women.<sup>93</sup>

Beyond name-calling and threats, some employers also psychologically mistreat their employees by restricting their religious practices.<sup>94</sup> For Indonesian women this most frequently results in employers being insensitive to their Muslim beliefs and forcing them to do such things as cook pork, care for dogs, work through prayer times, and eat on fast days.<sup>95</sup>

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90. HUMAN RIGHTS WATCH, *supra* note 14, at 40; Satterthwaite, *supra* note 1, at 31.

91. Satterthwaite, *supra* note 1, at 31.

92. *See id.* at 20 (explaining that the Convention on the Elimination of All Forms of Racial Discrimination is a useful tool for women migrant workers).

93. *Id.* at 50–51 & n.234; *see also* HUMAN RIGHTS WATCH, *supra* note 14, at 46 (recounting an interviewee whose employers called degrading names such as donkey and monkey, and on other occasions called her stupid and compared her to a bull).

94. In the Human Rights Watch study, up to a third of the Indonesian women working as domestic workers in Malaysia reported restrictions on their religious practices. HUMAN RIGHTS WATCH, *supra* note 14, at 45.

95. *Id.* at 44.

Individuals of other religions similarly have their practices curtailed: for example, denial of permission to attend church services.<sup>96</sup> These limitations are often enforced by employers of the same faith as the worker.<sup>97</sup>

With startling regularity cases of Malaysian employers brutally abusing or even killing their foreign domestic workers are reported in the news. It is positive that these extreme cases are coming to light; however, there seems to be a feeling among many Malaysians that these instances are the very rare exception to the rule, and not indicative of a systemic problem of abuse.<sup>98</sup> While it is true that extreme physical abuse and maiming is not the norm, the appearance of multiple cases in the news each year is certainly shocking.<sup>99</sup> In 2009, Migrant Care, an Indonesian NGO, reported that 1,018 of the country's migrant workers died abroad and that most of these instances took place in Malaysia and Saudi Arabia, the two largest markets for Indonesian laborers and domestic workers in particular.<sup>100</sup> On average there are fifty cases of abuse reported annually among the 300,000 Indonesian domestic workers in Malaysia, but the Indonesian government claims that the number of women who face mistreatment and violence in domestic employment is actually closer to 1,000 a

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96. *Id.* at 45.

97. *Id.*

98. Surin, *supra* note 74 (reporting the Malaysian Chinese Association President's statements that Malaysians should not "overreact" about reported abuse cases and that the government's decision to grant domestic workers a mandatory rest day was a "knee-jerk" reaction).

99. *Malaysia Condemns Latest Indonesian Maid Abuse Case*, ASIA ONE (Sept. 22, 2010), <http://news.asiaone.com/News/AsiaOne%2BNews/Malaysia/Story/A1Story20100922-238522.html>; *Malaysian Sentenced to Death over Indonesian Maid*, JAKARTA GLOBE (July 20, 2010), <http://www.thejakartaglobe.com/home/malaysian-sentenced-to-death-over-indonesian-maid-murder/386761> [hereinafter *Malaysian Sentenced to Death*]; *Malaysian Police Detain Couple over Alleged Maid Abuse*, MONSTERS & CRITICS (Oct. 29, 2010), [http://www.monstersandcritics.com/news/asiapacific/news/article\\_1595002.php/Malaysian-police-detain-couple-over-alleged-maid-abuse](http://www.monstersandcritics.com/news/asiapacific/news/article_1595002.php/Malaysian-police-detain-couple-over-alleged-maid-abuse); Dewi Kurniawati & Hera Diani, *The Misery of Indonesia's Migrant Workers*, JAKARTA GLOBE (Aug. 19, 2009), <http://thejakartaglobe.com/home/the-misery-of-indonesias-migrant-workers/324780>.

100. Tifa Asrianti, *Workers Send Billions Home, Lack Protection*, THE JAKARTA POST (Nov. 11, 2010), <http://www.thejakartapost.com/news/2010/11/11/workers-send-billions-home-lack-protection.html>.

year.<sup>101</sup> Reports of violent physical abuse range from instances of isolated kicks or punches to beatings resulting in loss of consciousness and/or hospitalization, often triggered by workers' "mistakes."<sup>102</sup> Most if not all of the more minor physical assaults—and some of the more severe beatings—go untreated, unreported and unprosecuted.<sup>103</sup>

Beatings are not the only type of physical abuse that Indonesian women experience while working in Malaysian households. They can be exposed to health and safety risks through their work when employers require them to use strong cleaning supplies, sometimes without providing them with the appropriate protections.<sup>104</sup> In other cases women have their food monitored or limited by employers, and many suffer from severe sleep deprivation.<sup>105</sup> Some women are even forced to sleep in uncomfortable and degrading places, such as a staircase or a bathroom floor.<sup>106</sup>

Women working in private households are also extremely vulnerable to sexual harassment and rape.<sup>107</sup> This can range from verbal harassment to unwanted touching and fondling to repeated rape.<sup>108</sup> Hygiene and health issues can consequently arise in these cases, as sexually assaulted domestic workers generally cannot see a health care provider until they leave their workplace, and often they do not feel they can leave until they have at least earned enough to pay their recruitment fees and other debts.<sup>109</sup> Even if abused women do get to see a doctor, an ILO report found that in Malaysia, migrant workers tend to pay double the amount that nationals are charged for the same procedure and often do not receive the same level of care.<sup>110</sup> Furthermore, these women often do not believe that they have anyone to whom they can turn for help. Many are punished or fired for having "affairs" if they tell the wife about

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101. *Malaysian Sentenced to Death*, *supra* note 99.

102. HUMAN RIGHTS WATCH, *supra* note 14, at 46.

103. *Id.* at 65–66.

104. Satterthwaite, *supra* note 1, at 43.

105. HUMAN RIGHTS WATCH, *supra* note 14, at 47.

106. *Id.*

107. See Fitzpatrick & Kelly, *supra* note 19, at 75–79 (discussing bias against domestic workers, particularly gender bias, in receiving country regulations).

108. HUMAN RIGHTS WATCH, *supra* note 14, at 48–49.

109. *Id.*

110. BOOKLET 4, *supra* note 16, at 28.

the sexual assault or if she finds out in some other way.<sup>111</sup> Overall, women migrating to perform domestic work are extremely vulnerable; one ILO study found that half of all foreign domestic workers suffered from verbal and/or physical (including sexual) abuse.<sup>112</sup>

#### IV. LEGAL FRAMEWORKS PERTAINING TO INDONESIAN DOMESTIC WORKERS IN MALAYSIA

##### A. *Malaysian Laws Relevant to Foreign Domestic Workers*

Despite the large and growing numbers of foreign domestic workers in Malaysia, the country's employment and immigration laws offer little or no protection for these women. The country's main labor law is the Employment Act of 1955, which lays out minimums in terms of what employers must allow and provide to their employees.<sup>113</sup> In particular, Part XII outlines requirements for conditions of service. Employees are entitled, according to this act, to at least one rest day each seven-day period and should not be required to work more than forty-eight hours a week or more than twelve hours a day.<sup>114</sup> However, the Act does not extend guarantees to domestic workers.<sup>115</sup> Instead, these women are expected to work long hours without break for very little pay.

There has been ongoing discussion of including domestic workers in these provisions of the Employment Act. In 2009, Malaysia's Minister of Human Resources, Dr. S. Subramaniam, made an announcement that a provision would be added to the Employment Act which would introduce a mandatory rest

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111. Satterthwaite, *supra* note 1, at 48.

112. *Id.* at 47.

113. Employment Act (Act No. 265/1955) (Malay.), available at <http://crestforce.net/admin/FileStorage/crestforce/Payroll/LabourLaw.pdf>.

114. *Id.* §§ 59–60.

115. The Employment Act excludes employees whose work, by its very nature, requires long hours from certain provisions. *Id.* § 60A(8). See HUMAN RIGHTS WATCH, *supra* note 14, at 12 (noting that domestic workers are excluded from regulations providing maternity and termination benefits as well); *Indonesia/Malaysia: Proposed Labor Pact Lacks Key Reforms*, HUM. RTS. WATCH (Mar. 4, 2010), <http://www.hrw.org/news/2010/03/04/indonesiamalaysia-proposed-labor-pact-lacks-key-reforms> [hereinafter *Proposed Labor Pact*].

day per week for all domestic workers.<sup>116</sup> However, this has not materialized since his making this statement.

Just as foreign domestic workers are excluded from many national employment and labor protections, they are similarly denied specific protections within the home. Malaysia's 1994 Domestic Violence Act outlines many offenses that employers are guilty of committing against their domestic workers, such as incitement of fear, forced conduct, confinement, or physical abuse.<sup>117</sup> However, the act stipulates that the violence must be against a spouse (or former spouse), a child, an incapacitated adult, or another member of the family (including those related by blood or other legal familial ties).<sup>118</sup> Since this act explicitly lists those to whom these protections apply, it is read to implicitly exclude other members of the household. Thus domestic workers, being categorized as neither business employees nor private family members, are effectively excluded from the protective guarantees of both acts. Because of this, as well as a pervasive worldwide problem of impunity for domestic abusers,<sup>119</sup> those that commit violence and sexual assault against domestic workers often go unprosecuted and unpunished.<sup>120</sup>

Malaysia did acknowledge the risk of abuse when it passed a measure prohibiting unmarried employers from hiring domestic help.<sup>121</sup> This, however, is largely ineffective as it does not protect the vast majority of women who are in abusive family homes. The measure also discriminates against unmarried people and can especially pose an increased burden on single parents while not actually addressing the underlying problem of systemic abuse of foreign domestic workers.<sup>122</sup>

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116. Irene Fernandez, *Complicity in Violence, Abuse and Trafficking*, MALAYSIA TODAY (June 1, 2011), <http://malaysia-today.net/mtcolumns/letterssurat/40802-malaysia-indonesia-mou-complicity-in-violence-abuse-and-trafficking->.

117. Domestic Violence Act (Act No. 521/1994) § 2 (Malay.), available at <http://www.agc.gov.my/Akta/Vol.%2011/Act%20521.pdf>.

118. *Id.*

119. Violence against women is a serious problem in Malaysia, with estimates of over three thousand cases of domestic violence in 2003, and as many as thirty-nine percent of Malaysian women have been victims of partner abuse. HUMAN RIGHTS WATCH, *supra* note 14, at 20.

120. Fitzpatrick & Kelly, *supra* note 19, at 77.

121. *Id.* at 79.

122. *Id.* at 79 n.147.

Malaysia is a destination country for immigrants and migrants from many different areas and for many different reasons. Because of this, Malaysian immigration law attempts to highly regulate the individuals entering and exiting the country. The Immigration Act of 1959/63 stipulates that individuals may not remain in Malaysia if they are not in possession of a valid pass or permit.<sup>123</sup> A person's pass is invalid immediately upon the expiration of the period of work that it is covering or if any of its terms or conditions are deemed to be contravened.<sup>124</sup> Thus, women who leave their place of work early, even if they leave due to abuse or forced labor conditions, are often arrested as illegal immigrants without the appropriate documentation. One escaped domestic worker explained that she was scared because she knew the Malaysian labor laws and felt that she would be prosecuted or deported, despite being the victim of abuse.<sup>125</sup>

In 2007 Malaysia enacted its first legislation specifically banning human trafficking, with its Anti-Trafficking in Persons Act, and seemed to indicate that the government was prepared to tackle this issue in earnest. The legislation was largely passed in response to the country having received a low ranking from the United States in its annual TIP Report, which indicated that the country was failing to address its large human trafficking problem. Upon the act's passage Malaysia's ranking was upgraded and it was placed on the U.S. State Department's Tier 2 Watch List, meaning that while there was still a lot of work ahead for the Malaysian government with regard to improving conditions, its legislation was noted and appreciated.<sup>126</sup> The act "clearly states that servitude, long working hours and debt bondage are all elements of labour trafficking."<sup>127</sup> This is commensurate with the international understanding of labor trafficking.

The Anti-Trafficking in Persons Act was amended in November 2010. The amendments broadened the country's defi-

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123. Immigration Act (Act No. 155/1959/63) § 15(1) (Malay.), *available at* <http://jpt.mohe.gov.my/RUJUKAN/akta/akta%20imigresen.pdf>.

124. *Id.* § 55B(2).

125. HUMAN RIGHTS WATCH, *supra* note 14, at 68.

126. Hariati Azizan, *Tough Fight Against Trafficking*, STAR ONLINE (Feb. 15, 2009), <http://thestar.com.my/news/story.asp?file=/2009/2/15/focus/3272925&sec=focus>.

127. Fernandez, *supra* note 116.



nition of trafficking to include “all actions involved in acquiring or maintaining the labor or services of a person through coercion.”<sup>128</sup> While these amendments could be a positive expansion of those punishable for human trafficking, the way the amendments were presented threatened to further conflate human trafficking with human smuggling. This could mean, however, that those individuals caught transporting victims are penalized while individuals or groups orchestrating or most profiting from the trafficking, such as labor recruiters or even employers, are not prosecuted.<sup>129</sup> As written, the anti-trafficking law would provide comprehensive means by which to combat trafficking; however, it is not being sufficiently utilized, especially in prosecuting cases of forced labor.

### B. *Indonesian Anti-Trafficking Laws*

Indonesia is a heavily populated country, and there are not sufficient jobs available to meet the needs of those seeking work. Because of this, Indonesia sends a large portion of its population overseas and it is believed that upwards of forty-three percent of these overseas workers are subjected to trafficking-like conditions.<sup>130</sup> This demonstrates that the government is not doing a sufficient job of working with receiving countries to adequately protect its citizens. However, the Indonesian government did pass anti-trafficking legislation in 2007, which prohibits all forms of trafficking and imposes penalties that are sufficiently stringent and commensurate with other similar crimes, such as rape.<sup>131</sup> Since enacting this anti-trafficking law the number of prosecutions for both sexual exploitation and labor trafficking have increased.<sup>132</sup> However, prosecutors and law enforcement officials are still relatively unfamiliar with the legislation and therefore hesitant to use it to most effectively and appropriately punish traffickers.<sup>133</sup>

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128. 2011 TIP REPORT, *supra* note 87, at 244.

129. *Id.*

130. 2010 TIP REPORT, *supra* note 33, at 176.

131. U.S. AGENCY FOR INT'L DEV., USAID ANTI-TRAFFICKING IN PERSONS PROGRAMS IN ASIA: A SYNTHESIS 44 (2009), *available at* [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/wid/pubs/Asia\\_Synthesis\\_TIP\\_FINAL\\_100216.pdf](http://www.usaid.gov/our_work/cross-cutting_programs/wid/pubs/Asia_Synthesis_TIP_FINAL_100216.pdf).

132. *Id.*

133. 2010 TIP REPORT, *supra* note 33, at 178.

### C. Indonesian-Malaysian Memorandum of Understanding

#### 1. *The 2011 MOU*

Women from many countries throughout the region travel to Malaysia to take jobs as domestic workers, with the highest number of the 300,000 women working in Malaysia coming from Indonesia.<sup>134</sup> In some cases the Malaysian government has set up individual agreements with the governments of these countries to determine employment terms for domestic workers. Rather than create binding bilateral agreements, however, Malaysia has signed Memoranda of Understanding (MOUs) that are not actually binding on either state party.<sup>135</sup> Terms for Indonesian domestic workers in Malaysia are laid out in a MOU established between the two countries in 2006 and revised in 2011.<sup>136</sup>

Following a rash of abuses in Malaysia and a disappointingly weak official response, the Indonesian government in June of 2009 put a ban on new migration of domestic workers to the country.<sup>137</sup> Such action, however, does not necessarily help those women who are driven to seek work abroad due to dire poverty at home. As the ban continued while discussions of a new MOU flagged, it was feared that the number of women illegally seeking domestic work in Malaysia would drasti-

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134. *Proposed Labor Pact*, *supra* note 115.

135. Ghosheh, *supra* note 20, at 314–15.

136. Memorandum of Understanding Between the Government of the Republic of Indonesia and the Government of Malaysia on the Recruitment and Placement of Indonesian Domestic Workers, Indon.-Malay., May 13, 2006 [hereinafter Indonesian-Malaysian MOU], available at <http://www.caramasia.org/docs/MoU%20My-Indonesia%202006.pdf>. Revisions came when the MOU was renewed to address the problematic provisions within the Agreement. However, both revisions have been considered disappointments by many human rights activists, as they have failed to address some of the most problematic aspects of the MOU. This is discussed further in Part IV.A.iii of this paper. The most recent version of the 2011 MOU is not currently publically available.

137. *Indonesia: Guarantee Domestic Workers' Rights in 2010: Government Slow to Address Discrimination and Mistreatment Both at Home and Abroad*, HUM. RTS. WATCH (Feb. 13, 2010), <http://www.hrw.org/en/news/2010/02/12/indonesia-guarantee-domestic-workers-rights-2010> [hereinafter *Guarantee Domestic Workers' Rights*].

cally increase.<sup>138</sup> For these women there is even less protection and greater danger of ending up in trafficking situations.<sup>139</sup> The Malaysian government responded to the ban by stating that it would have to seek hired help in greater numbers from Thailand and the Philippines, noting that it has always received good, Muslim domestic workers from those countries.<sup>140</sup> In actuality, the ban did result in an increase of domestic workers from Cambodia but also a discernible decrease in the overall number of domestic workers employed in Malaysia.<sup>141</sup> In May 2011 the two governments finally signed a new MOU, which addresses some, though certainly not all, of the provisions triggering human rights concerns but does little to indicate how it will be any more effectively carried out than its predecessor.

This agreement details protections and terms to which workers are entitled but also has some restrictive and/or problematic sections. The MOU is completely silent on some key issues, such as minimum wage,<sup>142</sup> and is explicit in allowing other regressive and potentially dangerous practices. For example, though the newest iteration of the MOU does guarantee one rest day a week (an improvement over the 2006 MOU, which had no such provision), it states that “a one-day off can be compensated with overtime pay.”<sup>143</sup> Thus, employers will have the option of paying domestic workers to forgo their day of rest, presumably adding some amount of extra pay to the pre-agreed monthly rate.<sup>144</sup> However, there is nothing stipu-

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138. Putri Prameshwari, *Malaysian Maid Deal Sunk Again*, JAKARTA GLOBE (July 14, 2010), <http://thejakartaglobe.com/home/malaysian-maid-deal-sunk-again/385714>.

139. Fitzpatrick & Kelly, *supra* note 19, at 72.

140. *Malaysia Says Indonesia Maid Deal Delayed; Will Look Elsewhere for Hired Help*, JAKARTA GLOBE (July 13, 2010), <http://thejakartaglobe.com/home/malaysia-says-indonesia-maid-deal-delayed-will-look-elsewhere-for-hired-help/385560>.

141. *Indonesia/Malaysia: New Pact Shortchanges Domestic Workers*, HUM. RTS. WATCH (May 31, 2011), <http://www.hrw.org/news/2011/05/31/indonesia-malaysia-new-pact-shortchanges-domestic-workers> [hereinafter *New Pact Shortchanges Domestic Workers*].

142. *Id.*

143. Fernandez, *supra* note 116.

144. *Indonesian Maid Issue Nears Settlement*, NEW STRAITS TIMES (May 18, 2010), <http://www.nst.com.my/nst/articles/Indonesianmaidissuenearssettlement/Article/>.

lating the amount of overtime pay that is appropriate to compensate for skipping a rest day, and the MOU does not provide the mechanics for how that overtime pay is monitored or delivered. As such, this provision seems prone to abuse and demonstrates the governments' refusal to recognize the extreme disparity in negotiating power between Malaysian employers and poor, foreign, and often young women from Indonesia.<sup>145</sup>

Other parts of the MOU involve vague language, consequently avoiding the establishment of finite standards with which employers would then have to comply. For example, the MOU says that employers shall provide "reasonable accommodation" and "adequate rest," yet does not set any minimums defining those requirements.<sup>146</sup> Some parts of the MOU are clearer about their requirements, such as those relating to the costs the employers are supposed to cover.<sup>147</sup> The new MOU stipulates that recruitment fees are capped at U.S. \$1,500, which employers are required to pay up front.<sup>148</sup> It also prohibits employers from passing on recruitment fees of more than U.S. \$600 to domestic workers and only allows deductions of up to fifty percent of their monthly wages.<sup>149</sup> The MOU also stipulates that Indonesian women be able to communicate in either Malay or English in order to enter the country as domestic workers.<sup>150</sup>

One important provision that was included in the most recent MOU after much pressure from the international and NGO communities is an allowance for Indonesian domestic workers to keep their passports. The 2006 MOU explicitly directed employers to hold workers' passports,<sup>151</sup> meaning that a domestic employee's legal status in the country was completely dependent on her employer. That the new version allows domestic workers to keep their passports instead of having to surrender them to employers is a positive change, according to Human Rights Watch.<sup>152</sup>

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145. *Proposed Labor Pact*, *supra* note 115.

146. Indonesian-Malaysian MOU, *supra* note 136, app. A(A)(xvi)–(xvii).

147. *Id.* app. A(A)(v).

148. *New Pact Shortchanges Domestic Workers*, *supra* note 141.

149. *Id.*

150. Indonesian-Malaysian MOU, *supra* note 136, art. 6(c).

151. *Id.* app. A(A)(xii).

152. *New Pact Shortchanges Domestic Workers*, *supra* note 141.

## 2. *Negotiations Between Labor Sending and Receiving Countries*

Indonesia faces challenges in negotiating with Malaysia for expanded protections in their MOU. For this reason, they have recently agreed to a revised MOU that still does not offer sufficient protection for their citizens travelling to Malaysia as domestic workers. As has been discussed previously, Indonesia relies upon the remittances sent home by its migrant laborers in Malaysia. Often, “labor-sending” countries such as Indonesia are fearful that increased protections for their nationals will result in less migration and therefore fewer remittances being sent home.<sup>153</sup> Competition with workers from other sending countries also erodes governments’ negotiating power when they are “reluctant to take an aggressive stance on labor standards that could impede the employment of their own citizens.”<sup>154</sup> This is particularly true in the case of domestic workers in Malaysia. Indonesia has been able to claim such a large part of that market because it sends the greatest number of laborers for the lowest cost. Thus, pay for domestic workers is dictated by country of origin rather than by education or experience. For example, the minimum wage for Filipina domestic workers in Malaysia is U.S. \$400 a month, whereas Indonesian women in Malaysia are typically paid only a third or even a quarter of that.<sup>155</sup> Indonesians receive, on average, less for performing domestic work in Malaysia than they do in any other country that hosts large numbers of Indonesian migrant workers.<sup>156</sup> The incentive to maintain a sizable market for Indonesian domestic workers in Malaysia has weakened the Indonesian government’s negotiating position and made the state a less effective advocate for the rights of its citizens working in other countries.<sup>157</sup>

Rampant stereotyping and biases against Indonesians generally, and uneducated workers in particular, are reinforced by the lower cost of Indonesian labor. Many Malaysian house-

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153. Chi, *supra* note 8, at 527.

154. *Id.* at 529.

155. *End Wage Exploitation of Domestic Workers*, *supra* note 68.

156. Irene Fernandez, *Malaysia Continues to Sustain Modern-day Slavery in Domestic Work*, SAYA ANAK BANGSA MALAYSIA (May 27, 2010), [http://sayaanakbangsamalaysia.net/index.php?option=com\\_content&view=article&id=365:malaysia-continues-to-sustain-modern-day-slavery-in-domestic-work&catid=1:letters&Itemid=88](http://sayaanakbangsamalaysia.net/index.php?option=com_content&view=article&id=365:malaysia-continues-to-sustain-modern-day-slavery-in-domestic-work&catid=1:letters&Itemid=88).

157. HUMAN RIGHTS WATCH, *supra* note 14, at 56.

holds hire Indonesian domestic workers because they are the cheapest; however, the utter lack of training given to these women during their recruitment means that they often do not know how to operate basic appliances and cannot effectively communicate with or understand their employers.<sup>158</sup> Frequently, this results in frustration and anger on the part of the employer, and it can be turned into justification for abusive treatment of these women. The Indonesian government's lack of mandated training demonstrates a willingness to use their human resources as "cash cows" to be shipped abroad as cheap commodities that require little investment but nonetheless collectively send home large amounts of money.<sup>159</sup> The abundance of untrained Indonesian domestic workers has solidified the bias in Malaysia that such women are unreliable or inept and thus has made many Malaysians resistant to having their government agree to higher salaries or other limitations on employers in the new MOU.

#### D. *Relevant International Law*

##### 1. *International Human Rights Law*

Accompanying, and perhaps enabling, the growth of international migration has been a concurrent development of international organizations and law. Much of the growth of international law that has occurred over the last sixty years has been in the field of human rights law. The international community has seemingly acknowledged certain inalienable human rights that no government or ruler should be able to deny. In 1948, the General Assembly of the United Nations set out these fundamental rights in the Universal Declaration of Human Rights (UDHR) and stated that they were to be globally and comprehensively protected.<sup>160</sup> While this is not a binding document establishing specific obligations of member states, it is meant to delineate the rights of citizens and non-citizens that all states must honor. However, as discussed later on, many of the rights set forth in this document are not guaranteed to foreign domestic workers by Malaysian law.

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158. *Indonesia, Philippines*, MIGRATION NEWS (Jan. 2004), [http://migration.ucdavis.edu/mn/comments.php?id=2984\\_0\\_3\\_0](http://migration.ucdavis.edu/mn/comments.php?id=2984_0_3_0).

159. Kurniawati & Diani, *supra* note 99.

160. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

The UDHR enumerates many fundamental rights that are to be protected and clarifies in article 2 that all people, irrespective of their race, gender, religion, or country of origin are entitled to these rights.<sup>161</sup> The Declaration states that everyone has the right to security of person,<sup>162</sup> that no one should be subject to cruel or degrading treatment or punishment,<sup>163</sup> and that everyone has a right to a standard of living adequate for health and well-being.<sup>164</sup> Everyone should have the right to leave any country,<sup>165</sup> the right to peacefully assemble and associate,<sup>166</sup> and the right to participate in cultural life.<sup>167</sup> These rights are effectively denied when employers keep their workers' passports and the immigration laws are such that individuals cannot exit their workplace without their papers. Furthermore, the UDHR guarantees that no one shall be held in slavery or servitude,<sup>168</sup> a basic expectation that is not being fulfilled given the current frequency of forced labor conditions faced by many domestic workers in Malaysia.

The non-discrimination provisions of the UDHR have become customary international law and some, such as the rule against discrimination on the basis of race, sex, or country of origin, may even be *jus cogens*.<sup>169</sup> It is not yet the case, however, that all human rights have reached the point of *jus cogens*.<sup>170</sup> Malaysia has not signed or ratified the two general human rights treaties—the International Convention on Economic, Social and Cultural Rights (ICESCR) and the Interna-

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161. *Id.* art. 2.

162. *Id.* art. 3.

163. *Id.* art. 5.

164. *Id.* art. 25.

165. *Id.* art. 13.

166. *Id.* art. 20.

167. *Id.* art. 27.

168. *Id.* art. 4.

169. See Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law*, RESEARCH NOTES (Norwegian Centre For Hum. Rts.), 2004, at 19–20, available at <http://www.mittendrinundaussenvor.de/fileadmin/bilder/0304.pdf> (“[T]here is little doubt that the right to equality and non-discrimination has the character of *jus cogens*.”).

170. Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1266 n.122 (1998) (identifying fundamental human rights as *jus cogens*, implying that some human rights are not fundamental, and thus not *jus cogens*).

tional Convention on Civil and Political Rights (ICCPR)—and thus is not formally bound by those conventions.<sup>171</sup> Malaysia would only be bound by those provisions which have reached the status of customary international law or *jus cogens*.

Even without signing any additional treaties, however, Malaysia is still failing to fulfill its current obligations. Malaysia is party to the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and as such must “pursue by all appropriate means . . . a policy of eliminating discrimination against women.”<sup>172</sup> According to the CEDAW Committee’s definition of gender-based violence, a practice or human rights abuse that disproportionately affects women’s ability to enjoy their basic rights constitutes discrimination.<sup>173</sup> Under this definition, the exploitative conditions which domestic workers face would be characterized as gender-based discrimination. By failing to adequately address these abuses the Malaysian government is ignoring its CEDAW obligations to provide women and men equal employment and remuneration.<sup>174</sup>

Malaysia has also signed the Protocol to Prevent, Suppress and Punish the Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime.<sup>175</sup> This protocol focuses on human trafficking conducted by organized crime syn-

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171. Malaysia has not signed either the International Convention on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3, or the International Convention on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. For a list of signatories to the ICESCR, see I MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 182, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009), available at <http://treaties.un.org/doc/source/publications/MTDSG/2009/English-I.pdf>. For a list of signatories to the ICCPR, see *id.* at 204.

172. Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13. For a list of signatories to the Convention, see I MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, *supra* note 171, at 285.

173. HUMAN RIGHTS WATCH, *supra* note 14, at 76.

174. See Satterthwaite, *supra* note 1, at 27 (noting that CEDAW guarantees women equal employment rights, including remuneration).

175. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319. For a current list of signatories, see III MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, at 255, U.N. Doc. ST/LEG/SER.E/26,



dicates and is not directly applicable in the type of arrangements through which domestic workers in Malaysia find themselves in forced labor conditions. However, in signing this protocol, Malaysia committed to fight human trafficking, and it could better honor that obligation by acknowledging the organized and systematic trafficking of domestic workers that occurs throughout the country.

## 2. *International Labor Rights*

The particular rights and concerns of laborers are recognized in a number of more specific treaties. One treaty that is particularly applicable to the needs of Indonesian and other migrant women travelling to Malaysia as domestic workers is the 2003 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW).<sup>176</sup> Malaysia hosted close to 4 million migrant workers in 2009,<sup>177</sup> and its economy is highly dependent upon the output of these laborers. Despite this dependence Malaysia is not one of the forty-five states party to this international treaty guaranteeing basic rights for such workers. The CMW requires that migrant workers be treated on an equal basis with nationals in terms of fundamental human rights, such as freedom from violence and exploitation.<sup>178</sup> However, this document does not sufficiently address some of the gender-specific problems faced by women serving as domestic workers in Malaysia.<sup>179</sup>

The International Labor Organization (ILO) has recognized that the women migrating to perform domestic work in growing numbers are disproportionately exposed to abuse and exploitation. On June 16, 2011 the ILO adopted a new treaty, the Convention on Decent Work for Domestic Workers, addressing issues faced by domestic workers.<sup>180</sup> In developing

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U.N. Sales No. E.09.V.3 (2009), available at <http://treaties.un.org/doc/source/publications/MTDSG/2009/English-III.pdf>.

176. CMW, *supra* note 6.

177. 2010 TIP REPORT, *supra* note 33, at 223.

178. CMW, *supra* note 6, art. 11, 25–26, 43.

179. Labadie-Jackson, *supra* note 18, at 88.

180. ILO, *Text for the Convention Concerning Decent Work for Domestic Workers*, PR.15A (June 16, 2011), available at [http://www.ilo.org/wcmsp5/groups/public/—ed\\_norm/—relconf/documents/meetingdocument/wcms\\_157836.pdf](http://www.ilo.org/wcmsp5/groups/public/—ed_norm/—relconf/documents/meetingdocument/wcms_157836.pdf).

this convention, the ILO attempted to come up with provisions that offer domestic workers the specific protection that they deserve, without condoning the State enactment of restrictive legislation characterizing women as inherently vulnerable.<sup>181</sup> According to one senior women's rights researcher for Human Rights Watch, this convention is "a long overdue recognition of housekeepers, nannies, and caregivers as workers who deserve respect and equal treatment under the law."<sup>182</sup> It is hoped that this convention, which was overwhelmingly supported by the governments, employers' organizations, and trade unions making up the ILO, will result in increased protections for domestic workers. Malaysia abstained from voting on the convention's adoption.<sup>183</sup>

## V. THE CURRENT SYSTEM FOR INDONESIAN DOMESTIC WORKERS IN MALAYSIA HAS RESULTED IN ENTRENCHED FORCED LABOR

### A. *Current Inadequate and Non-Existent Laws Allow Human Trafficking of Domestic Workers*

#### 1. *Malaysian Laws Specifically Exclude Domestic Workers from Protection*

Domestic workers in Malaysia are wholly under-protected, with their safety and fair treatment being almost entirely based upon the attitudes and practices of their assigned employers.<sup>184</sup> In many cases this enables conditions to reach the level of trafficking. The Indonesian-Malaysian MOU stipulates that Malaysian laws should be applicable to Indonesian domestic workers while they are in Malaysia.<sup>185</sup> While it makes sense that migrants should be subject to and protected by the receiving state's laws, this does not work as well in cases where the

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181. *Id.* pmb1.

182. *ILO: New Landmark Treaty to Protect Domestic Workers*, HUM. RTS. WATCH (June 16, 2011), <http://www.hrw.org/news/2011/06/16/ilo-new-landmark-treaty-protect-domestic-workers> (quoting Nisha Varia).

183. *Id.*

184. See Ghosheh, *supra* note 20, at 311 (explaining that the informality of the employment relationship in countries like Malaysia limits the efficacy of certain legal protections for domestic workers).

185. Indonesian-Malaysian MOU, *supra* note 136, art. 4, 7.

receiving country does not have laws specifying the rights of domestic workers.<sup>186</sup>

Domestic work, by its very nature, is different from other forms of labor. Since it is work performed within the household, it is often excluded from the receiving country's existent labor laws and thus has no functional oversight mechanism.<sup>187</sup> This is the case in Malaysia, where domestic workers are specifically *not* covered by the Employment Act. Malaysian labor laws stipulate that provisions on working hours, rest days, and other conditions of service are not applicable to domestic workers, who consequently work much longer days without rest periods than other laborers.<sup>188</sup> These resulting disparities between domestic help's working hours and other workers' are a clear violation of international human rights standards, including the UDHR's non-discrimination clause.<sup>189</sup>

Furthermore, as domestic workers are kept almost exclusively within the confines of private homes, abuses against these women are not readily observable, as would be the case in larger, more public places of employment.<sup>190</sup> And given the private sphere within which the work transpires, many employers (who are also often policy-makers) feel that it should not be subject to legal or governmental oversight in the way that other more public work spaces are governed.<sup>191</sup> This is analogous to the way in which many societies deal with (or ignore) cases of domestic violence, in essence granting impunity to abusers acting within their own private homes. Though Malaysia has recognized the governmental obligation to protect against domestic violence and enacted legislation guaranteeing protection from and outlining punishment for domestic abusers, it has refused to extend these protections to household employees. Thus, the organizational fear of public intrusion into the private sphere continues to prevent effective and

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186. Ghosheh, *supra* note 20, at 305.

187. Labadie-Jackson, *supra* note 18, at 85.

188. Employment Act (Act No. 265/1955) (Malay.), available at <http://crestforce.net/admin/FileStorage/crestforce/Payroll/LabourLaw.pdf>; BOOKLET 4, *supra* note 16, at 12.

189. UDHR, *supra* note 160, art. 2.

190. Labadie-Jackson, *supra* note 18, at 85.

191. *Id.* at 84 (“[L]ittle regulation incentive exists due to domestic labor being viewed as a ‘private household matter.’”); Ghosheh, *supra* note 20, at 303.

sufficient protection of domestic workers who are victims of human trafficking.

## 2. *Indonesia Fails to Protect Its Citizens Working Abroad*

Once workers have left the country, Indonesia's anti-trafficking laws are not able to offer them much protection, but this does not mean that the government is incapable of doing more to prevent abuse of its citizens overseas. Improved regulation and enforcement of anti-trafficking policies at home would better prepare workers once they are abroad. Lack of training, forged documents, lack of mental preparedness and an inability to speak the language in their host countries are all factors that lead to domestic workers' problems once they are working abroad.<sup>192</sup> Only slightly over half of the 506 employment agencies within Indonesia that recruit, process, and send domestic workers abroad have training facilities where recruits are given minimal instruction.<sup>193</sup> Beyond lack of training at these facilities, women frequently face confinement, threats, and withholding of documents while at recruitment centers and are also charged excessive fees by these agencies.<sup>194</sup> In some instances women are even subjected to forced labor in houses near the recruitment centers before they even leave Indonesia.<sup>195</sup>

## 3. *The New MOU Still Lacks Necessary Protections*

Despite almost two years of negotiations leading up to the signing of a new MOU, the agreement still is silent on important issues. Most critically, the new MOU does not set any hard and fast minimum wage.<sup>196</sup> Instead the MOU states that a monthly wage for Indonesian women of U.S. \$133-200 is sufficient, no matter that it is well below Malaysia's poverty line (monthly earnings less than U.S. \$250).<sup>197</sup> Malaysia does not have a national minimum wage, though deputy Minister of Human Resources Maznah Bt Mazlan recently stated that the

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192. Kurniawati & Diani, *supra* note 99.

193. *Id.*

194. 2010 TIP REPORT, *supra* note 33, at 177.

195. HUMAN RIGHTS WATCH, *supra* note 14, at 26.

196. See *New Pact Shortchanges Domestic Workers*, *supra* note 141. Copies of the newest MOU are not currently available to the public.

197. *Id.*

government is planning to introduce a minimum wage for private sector workers.<sup>198</sup> The Malaysian government justified the current wage rate for domestic workers by contending that the rates for Indonesian workers in Malaysia are acceptable so long as they are above Indonesia's set minimum wage.<sup>199</sup> This is a perverse justification, however, as the vast majority of these women are travelling for work in order to earn money and opportunities beyond what is available at home.

*B. Current Laws that Could Offer Minimal Protections Are Not Being Enforced; the Countries' Governments Are Actively Enabling the Trafficking of These Domestic Workers*

*1. Implementation and Enforcement of Malaysian Laws Are Lacking*

Malaysian immigration authorities reported that within a four-year period 57,000 domestic workers left the country before finishing their work contracts.<sup>200</sup> Since these women had mostly migrated due to severe need on their own or their families' parts, it seems unlikely that many of these women left employment early of their own volition. It is much more probable that the majority of these women left due to the abusive and often inhumane treatment that they received at the hands of their employers. Because of this problem, the Malaysian government started charging employers of domestic workers a security bond in hopes that this would encourage them to treat their workers better and decrease the numbers of women fleeing from their jobs.<sup>201</sup> However, this has more frequently provoked employers to further restrict a worker's freedom of movement, confining her to the house in order to prevent her from running away.<sup>202</sup> This demonstrates that the problem is not solely that Malaysia has not enacted the appropriate laws, but even more disturbingly that the Malaysian government is not correctly implementing its laws so as to protect this vulnerable class.

The immigration laws that are in place in Malaysia more often hurt temporary domestic workers than help them. Ma-

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198. Fernandez, *supra* note 116.

199. *Id.*

200. HUMAN RIGHTS WATCH, *supra* note 14, at 14.

201. BOOKLET 4, *supra* note 16, at 26.

202. *Id.* at 26–27.

laysian enforcement of the Immigration Act of 1959/63 discourages domestic workers from escaping or reporting cases of abuse and deters many from seeking redress when it is deserved.<sup>203</sup> The law is especially onerous as it stipulates that persons may be detained prior to being removed from the country.<sup>204</sup> Because of this, victims often face detainment by immigration authorities before leaving the country and even throughout investigation of their cases if they are pressing charges.<sup>205</sup> The Immigration Act also contains punishments beyond detention and deportation, including whipping and caning in certain instances.<sup>206</sup> In 2003, nine thousand foreigners sentenced to punishment for violating the immigration laws were caned.<sup>207</sup> Domestic workers who are found to have entered the country illegally (possibly through an unlicensed labor recruiter or by having been trafficked) are generally sentenced to imprisonment and fines.<sup>208</sup>

Immigration laws are used against domestic workers even while they are employed, as the Immigration Department conducts “random checks” on workers’ permits, according to a Malaysian immigration official.<sup>209</sup> The performance of such immigration status checks stands in stark comparison to the government’s complete lack of monitoring with regard to the protection of migrant domestic workers’ contracted rights.

While the Malaysian immigration laws often do not help trafficked domestic workers, it was hoped that the passage in 2007 of the country’s Anti-Trafficking in Persons Act would provide protection. Since the act’s passage, however, there has been minimal enforcement, and it seemed to many that the government felt that merely passing the legislation and “sitting on it” was sufficient.<sup>210</sup> This resulted in a reversion to

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203. HUMAN RIGHTS WATCH, *supra* note 14, at 67.

204. Immigration Act (Act No. 155/1959/63) § 34 (Malay.), *available at* <http://jpt.mohe.gov.my/RUJUKAN/akta/akta%20imigresen.pdf>.

205. 2010 TIP REPORT, *supra* note 33, at 224–25.

206. *See* Immigration Act, *supra* note 204, §36 (mentioning fines, imprisonment, and whipping as potential punishments).

207. HUMAN RIGHTS WATCH, *supra* note 14, at 69–70.

208. *Id.* at 70.

209. *Id.* at 68–69.

210. Baradan Kuppusamy, *Blacklisted for Not Enforcing Trafficking Laws*, INTER PRESS SERVICE (June 24, 2009), <http://ipsnews.net/news.asp?idnews=47332>.

its previous Tier 3 status in the U.S. State Department's 2009 TIP Report, though Malaysia was upgraded again in 2010 to the Tier 2 Watch List due to the Malaysian government's articulated commitments to better comply with human trafficking elimination standards.<sup>211</sup>

Despite those proclaimed commitments, there were not any reported criminal prosecutions of employers for subjecting their workers to forced labor and involuntary servitude conditions in 2010.<sup>212</sup> According to the 2011 TIP Report, NGOs reported that the police often failed or even refused to investigate domestic workers' complaints of document confiscation or withholding of wages as trafficking offenses,<sup>213</sup> despite the act clearly stating that such practices are indicia of debt bondage and forced labor.<sup>214</sup> The 2011 TIP Report stated that the "government did not report any criminal prosecutions of employers who subjected workers to conditions of forced labor or labor recruiters who used deceptive practices and debt bondage to compel migrant workers into involuntary servitude."<sup>215</sup> The Malaysian government has yet to demonstrate any commitment to protecting domestic workers from systematic forced labor or to deterring employers from committing human trafficking offenses.

Furthermore, trafficking laws are deficient in the services and protections provided to victims who are required to participate in the prosecution of their traffickers and are often held in inadequate conditions.<sup>216</sup> This requirement of participation in long, painful trafficking investigations and prosecutions serves to seriously discourage victims and their advocates

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211. Andrew Khoo, *Improved Human Trafficking Record—Don't Celebrate Yet*, MALAYSIAN BAR (June 18, 2010), [http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=3—7-](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=3—7-).

212. 2010 TIP REPORT, *supra* note 33, at 224.

213. 2011 TIP REPORT, *supra* note 87, at 245.

214. Fernandez, *supra* note 116.

215. 2011 TIP REPORT, *supra* note 87, at 245.

216. 2010 TIP REPORT, *supra* note 33, at 225. For comparison, the United States does not expressly require trafficking victims to remain in the country to participate in the prosecution of their case, should they prefer to return home. The law does require "willing[ness] to assist in every reasonable way" of victims wishing to remain in the United States permanently, but this does not necessarily require the victim's active participation, and is accompanied by other rehabilitative services. Trafficking Victims Protection Act, 22 U.S.C. § 7105(b) (2006).

from bringing cases.<sup>217</sup> Due to the poor treatment of victims once they are referred to the police, several NGOs providing victim services reported that they no longer refer victims to government authorities.<sup>218</sup> Thus, while these NGOs are working to provide the necessary services to victims, the traffickers themselves are going unpunished.

As the amendments to the Anti-Trafficking in Persons Act relating to “people smuggling” that were enacted in fall 2010 go into effect, there is a fear that individuals will be further harmed as more are treated as undocumented migrants rather than victims.<sup>219</sup> These amendments will narrow the definition of human trafficking, “undercutting protections for children and adults who are tricked, rather than forced, into being trafficked.”<sup>220</sup> This is problematic, as it provides traffickers with alternative ways to entice victims and is also not in accordance with the international definition of human trafficking.

## 2. *Many MOU Provisions Are Not Enforced*

The MOU outlines the basic requirements of the employers, recruiters, and workers but it does not establish any specific enforcement mechanisms, nor does it obligate the Malaysian government to monitor the fulfillment of its listed requirements. This means that compliance with the MOU’s terms is based almost entirely upon the “integrity of the employer and government officials,” many of whom are not familiar with the document’s content.<sup>221</sup> Furthermore, the existence of an array of other sending country agreements with various stipulated terms and requirements means that policing and monitoring is even more complicated and thus less likely to be realized.

Employers who prohibit domestic workers from ever leaving the premise or house where they are working are clearly committing human rights violations, yet the government does

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217. 2010 TIP REPORT, *supra* note 33, at 224.

218. 2011 TIP REPORT, *supra* note 87, at 245.

219. *Malaysia: Revised Law Threatens Anti-Trafficking Efforts*, HUM. RTS. WATCH (Sept. 8, 2010), <http://www.hrw.org/news/2010/09/08/malaysia-revised-law-threatens-anti-trafficking-efforts>.

220. *Id.* This narrowed definition requiring the victim to have faced actual or threatened force does not comply with the internationally recognized scope of human trafficking. See *supra* note 32 and accompanying text.

221. Ghosheh, *supra* note 20, at 311.



not prosecute or even monitor this conduct. Under the old MOU, which directed Malaysian employers to keep Indonesian domestic workers' passports, these women were even further prevented from exiting the house alone.<sup>222</sup> This provision meant that not only could individuals be prohibited from leaving for a few hours if they did have time off, but also that there were serious barriers in place to their attempting to depart from an abusive and dangerous environment. The new MOU allows domestic workers to maintain possession of their documentation, but it is not clear what will be done to ensure that this is actually happening. Without enforcement by the Malaysian government, there is no reason to believe that this new provision will have any tangible benefit for these women.

It is too early to know how much effect and benefit domestic workers will realize from the 2011 MOU. However, unless this new MOU is enforced with much greater rigor than previous iterations, it seems unlikely that it will have much effect. Vague language that mandates "adequate" and "reasonable" provisions,<sup>223</sup> yet leaves it to employers' discretion to decide what meets these standards, makes regulation more difficult, as law enforcement is not given a strict standard to apply. This allows employers to push the boundaries regarding acceptable treatment of foreign domestic workers and makes it easier for law enforcement to turn a blind eye to anything less than the most egregious of offenses. New guarantees that have been added to protect domestic workers are still negotiable, meaning that they may not actually be very helpful for domestic workers who are not in a strong position to negotiate. For example, the new MOU *allows* domestic workers to keep their passports.<sup>224</sup> This is certainly better than requiring workers to hand over their documentation to their employer, but it still permits employers to hold the documents. Many Indonesian women may not know or feel comfortable refusing to give their employers their documents if they request them. Similarly, the new MOU *allows* domestic workers to work on their rest days so long as they are paid overtime.<sup>225</sup> As one activist

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222. Indonesian-Malaysian MOU, *supra* note 136, app. A(A)(xii).

223. *Id.* app. A(A)(xvi)–(xvii).

224. This point is made according to reports on the 2011 MOU, but cannot yet be verified against the actual text of the 2011 MOU, which is not yet publically available. See *New Pact Shortchanges Domestic Workers*, *supra* note 141.

225. Fernandez, *supra* note 116.

noted, in a country where even monthly wages are not paid, ensuring appropriate overtime pay is highly unlikely.<sup>226</sup> Thus, while the inclusion of these provisions in the writing of the new MOU is a start, it will not realistically change anything without enforcement of these provisions. If the Malaysian government does not simultaneously increase its monitoring of domestic workers and their employers, it will remain complicit in the abuse they face by implicitly allowing their forced labor.

It is likely that other provisions of the new MOU, even those that are non-negotiable, will not be sufficiently enforced. The new MOU's cap on recruitment fees is progress, though it is still significantly higher than the two-month recruitment fee cap of Malaysia's neighboring state Singapore.<sup>227</sup> The old MOU had created regulations specifying that employers were to cover certain of the recruitment costs.<sup>228</sup> However, those regulations were widely ignored, as employers regularly withheld months of pay from domestic workers in order to pay off these fees.<sup>229</sup> Simply creating a cap is insufficient if the Malaysian government will not devise a way to monitor and enforce this provision. Similarly, provisions in the old MOU requiring that Indonesian domestic workers be able to communicate in either Malay or English in order to enter Malaysia for work were not monitored or enforced.<sup>230</sup> Obviously, this provision does not serve to protect domestic workers if cheaper labor without the requisite language skills is regularly allowed to enter, and remain in, the country.

### 3. *Labor Recruiters Often Serve as Human Traffickers.*

Though women employed in Malaysia as domestic workers serve at the whim of their individual employers, they are recruited and brought to the country by labor brokers. These brokers are private individuals or companies that are in the business of recruiting foreign women and connecting them with Malaysian households looking for hired help.<sup>231</sup> Gener-

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226. *Id.*

227. *New Pact Shortchanges Domestic Workers*, *supra* note 141.

228. Indonesia-Malaysian MOU, *supra* note 136, app. A(A)(v).

229. *New Pact Shortchanges Domestic Workers*, *supra* note 141; 2011 TIP REPORT, *supra* note 87, at 243.

230. Ghosheh, *supra* note 20, at 317–18.

231. Fitzpatrick & Kelly, *supra* note 19, at 73.

ally, women are recruited by one agency in Indonesia, which sets them up with another agency in Malaysia. For most women coming into Malaysia, these agents are the only contact they have in the country other than their employers. For this reason, it is critical that the recruiters fulfill all of their MOU obligations and serve as a resource for workers who encounter employment problems or abuse. Instead, however, recruiters generally fail to address reported problems—and sometimes are even the source of abuse—and receive little to no oversight from either country's government. For example, recruiters largely ignore the current limits on fees that they can charge for their services, yet “both Indonesia and Malaysia have failed miserably to oversee labor recruiters and their profiteering from migrant women.”<sup>232</sup> Both governments should do a better job to defend these employees' economic interests, especially as such protection is offered to other migrant workers.<sup>233</sup> Through charging these women inflated fees, the recruiters can become traffickers. They create situations whereby these women often feel compelled to stay with an abusive employer in order to pay off their debt to their recruitment agency.

Beyond economic exploitation, labor recruiters often fail to ensure workers' physical safety. As these individuals are private, profit driven operators, they have little incentive to remove workers from abusive employers.<sup>234</sup> Women who have complained or fled to their agents due to exploitative or violent working conditions were often told to stay or return to their jobs and “not [to] fight with their employer.”<sup>235</sup> One woman who was sexually harassed had to contact her agent three times before he would pick her up, and then he sent another

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232. *End Wage Exploitation of Domestic Workers*, *supra* note 68; *Proposed Labor Pact*, *supra* note 115 (highlighting both the low wages paid to domestic workers as well as the high recruitment fees imposed).

233. See U.N. POPULATION FUND, STATE OF THE WORLD POPULATION 2006: A PASSAGE TO HOPE-WOMEN AND INTERNATIONAL MIGRATION, at 51–52, U.N. Sales No. 06.III.H.1Doc. (2006) [hereinafter *PASSAGE TO HOPE*], available at [http://www.unfpa.org/swp/2006/pdf/en\\_sowp06.pdf](http://www.unfpa.org/swp/2006/pdf/en_sowp06.pdf) (“As the ILO states, ‘domestic workers experience a degree of vulnerability that is unparalleled to that of other workers . . . Many [domestic workers] are outside the protection of labour legislation.’”).

234. HUMAN RIGHTS WATCH, *supra* note 14, at 65.

235. *Id.* at 64.

worker to the same abusive employer in her stead.<sup>236</sup> In other cases the labor agents themselves beat the workers.<sup>237</sup> In such cases these agents are clearly actors (and possibly the main actors) in a system of abuse, and even physical violence, which entraps women in involuntary servitude. By failing to oversee and regulate these agents, the state governments are condoning their actions and the perpetuation of trafficking and forced labor.

### C. *The Current System Inhibits Workers' Exit and Voice Options*

Employees should have recourse when they dislike actions taken by their employer, whether it be quitting that job, discussing employment terms with the employer or filing a complaint or report with authorities. As outlined above, one paradigm for examining this phenomenon is via the available exit and voice options for employees. In the case of Indonesian domestic workers in Malaysia, there really are very few viable options, which increases the likelihood of forced labor conditions.

As discussed previously, the old Malaysian-Indonesian MOU specified that employers hold their domestic workers' passports.<sup>238</sup> While the newest MOU allows domestic workers to keep their passports, it is unclear whether this will result in a change of practice. Hopefully it will, as this practice makes it virtually impossible for the domestic worker to legally leave the country—including to return home—without the employer's permission.<sup>239</sup> Once they have surrendered their passport to their employer, these women effectively are denied the right of exit if they are dissatisfied with their situation. In many cases, the only way that a domestic worker can extricate herself from an abusive household is to "run away," fleeing the employer and losing legal status by doing so, not to mention forgoing the wages she had earned. That running away is the only exit option left open for Indonesian women working in Malaysia demonstrates the utter lack of employment protections for these workers and indicates a system more redolent of forced labor than legal employment.

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236. *Id.*

237. *Id.* at 63.

238. See *supra* text accompanying notes 150–51.

239. Satterthwaite, *supra* note 1, at 30.

A further problem that these women face when attempting to exit their abusive situations is that they do not know where to go. Being in a foreign country and not receiving any information from a recruitment training program or the government, many Indonesian women feel that they have no one to turn to for help and often do not even know other similarly situated domestic workers. In reality, their options are extremely limited, so this feeling is largely justified. Generally their best bet would be to go to the Indonesian embassy, which typically has a multitude of migrants seeking refuge there at any one time.<sup>240</sup> As one immigration official noted, however, “We seldom get complaints from maids. They don’t know how to come to the immigration office or to the embassy. The only way they know is through the labor agency,” or labor recruiter, not any sort of state or local official.<sup>241</sup> Consequently, women who flee to their agencies are generally either forced back to their abusive employer or shipped home—often without any pay.<sup>242</sup>

Unfortunately, it is not simply that these women are unaware of where to go for help; they are also hesitant to contact Malaysian government officials for fear of the repercussions they might face. Having fled an abusive employer, and possibly being forced to leave their passports with that employer, many women fear that they will be treated as illegal, undocumented migrants—rather than as abuse or human trafficking victims—and subsequently be deported without any of their wage earnings. One runaway domestic worker told Human Rights Watch, “I know the laws, and that’s why I’m scared,” perceiving the Malaysian law enforcement authorities as punishers, rather than protectors.<sup>243</sup> This fear of government officials is often well-founded, as many receiving countries—including Malaysia—continue to prioritize immigration concerns ahead of the protection of migrant workers legally

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240. Indonesian embassies around the world are typically inundated with thousands of workers seeking refuge. Kurniawati & Diani, *supra* note 99.

241. HUMAN RIGHTS WATCH, *supra* note 14, at 61.

242. See PASSAGE TO HOPE, *supra* note 233, at 54 (indicating that employment contracts between agencies and employers often include strict penalties if the employee ends employment early, and describing stories where workers were encouraged by their agencies to return to abusive employers).

243. HUMAN RIGHTS WATCH, *supra* note 14, at 68.

brought to the country.<sup>244</sup> In fact, Malaysia often does not attempt to distinguish between potential abuse or trafficking victims and other undocumented migrants,<sup>245</sup> or notify embassies of their nationals' presence in shelters.<sup>246</sup> One fourteen-year-old Indonesian domestic worker, who was identified as a trafficking victim, ended up being prosecuted for theft from her employer, rather than having her employers prosecuted for child labor law violations and trafficking infringements.<sup>247</sup> Such treatment effectively keeps domestic workers from accessing the criminal justice system in a meaningful way and further constrains their already limited exit options. This is also an undeniable failure of the government to uphold its international obligation to fight forced servitude and human trafficking.

For all the reasons discussed above, domestic workers also have difficulty reaching appropriate fora in which to voice their individual concerns. The isolated conditions of their work further aggravate this problem. By the nature of the job, domestic workers are secluded from other employees, friends, and family. Many employers also limit workers' access to the greater community.<sup>248</sup> The extreme isolation that the system currently fosters explains in large part why this sector of the migrant workforce is not well organized.<sup>249</sup> Without having a specific labor union for domestic workers, the existing worker associations are generally male-dominated. This is problematic as they often overlook women's more gendered concerns.<sup>250</sup> Furthermore, as domestic workers migrate to Malaysia from a number of different states and are paid according to their nationality, unions dominated by nationals from a particular sending country may not be best suited to lobby for in-

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244. See Labadie-Jackson, *supra* note 18, at 87 (quoting Fitzpatrick & Kelly, *supra* note 19, at 111 (indicating that many unspecified countries prioritize immigration controls over protection of migrants)).

245. HUMAN RIGHTS WATCH, *supra* note 14, at 69.

246. 2010 TIP REPORT, *supra* note 33, at 225.

247. *Id.*

248. Satterthwaite, *supra* note 1, at 56.

249. Labadie-Jackson, *supra* note 18, at 81.

250. Satterthwaite, *supra* note 1, at 56.

creased rights of domestic workers of less respected nationalities.<sup>251</sup>

Lacking freedom of association and the ability to organize, domestic workers have very little bargaining power with which to urge change. Typically these women are poor, many with minimal education, and thus they start at a disadvantage. The immigration laws in Malaysia further compromise their bargaining power, as their legal status in the country is tied to their continuing employment.<sup>252</sup> Thus it becomes very difficult for an individual to voice dissatisfaction, either to officials or directly to an employer who could fire her for as little cause as a single complaint. Domestic workers are even further limited in their ability to negotiate since there is such a large number of poor women looking for employment.<sup>253</sup> One worker's attempt to improve working conditions—no matter how valid—results in her replacement by another woman who is willing (or forced) to accept the status quo. This large supply of workers greatly lessens the chances of being able to lobby effectively for change, especially given the systemic barriers to organizing.

Situations in which workers do not have any viable exit or voice options have a higher likelihood of involuntary servitude conditions since there is no way for employees to effectively influence or control their own work environment. The circumstances that are discussed throughout this paper keep women from being able to seek help or redress for their abuses or even from being able to leave dangerous situations. The U.S. State Department noted that “Many migrant workers . . . employed as domestic workers throughout Malaysia experienced restrictions on movement, deceit and fraud in wages, passport confiscation, or debt bondage, which are practices indicative of trafficking.”<sup>254</sup> The general practice of using recruitment agencies and consequently withholding months of the workers' wages to pay back recruitment fees systematically puts these women at an increased risk of debt bondage and

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251. See *id.* (finding that women may not be adequately represented in unions comprised of multiple nationalities or ethnicities).

252. Fitzpatrick & Kelly, *supra* note 19, at 81.

253. *Id.* at 82.

254. 2010 TIP REPORT, *supra* note 33, at 223.

forced labor.<sup>255</sup> Feeling compelled to remain with abusive employers in order to pay back such fees, these women do not have options to leave or to report the abuses. Similarly, keeping employees' passports can be a type of coercion that holds individuals in involuntary servitude since their immigration status is tied to their employer.<sup>256</sup> This issue is even more problematic for undocumented workers, who are often at the complete mercy of their employers, employment agents, and traffickers.<sup>257</sup> Such women are consequently trapped and subject to forced labor without any ability to escape their abusers or report the abuses.

In Malaysia, these cases are very rarely treated as instances of human trafficking. The country has only made a limited effort to prosecute traffickers under its 2007 Anti-Trafficking in Persons Act, and the cases it has prosecuted have overwhelmingly dealt with occurrences of sex trafficking.<sup>258</sup> The government, however, seldom investigates cases where domestic workers are potential victims of human trafficking, despite institutional knowledge that there are many forced labor instances among domestic workers. When human trafficking instances are investigated and prosecuted, victims are held in detention-like facilities and required to remain in the country throughout the case and trial.<sup>259</sup> In the few cases that have ended in convictions of traffickers, some of the punishments have been extremely severe,<sup>260</sup> though the victims are often left without any monetary compensation for their ordeals and the work they performed.<sup>261</sup> But prosecutions remain exceedingly rare, and most of these women find themselves in situations where their only options are to endure the abuse and

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255. *Id.*

256. In the United States, the holding of employees' passports and other documents by employers is considered a type of threat or coercion, and can be found indicative of forced labor. *See, e.g.,* United States v. Bradley, 390 F.3d 145, 152 (1st Cir. 2004) (noting defendants alleged acts of coercion and threat included taking victims' passports).

257. Kuppusamy, *supra* note 210.

258. *Id.*; 2010 TIP REPORT, *supra* note 33, at 224.

259. 2010 TIP REPORT, *supra* note 33, at 225; Kurniawati & Diani, *supra* note 99.

260. *Malaysian Sentenced to Death*, *supra* note 99.

261. *See* 2010 TIP REPORT, *supra* note 33, at 225 (indicating that despite the right to pursue civil suits against exploiters, workers are left without an option for legal work to support themselves in order to pursue such suits).



exploitation of their employers or to run away. And as one human rights lawyer noted, "Running away evokes the era of slavery, you *leave* your job, but you *run away* only when enslaved."<sup>262</sup>

#### VI. A NEW DOMESTIC WORKERS SYSTEM COULD ALLOW WOMEN TO BENEFIT FROM TEMPORARY MIGRATION, RATHER THAN BE EXPLOITED BY IT

As a first step to ending the systematic trafficking faced by Indonesian women serving as domestic workers, Malaysia should sign and ratify the basic international human rights treaties, as well as the recently passed ILO Convention on Decent Work for Domestic Workers. Malaysia was recently appointed as a member of the United Nations Human Rights Council (HRC),<sup>263</sup> giving some activists reason to hope that the government will now feel increased pressure to improve its own human rights system.<sup>264</sup> Unfortunately, this hope has not been realized in other cases, with countries on the HRC, such as Saudi Arabia and Pakistan, remaining some of the worst human rights abusers. Malaysia should not follow in these countries' abusive footsteps but rather should demonstrate its commitment to human rights by signing the ICCPR and ICESCR and meeting those treaties' obligations. Malaysia should also sign the CMW as an important step towards protecting the rights and interests of its migrant community. By doing this, and by going a step further and signing the Convention for Decent Work for Domestic Workers, the Malaysian government could further establish itself as the regional and burgeoning international leader that it seeks to be. In order for these ratifications to have any actual value, however, they would have to be accompanied by real, systematic change that indicates Malaysia's active intent to comply with its human rights and treaty obligations and to combat systemized human trafficking within its borders.

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262. BOOKLET 4, *supra* note 16, at 31.

263. *Malaysia Re-Elected to UN Human Rights Council*, STAR ONLINE (May, 14, 2010), <http://thestar.com.my/news/story.asp?sec=nation&file=/2010/5/14/nation/20100514184557>.

264. See Sta Maria, *supra* note 59 (interviewing Phil Robertson, Deputy Asia Director at Human Rights Watch, who expressed hope that Malaysia's appointment to the Human Rights Council would force it to demonstrate intent to fix its human rights problems).

The only way to actually protect women travelling as domestic workers is to set up some sort of monitoring system. The Malaysian government needs to ensure that its law enforcement officers are performing effective random checks on employers. Albert Bonasahat, Indonesian Project Coordinator on Forced Labor and Trafficking at the ILO, contends that such checks would be possible and states that, in addition, the Indonesian embassy could increase its capacity to monitor migrant workers in Malaysia.<sup>265</sup> He notes, however, that these changes would require reworking of the entire system.<sup>266</sup> Unfortunately, the commitment required for such overhaul has not been exhibited by either government, especially given the lack of oversight mechanisms included in the new and long-negotiated MOU. Without such initiative, however, change seems unlikely.

Furthermore, in order for recruiters to act as any type of support or protection for domestic workers, they need to be monitored and abusive agents prosecuted.<sup>267</sup> Alternatively, workers might be better served were the governments or non-profit organizations to take over the recruitment process. This could be done by Malaysia as a sign that it takes its international human rights obligations seriously. Alternatively, the Indonesian Embassy could establish a department charged with overseeing the recruitment and placement process within Malaysia. Theoretically, either of these systems would aid migrant workers as the individuals overseeing their recruitment and placement would have incentives that were less profit-driven, and more in line with the needs of the employees.<sup>268</sup> At present, however, the Indonesian and Malaysian governments are failing to enforce the terms of their old MOU, and unless they intensify regulation of the recruitment and monitoring of workers, a new agreement is likely to do little to improve the current situation.

Another important component is improved education of the women travelling for domestic work. Indonesia owes its citizens increased protections as they travel abroad in order to

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265. Kurniawati & Diani, *supra* note 99.

266. *Id.*

267. HUMAN RIGHTS WATCH, *supra* note 14, at 65.

268. See Fitzpatrick & Kelly, *supra* note 19, at 74 (suggesting governments monitor recruitment agencies or provide recruiting services themselves).

better their own and family situations. Training prior to their leaving Indonesia would greatly improve their perceived worth as domestic workers to foreign employers. Similarly, at least rudimentary language training would enable them to communicate more effectively with employers and, should it be necessary, officials in their destination country. Malaysia also owes these workers on whom the country's households so depend. Upon recruitment, Malaysia should require educational sessions on the laws governing domestic workers and employers and the rights guaranteed to all individuals in Malaysia. One of the recommendations in the 2011 TIP Report states that Malaysia should "make greater efforts to educate migrant workers on their rights, legal resources available, and how to seek remedies against traffickers or employers who fail to meet their legal obligations."<sup>269</sup> Such training is critical for providing domestic workers with some options to voice their complaints and would lessen the government's responsibility for systematic involuntary servitude. However, it must be accompanied by training of Malaysian officials so that domestic workers' complaints are appropriately handled once reported. While these changes may not prevent all cases of trafficking of domestic workers, they would be a start. They would also demonstrate the governments' good faith efforts to combat forced labor within the domestic workers system.

## VII. CONCLUSION

Malaysia's extensive reliance upon domestic workers and simultaneous refusal to monitor and protect these women establishes a system riddled with abuse and demonstrates a disturbing disregard by the government of internationally recognized human rights standards. The seclusion of these workers, restrictions with regard to their movement and ability to communicate, and psychological and physical abuse all tend to turn domestic work into domestic servitude, which is a violation of many international conventions and state obligations.<sup>270</sup> Thus, the current recruitment and employment patterns of women being brought to Malaysia to perform domestic work are systemically enabling the trafficking of many of

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269. 2011 TIP REPORT, *supra* note 87, at 244.

270. *From Domestic Work to Modern Day Slavery*, ILO (Oct. 10, 2010), [http://www.ilo.org/sapfl/News/lang—en/WCMS\\_146485/index.htm](http://www.ilo.org/sapfl/News/lang—en/WCMS_146485/index.htm).

these individuals into forced labor conditions. Malaysia and Indonesia must take immediate and substantial action to remedy these human rights abuses.

Improving the system by which temporary foreign workers go to Malaysia would not only be beneficial to the migrants, but would also be in the best interests of both countries. As discussed in Part I, Indonesia depends upon the remittances sent home by the country's migrant nationals. Creating a system that allows domestic workers in Malaysia to earn a decent wage and to access their earnings would result in much larger remittances and be a great boon for the struggling Indonesian economy. Malaysia could also benefit substantially from a system that protects the fundamental rights of domestic workers. The country is emerging as an important regional and global player. By aggressively combating the human rights violations that occur regularly against its foreign domestic workers, Malaysia could become a model labor-receiving country. This would further the government's interest in establishing the state as a respected regional leader and an increasingly significant global actor.

While it is good that Indonesia and Malaysia made some improvement to the terms of their MOU, at present it does not seem likely that these improvements will be sufficient to vastly overhaul the system. This being the case, the international community must recognize that a serious, global human rights issue exists and apply pressure for action to be taken, both in this situation and worldwide. Until such global accountability is created, countries like Malaysia will truly have little incentive to stop systemizing human rights abuses and human trafficking; the story of female migration will continue to be one of degradation and servitude, rather than empowerment and hope.