

**Programme Consultation Meeting**  
on the Protection of Domestic Workers  
Against the Threat of Forced Labour and Trafficking

# Discussion Paper

Paper prepared for Anti-Slavery International by Lin Chew, in cooperation with  
the ILO's Special Action Programme to Combat Forced Labour

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# Discussion Paper

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## Introduction

The International Labour Office, through its Special Action Programme to Combat Forced Labour, is convening a Programme Consultation Meeting on the Protection of Domestic Workers Against the Threat of Forced Labour and Trafficking, to be held in February 2003, in Hong Kong SAR. It is timely that the ILO is putting the 'spotlight' on the domestic work sector and making a concerted effort to develop more comprehensive and efficacious strategies to address the specific vulnerabilities of workers in this sector.

In 1998, the ILO promulgated the Declaration on Fundamental Principles and Rights at Work, exhorting all members to renew their commitment to respect, promote and realise the four fundamental principles and rights of workers:

1. Freedom of association and the effective recognition of the right to collective bargaining.
2. The elimination of all forms of forced or compulsory labour.
3. The effective abolition of child labour.
4. The elimination of discrimination in respect of employment and occupation.

The second Global Report in the Follow-up to the Declaration: *Stopping Forced Labour*, issued in June 2001, lays the foundation for the discussions at this meeting by explicitly linking domestic work, forced labour and trafficking: The Global Report specifically describes the forced labour situation of domestic workers:

Modern trafficking and modern forms of bondage are linked through indebtedness, which makes trafficking a form of forced labour.... Forced labour as such has not really caught the world's attention. It takes different forms and their common features might seem abstract at first glance. Yet forced or compulsory labour makes headlines almost daily in stories of trafficking in persons, imprisonment in sweatshops and the slavery-like conditions on some plantations and even in private homes.

(ILO 2001: para 305)

In these three paragraphs the report succinctly illustrates that for domestic workers, action has to be taken on all the four principles promoted by the Declaration: freedom of association, elimination of forced labour, abolition of child labour and elimination of discrimination regarding employment.

Domestic work *per se* is of course not forced labour. But it can degenerate into forced labour when debt bondage or trafficking is involved - or when the worker is physically restrained from leaving the employer's home or has his or her identity papers withheld...

When the domestic workers are international migrants, the problems are compounded further.... Primarily in developing countries, most often girls and sometimes boys spend long hours toiling in private homes instead of attending school...most common in urban areas, with children having been lured from poor rural areas. Even adult domestic workers are subject to the same fraudulent and coercive recruiting practices as those faced by rural workers, and themselves come from the countryside.

Once on the job, domestic workers tend to work in isolation, creating ample opportunity for disregarding labour legislation, if it applies to them in the first place. Indeed, domestic workers suffer prejudice on account of their frequent exclusion from the coverage of labour legislation (in developed and developing countries alike) and the obstacles they face in exercising freedom of association. This combination makes it all the more difficult for them to extract themselves from situations involving forced or compulsory labour. (ILO 2001: para 83, 84, 85).

The aims of this Asian advisory group meeting are:

- To examine the nature and working conditions of domestic workers in and from Asia.
- To analyse the need for specific regulation and the extent to which international standards on forced labour and trafficking are relevant as instruments to protect the rights of domestic workers.
- To share experiences and successful strategies to protect the rights of domestic workers.
- To prepare recommendations on future programme development to address the needs for protection and assistance of Asian domestic workers.

The issues to be discussed at the meeting include the following:

- What are the specific vulnerabilities of workers in domestic work? What are the differences in the nature of the situation and conditions facing women and men, boys and girls, and those of differing ethnic origins? What are the similarities and differences in the situations of domestic workers moving internally and those migrating internationally?
- To what extent have countries recognized domestic work as work, acknowledging that domestic workers deserve equal protection? Is there a need for sector-specific legislation?
- What level of forced labour/and or trafficking is involved in domestic work and how is it manifested? To what extent have migration policies reinforced dependency on employers and intermediaries and increased vulnerability to abuse? What, if any, effects have recent migration policies had on recruitment systems?
- How could the forced labour/trafficking standards be useful in relation to the domestic worker issue?
- How do domestic workers themselves see forced labour and trafficking in relation to domestic work?
- What are the responsibilities of governments, trade union and worker organisations and civil society at national and local levels in origin and destination countries/communities? What can domestic workers and/or their organisations do to ensure these responsibilities are fulfilled?
- What should be the main elements of a regional action programme to improve recruitment and working conditions of domestic workers?

This paper provides background information to facilitate discussion of the questions listed above, with particular focus on the applicability of the trafficking/ forced labour framework in addressing domestic work.

## Section I:

### The specific vulnerabilities of workers in domestic work

#### A. Situational vulnerabilities in domestic work

The experiences of domestic workers around the world are 'disturbingly similar' and demonstrate the 'specificity of domestic work' (Blackett 1996).<sup>1</sup> She highlights three aspects of the commonality found among domestic workers worldwide:

1. Domestic workers are usually employed in private households, and also live-in with their employer's family. It is this combined site of living and working, whether dictated by immigration regulations or the employer's condition or because of the migrant's own (economically necessitated) choice, which is the arena for much ambiguity in relationships between worker and employer. Is the domestic worker 'one of the family', for which privilege she should be grateful? Family relationships are the least prone to 'regularisation'. The worker is thus prey to the whims and fancies of each member of the family regarding her work responsibilities. The hidden-ness of the private home and the ambiguity of the relationships in the 'private sphere' form a major cause of resistance to the recognition and regulation of the domestic work relationship. This renders the domestic worker's position one of 'vulnerability that is unparalleled'

2. The overwhelming majority of domestic workers are women, who are 'socially and politically constructed to provide a wage substitute for the unwaged labour' that has been traditionally considered women's work. In this way the woman-employer is freed from her household responsibilities and is enabled, in her turn, to take up paid employment or other activities outside the home.

3. Most domestic workers have had to leave their own families behind, migrating from rural or economically poorer areas to richer, urban centres in their own countries, or migrating across borders to other richer, more developed, countries where they can earn higher wages for the same work. Although they are able to maintain whole families on their meagre incomes, the real costs of the migration on the domestic worker, her family and her country of origin are hidden.

Other studies amply support this argument. For example, with regard to the lack of legal protection of domestic workers in the informal work sector, the Cambodian Working Group on Human Rights reported in 1996:

One group in the informal sector that has been largely ignored, but where slave-like working conditions prevail, is domestic work. Their marginalisation in society and law, because of the hidden nature of their work and due to their low social position,...is a major impediment to their enjoyment of basic human rights. Due to...the lack of protection by labour laws, Cambodian domestic workers are denied basic rights: the right to fair wages and humane working conditions, the rights to due process and to fair and just trial, the right to be protected against inhuman and degrading treatment and unusual punishment, the right to be heard and air grievances, including the right to complain without the threat of physical or verbal abuse or withholding of salary, and the right to recreation and social security. Domestic workers are generally looked down upon by law-enforcers when they try to complain about the maltreatment by their employers. They lack access to counselling, legal and social services.

Such conditions of work are shared by domestic workers across different countries, due to their commonality of having a work site in the employer's home that is hidden from public scrutiny. More so than other workers, domestic workers are highly vulnerable to physical violence, including sexual harassment and rape. As noted by Radhika Coomaraswamy, UN Special Rapporteur on Violence Against Women, at the Regional Summit on Foreign Migrant Domestic Workers (26-27 August 2002), wives and domestic workers are both vulnerable to the violence of the domestic sphere, which she describes as 'the last frontier of protecting people from violence'.

It thus seems that the physical and psychological violence that is committed against domestic workers, both national and migrant, is systemic in nature. In 1999, the Domestic Workers Association of Bangladesh (DWAB)

<sup>1</sup> The paper by Adelle Blackett, 1996, Making domestic work visible: making a case for specific regulation, Geneva: International Labour Organization, is cited from the Web site: [www.ilo.org/public/english/dialogue/ifpdial/publ/infocus/domestic/html](http://www.ilo.org/public/english/dialogue/ifpdial/publ/infocus/domestic/html)  
Page numbers of this reference are thus unavailable.

formed a 'human chain' in Dhaka and reported that just during the previous 100 days, 21 domestic workers were killed, 5 were killed after being violated, 4 were burnt to death, 29 became victims of rape, 9 were abducted, 19 were tortured, 21 were forced into prostitution, more than 300 were smuggled out, more than 3000 lost their jobs without any compensation, and more than 15000 became homeless due to the destruction of the slums in which they lived. (See <http://womensnet.org.za/>).

The vulnerability of domestic workers is compounded by the gendered nature of domestic work that is, women's work:

The work of the home childcare, care of the sick and elderly, housework-is commonly regarded as 'dirty work' that women do naturally without needing any training.... This implies that it can be done by all women instinctively. Women's labour is thus seen as a cheap, easily available and unskilled form of labour. Consequently, employment in domestic service is devalued as informal work, not...on par with formal waged employment. (Heyzer and Wee 1992: 31)

The generally female domestic worker who enters a household to work becomes the lowest member of the family hierarchy, subject to the command of not just a single employer but a household of employers, including male and female, young and old. This unusual employer-employee ratio, with the former outnumbering the latter, tends to be the norm in domestic work situations. Only the very rich can afford to hire many domestic workers. In most cases, the domestic worker is the lone worker in a household of employers. This isolation greatly exacerbates her vulnerability, particularly if all her means of communication with the outside world, by phone, post or interaction, are cut off.

Women employers are not necessarily allies of the female domestic worker. Citing Glen (1992), Parreñas (2001: 62-63) notes that class-privileged women have freed themselves from reproductive labour by hiring lower-class women, resulting in a two-tier hierarchy among women, as well as the preservation of traditional patriarchy. Therefore, although domestic work tends to be gendered, this does not usually lead to the solidarity of women across class lines.

On the contrary, there are profound conflicts of interest between women employers and women domestic workers. As a result, in many Asian countries, women's organisations led by middle-class professionals tend to be reluctant to take up issues pertaining to domestic workers, particularly if the latter are migrant women. This implies that the women's movement in receiving countries in Asia tends not to include domestic workers, especially migrant domestic workers (Vivienne Wee: personal communication).

In many recorded cases of abuse, physical violence against domestic workers has been perpetrated by women employers. Sushila Patil and Moses Seenarine (no date or page) relate this to women employers' demonisation of sexually abused workers for 'seducing' the men in the household, thereby allowing the men to escape blame, even when they are the ones inflicting sexual harassment, assault, abuse, or rape on the domestic workers:

This issue presents a major dilemma for middle class women seeking 'good' female help, when instead they should be seeking 'good' male help, or husbands willing to share domestic production.

The gendered nature of domestic work means that even when men are employed as household help, the gender division of labour prevails between male domestic workers and female domestic workers. Weix (2000: 143) documents that in contemporary Java, Indonesia, 'male servants are typically the chauffeurs...and they guard residences', while 'female servants shop for produce and prepare cooked food exclusively.' This indicates that the former tends to work outside the house proper, while the latter tends to work inside the house itself. Therefore, women domestic workers are more vulnerable to any violence that occurs within the domestic sphere as a hidden domain.

There is currently very little research about male domestic workers. They are evidently few in number, though they are known to exist in Indonesia (especially Java) and India (Weix 2000 and Vivienne Wee: personal communication). While they may share some of the problems faced by women domestic workers, they nevertheless have greater physical mobility and are less likely to be subjected to sexual harassment or rape.

Women domestic workers are thus at the bottom not only within the family hierarchy but also a class-differentiated gender hierarchy. It has been suggested that there seems to be some correlation between the status of women in general in a particular society and the treatment of domestic workers, such that the lower the status of women is in a society, the worse is the treatment meted out to women domestic workers as the lowest of the low.<sup>2</sup>

Such vulnerability is compounded by age, caste, ethnicity and citizenship. In contravention of the Forced Labour Convention, child domestic workers often live in situations of debt bondage and near-slavery. They suffer long hours of work, under- or non-payment of wages, sexual harassment, physical and mental abuse, violence, torture, confinement and isolation, often more severely so than adult domestic workers. Child domestic workers of remote ethnic minorities (e.g. hill tribes) or from other countries, as well as those with parents working overseas, are even more vulnerable, being the butt of double discrimination, with no family member around to turn to.

Poor families in many Asian countries tend to send daughters, rather than sons, away to work as domestic workers. This pattern may relate to the traditional son-preference found in many Asian cultures. As a result, even among child domestic workers, girls are more vulnerable than boys and found more frequently in slavery-like conditions. Despite this, the girls are known to send home faithfully whatever little money they earn. (See Amparita 2000: 3, 45, 67).

Concerning the impact of caste on domestic work, Passanha et al (1998: 3, 11) describes the following situation in India:

Since housework or domestic work can also be seen as an extension of the caste system in India, most domestic workers are poorly paid, underpaid and discriminated. As there is no law applicable to domestic workers, employers can hire, fire and treat them as they please.... Therefore, domestic workers remain victims of unmitigated injustice, and are totally powerless and voiceless. They are treated as objects and non-persons...a modern-day manifestation of slavery.

#### **B. The development of paid domestic work in Asia, especially by women and children**

A key problem with paid domestic work is its historical continuity with the unpaid reproductive labour of either wives, mothers and daughters or slaves, serfs and debts-bondswomen. In many societies, social hierarchies have traditionally been maintained by the servitude of the poor in the household of the rich. In India, for example:

Manual labour is often eschewed by high-caste and -class people, and doing manual labour for others is a sign of low status. Moreover, domestic workers' labour involves contact with the dirt and pollution of others, making theirs an especially low-prestige occupation. (Dickey 2000: 40)

Hierarchy based on such servitude is also found in Indonesia. Weix (2000: 141-144), for example, studied a Javanese household that hires at one time forty men, women, boys and girls as servants. These traditional relations of servitude do not seem to be regarded as formal employment, but as informal relations of dependency (Shah 2000: 92; Weix 2000: 142).

The remuneration for servitude of this nature often depends on the depth of material deprivation experienced by the poor. In India, for example, one way for the homeless to find housing is to get a job as a servant of a railway officer's family. Payment for this job consists of the rent-free occupation of the officer's staff quarters, occasionally with the very minimal monthly wage of 50 rupees (US\$1.65) included (Tolen 2000: 65).

Another example may be found in Nepal, where marginal rural households enter into usurious debts with richer households, often just to obtain food.

As the levels of debt and poverty rise, many marginal households place some of their members, usually children, to work in the home of the patron, both as a surety on the loan or in lieu of interest on the loan. (Shah 2000: 94)

<sup>2</sup> Bridget Anderson: personal communication, in her comments on an earlier draft of this paper.

But increasingly, even these local patron-client relations cannot adequately sustain the poor and landless. This leads to a steady flow of rural-urban migration, which thereby provides a ready reserve of cheap and compliant labour for domestic service in urban households.

People arriving from the hinterland, especially children, cannot easily find a place to stay and work, so a position of a servant, however, unpleasant, at least provides the security of shelter and food.

(Shah 2000: 96)

The promise of such security is, however, very tenuous. Elsewhere, Shah (1993: 174) notes that employers prefer to hire young children, especially girls, for the following reasons:

First, the young child can be controlled more thoroughly; there is no fear of insubordination to threaten the master's power. Secondly, small servants occupy less space to sleep, need less amount of clothing and eat much less. Of course they need to be paid very little as well.

This situation is found in many countries. The ILO-IPEC paper on 'Child domestic work as [a] worst form of child labour' (2002: 3)<sup>3</sup> lists the following as conditions that 'increase a child's risk of entering domestic labour':

- Poverty, especially rural poverty.
- The poor quality and high cost of education.
- Single-parent households.
- Death of both parents due to HIV/AIDS.
- Lack of legal protection for children.
- Lack of understanding of children's rights to education and to environments that enable their healthy development.

The key factor is poverty, especially large-scale rural poverty, with sizeable numbers of landless people. It is poverty that leads to debt bondage, massive rural-urban migration, and urban homelessness.

Asian countries that fit this description include:

- Bangladesh
- Cambodia
- India
- Lao
- Pakistan
- Sri Lanka
- Vietnam
- Burma (re-named Myanmar)
- China
- Indonesia
- Nepal
- The Philippines
- Thailand

Significantly, these are also major labour-exporting countries, not just regionally, but also globally. This is so because there is a limit to employment opportunities in the urban centres for the rural poor in these countries. Instead, many of the rural and urban poor need to migrate in search of work in other countries, including domestic work.

The demand for migrant domestic workers is found in those countries (1) where a sizeable urban middle class has developed, including significant numbers of female professionals, and (2) where industrialization has created a proletariat out of the rural and urban poor. This means that in these countries, which thereby become the receiving countries of migrant domestic workers, there is no labour reserve to meet the demand for domestic service in the increasing number of middle class households.

<sup>3</sup> Presented by Ms Ma. Concepcion E. Sardaña, National Programme Manager, IPEC-Philippines, during the Second Regional Consultation on Child Domestic Workers in Asia (27 July 2002).



Chin (1998: 79-83) documents this process in Malaysia. In 1970, more than 60 percent of all female rural out-migrants worked as urban domestic workers. At that time:

Urban centres neither had the infrastructural support nor the employment opportunities to absorb large numbers of rural-urban migrants. Female migrants who found employment in urban areas were concentrated mostly in informal jobs such as domestic service.... [But] from the late 1960s, the trend in women's employment began to shift from a concentration on 'traditional' services, such as paid housework, to that of manufacturing work as a result of newly established FTZs [free trade zones]... As the number of female factory workers increased, the supply of live-in servants began to decline... In an unpublished study of Malaysian servants, the major problem identified was the lack of legislative protection: servants laboured under conditions of long work hours, low pay, and no rest days. Alternative employment opportunities for women meant that those who had been working or could have worked as domestic servants either left their jobs or used the threat of alternative employment opportunities to make demands that could and did significantly alter employer-employee relations within the household. Women who remained in domestic service were specific in their demands to employers: higher wages, more rest days, and clearly delimited number of work hours per day. (Chin 1998: 79-81)

Employers, however, were evidently unwilling to accede to these demands, preferring instead to import foreign domestic workers who had no alternatives but to work under the conditions imposed on them. Local domestic workers, on the other hand, preferred alternative employment that offered better conditions of work. Reportedly, by the 1980s, hardly any local domestic worker could be recruited in Malaysia.

These globally integrated patterns of economic development have resulted in the complementary distribution of national domestic workers and migrant domestic workers, as follows:

- In relatively less industrialized countries, increasing numbers of the rural poor seek work in urban centres. Because of the lack of formal employment opportunities, those who do find work tend to be in the informal sector. This is especially so for women and children, who become domestic workers in wealthy households, under conditions of traditional servitude. Many others, however, who are not able to find even such work, migrate to other countries to work as domestic workers. As a result, these relatively less industrialised countries are also the labour-exporting countries.
- In relatively more industrialized countries, the rural poor find jobs in industrial production. Hardly anyone is willing to work in domestic service. The increasing demand for domestic workers by the growing middle class is met by the labour supply of migrant domestic workers. As a result, these relatively more industrialised countries are also the labour-importing ones.

Although national domestic workers and migrant domestic workers generally work in countries at different levels of industrialisation, nevertheless, their conditions of work are often very similar. Although labour-importing countries tend to be more industrialized, with a larger middle class, traditional notions of servitude are still prevalent. Indeed, it may be argued that the importation of vulnerable foreign domestic workers, with no employment alternatives, enables traditional hierarchies to persist, sometimes even reinforcing old ideas of servitude.

### **C. The additional vulnerabilities of migrant domestic workers**

As a result of the developmental trajectories discussed above, the great majority of domestic workers are not just female but also migrant. Most have had to leave their homes in poorer rural areas and migrate for waged work in more developed, wealthier and urbanised places both in their own countries and in other countries. The vulnerabilities discussed above are greatly compounded for those who migrate to other countries, as they face not only problems of cultural and personal isolation and adjustment, but also immigration and labour restrictions in the host country.

The gendered aspects of migration increase the vulnerabilities of women migrant domestic workers. Apart from immigration restrictions in the country of destination, there may also be supposedly protective emigratory regimes in the country of origin. For example, in Pakistan, women migrants have to be over 35 years of age and have to obtain the permission of their fathers or husbands. Furthermore, they have to sign an indemnity stating that they

themselves are responsible for all risks undertaken, including the risk of being exploited.<sup>4</sup>

Like other migrant workers-including male migrant workers, as well as other women migrant workers in the entertainment industry and the sex industry migrant domestic workers are also vulnerable to the exploitation of recruitment agencies. These agencies are now linked in a worldwide network of labour transfers, from the source of the labour supply in remote towns and villages to the market for migrant labour in urban centres. The entire labour recruitment process has come to be dominated by these agencies. While they have made it possible for many Asian women to work abroad, they are also a major cause of their vulnerabilities. In most countries, agencies use very devious and exploitative methods, charge exorbitant fees, inflict debt bondage on the workers, maintain the workers' dependency by withholding passports and other personal documents, practise fraud and deception systematically-all practised largely with impunity. This is especially true for the recruitment system in Indonesia. (See case study of Adek in Section 3 below and Jones 2000).

In 1990, Anti-Slavery International documented the living and working conditions of overseas domestic workers in Britain in a report<sup>5</sup> to the UN Working Group on Contemporary Forms of Slavery-conditions described as 'slavery':

1. Illegal confinement: the migrant workers' passports are kept by employers or agents; they are not allowed to leave the premises without accompaniment or supervision, and they are discouraged or even forbidden to speak to other domestic workers.
2. Cruel, humiliating and degrading treatment: slapping, hair-pulling, spitting, humiliating name-calling; having no own room, having to sleep in corridors, on the floor, even in the bathroom or kitchen; sexual harassment is usual; rape is not exceptional.
3. Long hours of work without sufficient food and rest.
4. Debt bondage: women invariably have to borrow money to pay exorbitant fees to the agents, and feel bound to stay and work in order to pay off these debts.
5. Not being able to change jobs legally, even in the face of ill treatment.

Current studies of migrant domestic workers in many countries indicate that this situation has not improved in the last twelve years. The Asian Migrant Yearbook (AMY) published in 1999 a list of reported cases of Filipina migrant domestic workers who had died while working abroad, and in 2000 a list of Indonesian domestic workers who had experienced physical abuse and rights violations (AMY 1999:172; AMY 2000: 150).

In some Middle Eastern countries, migrant domestic workers have received violent and life-threatening punishments, such as stoning and caning; they have been arrested, imprisoned and convicted of dubious crimes through irregular legal processes. Many have died there under mysterious circumstances, including those from Sri Lanka, The Philippines and Indonesia. Systematically migrant domestic workers are restricted in their movements and isolated (al-Najjar 2002: 26-27 and Jureidini 2002: 6-10). Amnesty International reported that the restrictions on the liberty and freedom of migrant domestic workers in Saudi Arabia make them extremely vulnerable to a wide range of abuses, including verbal and physical violence, rape, restriction of movement, non-payment, no time off, isolation from all social contact, even from communications with family members at home (Amnesty International 2000).

In Hong Kong, and Singapore, in the last few years, several cases of severe ill treatment of migrant domestic workers by employers have been reported and prosecuted, including at least one case of homicide. Violent and inhumane punishment includes the use of a hot iron on the worker's hands and face, kicking, beating, pulling hair, pinching, scalding with hot water, starving.

Although national domestic workers may also be subjected to abuses and may also lack any legal employment status, migrant domestic workers are in an even more precarious position, due to the lack of secure legal status in the host country (Anderson 1999). There are two aspects of this: immigration status and employment status. The immigration status of migrant domestic workers is tightly controlled. Receiving states generally restrict the possibility of migrants seeking (and finding) new employers by limiting their stay in the country once their

<sup>4</sup> Bridget Anderson: personal communication, in her comments on an earlier draft of this paper.

<sup>5</sup> Domestic Workers: Report to the Working group on Contemporary Forms of Slavery 1990, in Anti-Slavery International Human Rights series No.5, London, 1993.

employment contracts are terminated (except in the few countries which allow migrant domestic workers to stay for the duration of any labour or criminal case procedures, e.g. Hong Kong). Any worker staying on after the expiry of her contract becomes 'undocumented' and even more vulnerable to abuses.

The domestic worker's employment status is equally insecure. Where legal contracts of employment exist, the terms of the contract are usually weighted in favour of the employer, who can arbitrarily fire the worker, causing her to leave the country summarily. Moreover, most aspirant domestic workers do not even get a chance to study and understand their so-called 'contracts' before agreeing to take up the job, much less be in a position to negotiate terms and conditions. Their contracts and passports are then often taken away by agents, and sometimes by employers, 'for safe-keeping' as soon as they arrive in the country of destination. Many have recounted how they have been confined indoors for most of their working days and only allowed to go out accompanied by employers or their family members. The uncertain nature of their employment is a major factor that entraps migrant domestic workers in abusive situations.

The UN Special Rapporteurs on the Human Rights of Migrants and on Violence against Women-Gabriela Rodriguez Pizarro and Radhika Coomaraswamy-listed the following as the most frequently cited factors that hinder women migrants (especially domestic workers) from leaving situations of forced labour:

1. The lack of alternate employment (i.e. they are not allowed to change employers or type of employment).
2. The fear of deportation (with which they are being constantly intimidated).
3. The financial obligations to her family and their dependence on her income.
4. The lack of financial resources (when they have not been paid due wages).
5. Restrictions on her movement (ranging from orders to stay indoors and not to go anywhere without accompaniment to being locked up in the house when employers are away).
6. The lack of identity papers (which have been confiscated, or falsified by agencies).
7. The fear of arrest (again an intimidating tactic of agencies and employers).
8. Violence by traffickers and employers (threatened or real).
9. Debt bondage, and the often concurrent fear of retaliation against her family for not paying debts.
10. Fear of reprisals.
11. Not knowing their rights, and not knowing where they can go for help.

(E/CN.4/2000/82, E/CN.4/1997/47, para. 133)

#### **D. Conclusion**

While this range of obstacles impacts with full force on migrant domestic workers in particular, many of these also apply to national or internal migrant domestic workers, such as financial obligations, lack of financial resources or debt bondage. These obstacles, that effectively prevent domestic workers from undertaking action to escape from their oppressive working and living conditions, are the demonstrable elements of constraint characteristic of 'forced labour and slavery-like situations' in the domestic work sector. At the same time, these obstacles represent potential points of policy intervention in efforts to ameliorate the conditions of domestic workers.

## Section 2

# International standards and national regulations for protecting the rights of domestic workers against the threat of forced labour and trafficking

The discussion above points to clear evidence of the occurrence of forced labour and slavery in the domestic work sector, especially for women and children domestic workers. Migrant domestic workers are extra vulnerable due to the added constraints of immigration laws and regulations. The source of the problem lies in the non-recognition of domestic work as work, compounded by the hidden nature of the work-site, which gives rise to systemically abusive living and working conditions. At the same time, their precarious status prevents domestic workers from leaving the oppressive situation and seeking help. What then are the international standards and national policies that can be used to protect the rights of domestic workers against the threat of forced labour and trafficking?

### A. International Labour Organization (ILO) Instruments relevant to forced labour

As noted in the Introduction to this paper, the ILO Declaration on Fundamental Rights and Principles at Work, and its Follow-up, adopted by the International Labour Conference in 1998, especially the 2<sup>nd</sup> Global Report on 'Stopping Forced Labour' explicitly addresses forced labour and trafficking in the domestic work sector.

The report provides an excellent Annex<sup>6</sup> which points out the range of the international ILO instruments relevant to forced labour. The whole Annex is reproduced here:

In addition to the two main ILO instruments dealing with forced labour as their principal subject - the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105) - the Organisation has at its disposal other normative tools that can help inspire action for the elimination of all forms of forced or compulsory labour.<sup>7</sup> Without attempting to be exhaustive or detailed, this Annex points out the range of instruments that might serve as a source for policy guidance or, in the event of a member State having ratified a Convention, create obligations relevant to the prevention of forced labour.<sup>8</sup> The follow-up to the ILO Declaration on Fundamental Principles and Rights at Work does not by any means imply the obligations detailed in the Conventions mentioned in this Annex, but these instruments can provide useful guidance for pursuit of an active policy to eliminate all forms of forced or compulsory labour.

First of all, there are the three other categories of fundamental principles and rights encompassed by the ILO Declaration, i.e. those regarding freedom of association and the effective recognition of the right to collective bargaining; the elimination of discrimination in respect of employment and occupation; and the effective abolition of child labour.<sup>9</sup> The four categories covered by the Declaration involve mutually reinforcing principles and rights. In addition, provisions of Conventions on topics as diverse as those concerning indigenous peoples, migrant workers, recruitment practices, protection of wages and social dialogue can underpin certain forms of action to prevent or combat forced or compulsory labour. Conventions designated as priority instruments for the ILO, i.e. those relating to employment policy, labour inspection and tripartite consultation,<sup>10</sup> involve institutional support for sound labour practices that may also contribute to preventing or eliminating forced labour.

<sup>6</sup> *International Instruments relevant to Forced Labour*: ILO Global Report 2001 Annex 4.

<sup>7</sup> The full text of ILO Conventions and Recommendations adopted since 1919 and information on ratifications is available through the ILO website (<http://www.ilo.org>), on CD-ROM (ILOLEX) and in printed form.

<sup>8</sup> In the case of ratified Conventions, member States enter into obligations and are required to report regularly on the effect given to the provisions of the Conventions. An extensive supervisory machinery is in place to follow up on the application of ratified Conventions. For further information, consult the ILO web-site.

<sup>9</sup> In addition to the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105), the Conventions considered fundamental for purposes of the follow-up to the Declaration are: Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); and Worst Forms of Child Labour Convention, 1999 (No. 182). Furthermore, there are ILO instruments relating to these topics, such as the Right of Association (Agriculture) Convention, 1921 (No. 11).

<sup>10</sup> Employment Policy Convention, 1964 (No. 122); Labour Inspection Convention, 1947 (No. 81); Labour Inspection (Agriculture) Convention, 1969 (No. 129); and Tripartite Consultation (International Labour Standards) Convention, 1974 (No. 144).

### **ILO forced labour conventions**

Under the Forced Labour Convention, 1930 (No. 29), the term forced or compulsory labour means 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. For the purposes of the Convention, there are certain exclusions, however.<sup>11</sup> Moreover, Convention No. 29 specifically prohibits certain forms of forced or compulsory labour, such as forced or compulsory labour for the benefit of private individuals, companies or associations; and forced or compulsory labour as a punishment for crimes if it is applied to an entire community.

Under Convention No. 29, Members undertake to suppress the use of forced or compulsory labour in all its forms within the shortest possible period. During the transitional period, now past, recourse could only be had to forced labour for public purposes and as an exceptional measure, subject to certain guarantees.<sup>12</sup>

The Abolition of Forced Labour Convention, 1957 (No. 105), supplements rather than revises the earlier instrument. Convention No. 105 calls for the immediate and complete abolition of any form of forced or compulsory labour in five specified cases: (a) as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (b) as a method of mobilizing and using labour for the purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; and (e) as a means of racial, social, national or religious discrimination.

### **Other ILO Conventions of particular relevance to preventing forced labour**

Several other ILO instruments address issues of forced labour, either directly or indirectly. Under the Employment Policy Convention, 1964 (No. 122), Members are to formulate and apply an active policy aimed at promoting full, productive and freely chosen employment. By looking at the other side of the coin, from the perspective of freedom of labour, the instrument places emphasis on the positive labour market interventions and other measures that can help to eradicate coercive systems of work.

ILO instruments on indigenous and tribal peoples have emphasized the need to confront the particular problems of forced and compulsory labour experienced by those groups. The most recent of these is the Indigenous and Tribal Peoples Convention, 1989 (No. 169). Under this instrument, the exaction of compulsory personal services in any form, whether paid or unpaid, is to be prohibited and punishable by law, except in cases permitted for all citizens under the exceptions to Convention No. 29. Convention No. 169 further provides that measures to prevent any discrimination against indigenous and tribal peoples should include measures to ensure that workers belonging to these peoples are not subjected to coercive recruitment systems, including bonded labour and other forms of debt servitude. An earlier instrument, the Indigenous and Tribal Populations Convention, 1957 (No. 107), now revised by Convention No. 169, sets out the basic standards for special measures of protection for these peoples with regard to recruitment and conditions of employment, as well as land and other basic rights.

### **Migrant workers**

In relation to persons crossing borders for employment purposes, the Migration for Employment Convention (Revised), 1949 (No. 97) aims at assisting migrants for employment, in particular through provision of free placement services, information and various other support services. In particular, it calls for action against misleading propaganda regarding emigration or immigration, which often plays a role in trafficking related to forced labour. The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), requires the adoption of all necessary and appropriate measures, within a State's jurisdiction and in collaboration with other member States, to suppress clandestine movements of migrants for employment and illegal employment of migrants, and to take action against those involved in the abuses identified by the Convention.

<sup>11</sup> For purposes of the Convention, the term 'forced or compulsory labour' does not include the five categories of work which are detailed in footnote 2, Part I of this Report.

<sup>12</sup> See ILO: *Abolition of Forced Labour*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 65th Session, Geneva, 1979.

While these instruments provide considerable protection for migrants who may be at risk of falling into situations of forced labour, their revision has been suggested with a view to filling gaps in coverage and permitting broader ratification.<sup>13</sup>

The International Labour Conference has adopted a number of instruments designed to provide workers with terms and conditions of employment that would contribute to preventing situations of forced labour from emerging. The most directly relevant of these is the Protection of Wages Convention, 1949 (No. 95), which contains several measures aimed at protecting workers in relation to how they are paid (with limits on payment in kind instead of legal tender), where they are paid (e.g. not in taverns), and how they are to be informed about their earnings. The Convention also places safeguards on permissible deductions from wages and measures to avoid exploitation of workers through company stores.

Based on the central idea that employers are prohibited from limiting in any manner the freedom of the worker to dispose of his or her wages, the instrument addresses many of the practical dilemmas in which persons subjected to forced labour find themselves.

In adopting the Private Employment Agencies Convention, 1998 (No. 181), the International Labour Conference recalled the provisions of the Forced Labour Convention (No. 29) in its preamble. The new Convention recognizes the role of private employment agencies in the labour market and includes a number of protections against abuse for workers who use their services. It refers specifically to the need for laws and regulations which provide for penalties, including prohibition of private employment agencies which engage in fraudulent practices and abuses in relation to migrant workers and encouragement of bilateral agreements between countries. Adequate machinery and procedures are also to be established to investigate complaints, alleged abuses and fraudulent practices of private employment agencies.

### **Workers' organisation**

Furthermore, the range of ILO instruments designed to strengthen the capacity of workers and employers to form organisations to defend their interests and engage in social dialogue also have the effect of strengthening participation and thereby the ability to resist falling into forced labour situations. A prime example is the Rural Workers' Organizations Convention, 1975 (No. 141), which calls upon ratifying States to pursue a policy of active encouragement to these organisations.

It also aims to facilitate the establishment and growth of strong and independent organisations, on a voluntary basis, as an effective means to ensure the participation of rural workers in economic and social development and in the benefits resulting from it.

### **Particular attention for children**

Finally, the Worst Forms of Child Labour Convention, 1999 (No. 182), refers to slavery and slavery-like practices. For the purposes of this Convention, the term 'the worst forms of child labour' refers inter alia to 'all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict'. States are to take immediate and effective measures (including a programme of action and enforcement measures) to prohibit and eliminate trafficking in girls and boys under 18 years of age. Convention No. 182 contains a number of other provisions designed to prevent conditions conducive to trafficking. This Convention has broken all speed records for ratification (to date 132 countries have ratified this Convention since its adoption in June 1999).

(ILO Global Report 2001, Annex 4)

## **B. A human rights framework**

Domestic workers everywhere in the world are, first and foremost, human persons, regardless of whether they are working in their own neighbourhood, their own countries, or in other countries. They are thus fully entitled to the whole range of human rights that have been codified and promulgated by the United

<sup>13</sup> ILO: *Migrant workers*, International Labour Conference, 87th Session, Geneva, 1999, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 1B), para. 667.

Nations and are internationally accepted as fundamental rights to be enjoyed by all men and women without any discrimination on any grounds whatsoever.

In recognition of this fundamental principle, many migrant workers' organisations increasingly articulate their demands for better working conditions under the slogan 'Migrants' rights are human rights'. A concrete output of this approach is the *Primer on Migrant Workers' Rights* produced by the Migrant Forum in Asia and the Asian Migrant Centre as a basic standard reference for the Joint Migrant Human Rights Project, launched in 1999, to monitor, document and report systematically on violations of the human rights of migrants, as necessary requisites of the advocacy process.

In August 2002, in Colombo, Sri Lanka, the Regional Summit on Foreign Migrant Domestic Workers, comprising 132 participants from 24 countries, representing migrant domestic workers, governments, trade unions, NGOs and international organisations, declared the following:

- The right to stay and the right to move within and across borders with dignity are fundamental to human civilisation.
- The main principles...include the principles of human rights for all without discrimination, and the values of freedom, equality and justice.

### C. United Nations instruments

Annex 4 of the ILO Global Report 'Stopping Forced Labour' (2001) includes the following list of United Nations instruments relevant to the forced labour framework:

#### Slavery and practices similar to slavery

The Universal Declaration of Human Rights proclaims that, 'All human beings are born free and equal in dignity and rights ...' (Art. 1). 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms' (Art. 4).

The first international definition of slavery is found in the League of Nations Slavery Convention of 1926, which defines slavery as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised (Art. 1(1)). The 1926 Convention also prohibits all aspects of the slave trade, including all acts involved in the capture, acquisition or disposal of a person with intent to reduce him or her to slavery (Art.1(2)). Contracting Parties are also required to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery (Art. 5).

Slavery-like conditions are defined in a United Nations instrument adopted in 1956, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. This instrument calls on all States Parties to abolish progressively, and as soon as possible, such practices as debt bondage and serfdom. Debt bondage is defined as 'the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined' (Art. 1(a)). Serfdom is defined as 'the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status' (Art. 1(b)).

Of the United Nations instruments, forced and compulsory labour are addressed in most detail in the International Covenant on Civil and Political Rights, adopted by the General Assembly in 1966. This instrument prohibits slavery, the slave trade and servitude in all its forms. The Covenant provides generally that 'No one shall be required to perform forced or compulsory labour' (Art. 8(3)(a)). While the terms are not otherwise defined, the United Nations Covenant lists the services that will not be considered as forced or compulsory labour for its purposes. These include: the performance of hard labour in pursuance of a sentence to such a punishment by a competent court (Art. 8(3)(b)); any other work or service normally required of a person under detention in consequence of a lawful court order (Art. 8(3)(c)(i)); any service of a military character, or national service required by law of conscientious

objectors (Art. 8(3)(c)(ii)); any service exacted in cases of emergency or calamity threatening the life or well-being of the community (Art. 8(3)(c)(iii)); and any work or service which forms part of normal civic obligations (Art. 8(3)(c)(iv)).

### **Trafficking in persons**

While trafficking in persons has received considerable attention of late, the term was not until very recently defined in United Nations instruments, although the subject was addressed at the beginning of the past century with the treaty to combat the so-called white slave traffic, and later updated in 1949.<sup>14</sup> In November 2000, the General Assembly adopted the United Nations Convention against Transnational Organized Crime, supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The Convention lays down a number of provisions to fight organized crime, including mutual legal assistance between States, training and technical assistance.<sup>15</sup>

### **Rights of the child**

Finally, the United Nations Convention on the Rights of the Child, adopted in 1989 and almost universally ratified, includes the right of the child to be protected from economic exploitation and from performing work which, inter alia, would be harmful to his or her health or physical, mental, spiritual, moral or social development (Art. 32). Another provision calls on countries to take measures to prevent the abduction or sale of, and the trafficking in, children for any purpose or in any form (Art. 35). While these provisions are of direct relevance to the elimination of forced labour, respect for other articles of this Convention would also help set a framework in which it would be much more difficult for forced labour involving children to emerge. (ILO Global Report 2001, Annex 4)

### **Discrimination**

In addition to the above, as discrimination is one of the factors affecting seriously the lives and working conditions of migrant domestic workers,<sup>16</sup> the following convention is relevant: *The International Convention on the Elimination of All Forms of Racial Discrimination* (1969) condemns racial discrimination, i.e. any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. Regarding migrants, the Convention provides for the possibility of treatment differentiating between citizens and non-citizens, but, as between non-citizens, States may not discriminate against any particular nationality. In addition, the Committee on the Elimination of Racial Discrimination affirms that such a distinction between citizens and non-citizens must not be interpreted as in any way affecting the rights and freedoms recognized in other instruments.

### **The Migrants Convention**

This meeting should also consider a strategy for the implementation of the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) which has recently come into force, after the 20th ratification by East Timor. It is a matter of concern that not a single receiving country has signed the Convention. The Migrants' Convention has been built upon the principles established in existing UN and ILO Conventions, in many ways going beyond them (ILO 1999: 25). This Convention can also be used for defending and enhancing the rights of domestic workers, most of whom are either internal or overseas migrants, living away from home and devoid of natural community rights and solidarity.

### **Discrimination against women**

The *Convention on the Elimination of All Forms of Discrimination against Women* (1976) is relevant to women domestic workers, who form the majority of all domestic workers, both national and migrant. This Convention:

<sup>14</sup> International Convention for the Suppression of the White Slave Traffic, signed in Paris on 4 May 1910, and amended by the Protocol signed in Lake Success, New York, 4 May 1949.

<sup>15</sup> This Protocol will be discussed fully in Section 3 of this paper.

<sup>16</sup> Baseline research on Gender and racial discrimination towards Filipino, Indonesian and Thai domestic helpers in Hong Kong. Asian Migrant Centre et al, 2001.



1. Provides that States parties condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women (art. 2).
2. Advocates the suppression of the exploitation of women (art. 6).
3. Provides for equality of rights in respect of employment and work (art. 11).

**D. The link between forced labour, slavery, trafficking and domestic work**

The ILO and other international organisations, like Anti-Slavery International and the International Confederation of Trade Unions (ICFTU) have progressively, in the last 10 years, perceived trafficking from a 'forced labour' perspective.

An ILO Note on trafficking in persons<sup>17</sup> states:

For more than 10 years, the Committee of Experts on the Application of Conventions and Recommendations (CEACR)...has commented on several occasions on situations related to trafficking of men, women and children for purposes of labour exploitation, including forced labour in sweatshops, factories, plantations, brothels and as domestic servants in private houses. The Committee found that victims of trafficking were often submitted to conditions of forced labour; therefore information on national and cross-border trafficking has generally been examined under Convention 29.

The CEACR had considered cases of indigenous people, children, women as well as men, and concluded that 'women and children are the key target group for traffickers'. It draws attention to the particular vulnerability and needs of children 'where child bondage and forced labour is related to trafficking and related forms of abuse'. (Landuyt, 2001).

The circumstances in which domestic workers operate often do not only bear witness to inadequate protection, but amount to outright forced labour. This is particularly the case when the woman or man's freedom of movement is restricted, when he or she is physically abused, or when the opportunity to leave the job is removed under threat.

Many migrant workers are clearly working in situations where it is against their will under the menace of reprisals from the trafficker (see, for example, Section 3C) and therefore meet the criteria of forced labour set out in ILO Convention 29. Many will also be in debt bondage in accordance with the provisions of the UN 1956 Supplementary Convention on Slavery.

Anti-Slavery International and the ICFTU jointly published a Report<sup>18</sup> which draws closer the link between forced labour, slavery and trafficking and argues the relevance of such 'forced labour framework' for addressing the issues of domestic work:

The link between forced labour and slavery was clearly established in the League of Nations' Slavery Convention of 1926. Article 1(1) of the Convention sets out the definition of slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.' Article 2(b) requires signatories 'to bring about...the complete abolition of slavery in all its forms.'

The reference to 'any or all of the powers of ownership' and the 'abolition of slavery in all its forms' in these articles ensures that the definition of slavery includes not only the chattel slavery involved in the transatlantic slave trade, but also practices which are similar in nature and effect, like forced labour.

When an individual is forced to work against his or her will, under the threat of violence or some other form of punishment, their freedom is restricted and a degree of ownership is exerted over them. In such circumstances forced labour can clearly be seen to be a form of slavery which the 1926 Convention calls on governments to abolish. Anti-Slavery International/ICFTU:1)

<sup>17</sup> *Trafficking in persons: relevant ILO standards*, 10 December 2001, by Katerina Landuyt for ILO (DRAFT).

<sup>18</sup> *Forced Labour in the 21st Century*, Anti-Slavery International and ICFTU, 2001

The ILO Convention's definition of forced labour (Convention 29) focuses on the exaction of involuntary labour through coercive means and thereby retains the link between forced labour and slavery. (Anti-Slavery International/ICFTU: 2)

Migrant domestic workers are particularly vulnerable to forced labour because the nature of their work means that they are invisible to the wider society. Employers may seek to further isolate their domestics by preventing them from leaving the house where they live and work unless they are accompanied, and by confiscating their passport or other identity documents. (Anti-Slavery International/ICFTU:12)

States are in breach of ILO Convention No.29 in situations where, through legislation, or the omission of proper legislation, domestic workers are (for example) prevented from changing employers, where employers are allowed by law to hold documents, brokers who are using deception, coercion and threat of violence are allowed to operate with impunity. States which have not ratified ILO Convention No.29 are still obligated to report on their efforts to bring their law and practice into conformity with the legislation.

#### **E. A consideration of specific regulation to address the specificities of domestic work**

Lim and Oishi (1996: 109) note that the plethora of international instruments does not specifically address the problems of female migrant workers, much less those of domestic workers, who are specifically mentioned in only a few instances. Blackett (1996) concurs that there is currently no specific international instrument prescribing 'labour standards that exclusively apply to domestic workers'.<sup>19</sup> Ramirez-Machado (2000) also points out this critical gap.

In the absence of such an international instrument, there is a wide range of diversity in the approaches of countries towards the regulation of domestic work, even among those that have enacted specific legislation for it. This also implies a lack of international monitoring of different national approaches. Blackett (1996: 6) notes that many ILO Member States recognise that it is enough just to exclude mention of domestic workers in national legislation to escape challenges to its laws in regular ILO observations.

Such being the case, 'some might perceive a paradox between arguing for specific regulation in national laws when International Labour Standards for the most part do not directly mention domestic workers or contemplate the specificity of their employment relationship' (Blackett 1996: 6-7).

Paradoxically, it is the very specificity of domestic work that puts the workers in a 'catch-22' situation. Although domestic workers are often considered as a special category, usually this does not mean that labour standards are specially tailored to improve their situation by taking into account their particular conditions of work and employment relationship. On the contrary, it normally means that they are afforded lower protection than other categories of workers. This legal stigmatisation occurs in two different ways:

- Passively, when they are explicitly excluded from the scope of basic labour standards applicable to other categories of workers and are thus deprived of the basic protection afforded to those other categories.
- Actively, when special laws or rules in the basic labour legislation are specifically enacted ....which, on the grounds of the particular nature of domestic work,...grant to domestic workers a lower protection than other categories are offered by general labour laws. (Ramirez-Machado 2000)

Blackett (1996) makes a lucid plea for specific regulation on domestic work. She begins by pointing out the following:

In 1965, the International Labour Conference adopted the Resolution concerning the Conditions of Employment of Domestic Workers which recognised the 'urgent need' to establish minimum living standards 'compatible with the self-respect and human dignity which are essential to social justice', for domestic workers in both developed and developing countries.

<sup>19</sup> Examples of the few Conventions that expressly mention domestic workers, as given by Blackett (1996), are: (1) *Convention concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants*, also known as the *Sickness Insurance (Industry) Convention*, 1927 (no. 24): this Convention was revised as the *Medical Care and Sickness Benefits Convention*, 1969 (no. 130), which does not mention domestic workers explicitly, but does not exclude them either; (2) *Medical Examination of Young Persons Recommendation*, 1946 (no. 79) stipulates that it should apply to domestic service for wages in private households; (3) *The Employment Services Recommendation*, 1948 (no. 83) proposes separate employment offices that specialise in meeting the needs of employers and workers belonging to certain categories of work, including domestic service. See also Ramirez-Machado's (2000) 'Classified guide to ILO International Labour Standards relevant to domestic workers' in Annex 1 of his *Domestic work, conditions of work and employment: a legal perspective*.

But decades after the adoption of this Resolution, the inclusion of domestic workers in labour legislation remains ambiguous and controversial. The specificity of domestic work seems to necessitate the design of specific legislation to make visible all the remunerable aspects of domestic work and to regulate the worker-employer relationship in such a manner as to reduce significantly the vulnerability of the domestic worker in private households. A comparison of labour legislation for domestic workers in 67 countries came up with the following findings tabulated below:<sup>20</sup>

No. of countries	Labour legislation for domestic workers	Names of countries	Comments
19	Enactment of specific laws dealing with domestic work	Argentina, Austria, Brazil, Burkina Faso, Central African Republic, Denmark, Finland, Hungary, Italy, Malta, Peru, Portugal, Spain, St. Vincent and the Grenadines, Swaziland, Sweden, Tanzania, Zimbabwe	
20	Specific chapters, titles or sections either in the labour code, the employment act, or the act concerning contracts of employment	Belgium, Bolivia, Canada (Ontario), Chile, Costa Rica, Dominican Republic, Ecuador, El Salvador, France, Guatemala, Haiti, Honduras, Malaysia, Mexico, Nicaragua, Panama, Paraguay, Philippines, South Africa, Venezuela.	In addition to the inclusion of workers under its Labour Code, France enacted in 1980 a National Collective Agreement specifically for domestic workers.
19	No specific regulations on domestic work in basic labour legislation, which seems to include domestic workers as a category of workers	Belarus, Burundi, Cameroon, China, Colombia, Cape Verde, Côte d'Ivoire, Equatorial Guinea, Ethiopia, Gabon, Hong Kong, Iran, Lao People's Democratic Republic, Madagascar, Mongolia, Namibia, Thailand, Tunisia, Vietnam, Zambia	<ul style="list-style-type: none"> <li>● Vietnam explicitly mentions that domestic workers are to be included in its labour code</li> <li>● although Hong Kong's Employment Ordinance does not explicitly mention domestic workers, the Labour Department's Practical Guide for Employment of Foreign Domestic Helpers states that 'foreign domestic helpers are entitled to the same benefits and protection under the Employment Ordinance'</li> <li>● the countries that neither mention nor exclude domestic workers in the labour code are Burundi, China, Côte d'Ivoire, Equatorial Guinea, Gabon, Lao People's Democratic Republic, Madagascar, Mongolia, Thailand, Zambia</li> <li>● the countries that mention domestic workers in order to include or exclude them in relation to particular matters are Colombia, Ethiopia, Namibia, Tunisia</li> <li>● the countries that mention domestic work as needing regulation by special laws are Belarus, Cape Verde and Iran</li> </ul>
10	Exclusion of domestic work from the scope of the labour code or equivalent text	Cambodia, Egypt, Guinea-Bissau, Japan, Jordan, Lebanon, Singapore, Turkey, United Arab Emirates, Yemen	Singapore's Employment Act explicitly excludes domestic workers because they are deemed as neither 'employees' nor 'workmen'. This explicit exclusion is also found in Turkey, United Arab Emirates and Yemen. Cambodia states that unless explicit reference is made to domestic workers, they are excluded from the basic labour law. In this category of countries, only Guinea-Bissau recognizes the need to regulate conditions of work for domestic workers through special legislation. The others are completely silent about how domestic workers are to be protected.

<sup>20</sup> Sources: (1) Ramirez-Machado, Jose Maria. 2000. *Domestic work, conditions of work and employment: a legal perspective*. Chapter 3: Conditions of work and employment of domestic workers: a cross-national comparative analysis of labour legislation; (2) Blackett, Adelle. 1996. *Making domestic work visible: the case for specific regulation*; (3) Lin Chew: personal research.

As shown above, there is considerable variation between countries on the very fundamental point of including or excluding domestic workers within the labour code. At the bottom of the list are the countries that explicitly exclude them from the labour code, yet make no mention of how they are to be protected at all. At the top of the list are the countries that have enacted specific laws on domestic work or specific chapters, titles or sections either in the labour code, the employment act, or the act concerning contracts of employment. In the middle are the countries that have no specific regulations on domestic work, but do not exclude it from the labour code. However, some of the countries currently without specific laws on domestic work have recognised the need for special legislation.

Blackett (1996) highlights six issues in domestic work that require specific labour standards:

1. Definition of domestic work.
2. Accommodation.
3. Hours of work.
4. Minimum wages.
5. Leave periods.
6. Termination of employment.

In addition to these, the following discussion will point out four other key issues, which need to be considered in the specific regulation of domestic work. Particular ambiguities and vulnerabilities inhere in these issues, which tend to render domestic workers invisible and to place them outside the scope of labour regulation.

### **Definition of domestic work**

Due to the unbounded nature of the work, it is not immediately clear who domestic workers are. National laws that exist on domestic law have found it necessary to address this problem at the outset. For example, Zimbabwean legislation defines 'domestic worker' as follows:

A person employed in any private household to render services as a yard/garden worker, cook/housekeeper or child-minder or disabled/aged-minder irrespective of whether the place of employment is in an urban or rural area.

France, on the other hand, defines *employés de maison* as 'salaried workers employed by individuals to perform domestic labour', including full-time and part-time workers, doing all or part of household tasks, but not including gardeners and guards. But Spain defines domestic work as 'services or activities provided in or for the home in which the work is done', including housekeeping, care-giving for household members, guardianship, gardening and chauffeuring. (See Blackett 1996).

### **Accommodation**

Blackett (1996) notes that the worker's accommodation is a key factor characterising the specificity of domestic work: 'the relationship of dependence that results from living in the employer's house cries out for regulation'. It is this issue that impacts on other employment issues in domestic work, including working hours, leave periods and termination notice. National legislation varies widely on this issue.

Blackett (1996) mentions the importance of regulating the living standards of the worker's accommodation, including personal privacy and security (such as an individual room which the worker can lock), cleanliness, lighting, heating, sanitary facilities, as well as healthy and sufficient food, if that is provided.

The problematic location of the worker's accommodation in the employer's house is compounded by the fact that it is also her/his worksite. Because of this, domestic work is hidden from public scrutiny, resulting in its de-recognition as work. The location of domestic work at the employer's house should not obviate it as work. So notions of a dichotomy between public worksite and private home space also need to be re-considered. The entry of a worker for remunerative work at the employer's house means that it has thereby become a worksite for such work, which should thus be accessible to labour inspections, as are other more public worksites.

The inclusion of domestic work as work necessitates a re-definition of the worksite simply as the place where

remunerated work is carried out, including the employer's home if it is used as such. Therefore, in addition to the issue of accommodation, the issue of the domestic worker's **worksite inspection** should be included as one needing specific labour standards.

### Hours of work

This issue relates directly to the issue of the employer's house as the worker's worksite and accommodation. This spatial convergence potentially gives the employer access to the employee at all times of day and night. This makes it particularly difficult to regulate and monitor the working hours of domestic workers. Blackett (1996: 12) states that while the general impetus in regulating domestic work hours is to adhere to the principle of the forty-hour work week, with provisions for overtime, some jurisdictions recognise extended hours, either simply as longer working hours or as 'on-call' hours.<sup>21</sup>

However, even if national legislation were to stipulate reasonable working hours for domestic workers, the implementation of this depends crucially on the employer's compliance. This relates to another issue that is specific to domestic work—that is, the power of the employer to determine the physical whereabouts of the employee at all times, including off-duty hours. Many live-in domestic workers have to obtain the employer's permission to go out, even during their off-duty hours.

It is this element of control over the domestic worker's physical whereabouts at all times that can potentially lead to forced labour and slavery-like conditions. At the same time, the worker who is placed in such a situation is completely unable to seek her/his rights by lodging complaints and making police reports. In short, the spatial convergence of the employer's house as the worker's worksite and accommodation has the potential of being abused as a site of captivity.

To address this critical problem, the mere stipulation of working hours is inadequate, if it is unaccompanied by effective monitoring capacity, including labour inspections of the domestic worker's worksite, as well as accessible mechanisms of redress, such as a labour tribunal. Furthermore, it is necessary to ensure the domestic worker's **freedom of movement**<sup>22</sup> as a distinct issue requiring labour standards, as there are indeed employers who may allow their employees off-duty hours without allowing them to leave the house (Vivienne Wee: personal communication).

### Minimum wages

As stated by Blackett (1996: 13):

Minimum wage fixing is necessary because domestic workers are typically unorganised or are associated in union that are not legally recognised, therefore are usually unable to bargain collectively.

The isolating nature of the work sited in individual households necessitates innovative forms of collective bargaining, beyond that engaged by conventional trade unions based on collective work-sites and shared employers.<sup>23</sup>

A notable example of this is the collective bargaining that has been jointly done by the Government of The Philippines, non-governmental organisations and domestic workers' unions. In 1987, in response to the advocacy of key women's organisations at a Planning Meeting on the Trade in Domestic Workers held in Quezon City, the Government of the Philippines sent an Envoy to negotiate the terms of employment and working conditions of Filipina domestic workers in various receiving countries. As a result of such negotiations, minimum wages for Filipina domestic workers were established in many of these countries, including Hong Kong, Malaysia and Taiwan but excluding Singapore (Heyzer and Wee 1994: 95).

<sup>21</sup> In Québec, the 'standard work week' for live-in domestic workers is 53 hours, as opposed to 44 hours for most other workers, including domestic workers who...do not live in the home of their employers (Section 8, *Regulation respecting labour standards*, R.R.Q., c.N-1.1, r.3). Blackett (1996: 12-13) gives details of how France, Spain and Zimbabwe 'have attempted to combine creatively maximum work hour protections with limited 'on-call' duties to try to arrive at fair and realistic solutions to regulate working hours.'

<sup>22</sup> Of relevance is this context are Articles 9 and 12 of the *International Covenant on Economic, Social and Cultural Rights* (1966), as well as Article 13 of the *Universal Declaration of Human Rights* (1948).

<sup>23</sup> ILO Report III (Part 1A), International Labour Conference, 86th session, 1998, Report of the CEACR, Part 1, General Report, paragraphs 49 and 44.

The countries that have currently set minimum wages for all domestic workers, regardless of nationality, include Canada (Ontario), France, Hong Kong and Spain.<sup>24</sup> However, the issue of minimum wages, like the issue of working hours, depends crucially on the employer's compliance. Similarly, the effective implementation of any minimum wage stipulation requires monitoring capacity and mechanisms of redress, underpinned by the worker's freedom of movement in seeking her/his rights. In countries without minimum wage stipulations, employers are able to pay the lowest amount they can get away with.

### Leave periods

Blackett (1996: 15) notes that 'according to the most modern and comprehensive International Labour Standard on annual leave, the Holidays with Pay Convention (Revised), 1970 (no. 132), workers are entitled to an annual paid holiday of a specified minimum of three working weeks for one year of service... It prohibits agreements to relinquish the right to the minimum annual holiday with pay or to forego the holiday for compensation.' While the right to leave is recognised by those countries with legislation on domestic work, its implementation depends again on the employer's compliance, which has to be monitored and regulated. In relation to this issue, the worker's freedom of movement is again crucial.

### Termination of employment

Blackett (1996: 16) notes that 'for many domestic workers, losing or quitting a job entails losing a place to live'. This problem is compounded for migrant workers, for whom job loss entails losing immigration status in the host country.

The Termination of Employment Convention, 1982 (no. 158), which applies to domestic workers, stipulates that the employer must give a reasonable period of notice or compensation in lieu thereof, as well as valid grounds for dismissal. This is difficult to regulate in domestic work, given the informal nature of the relationship between employer and domestic worker. To address this problem, Spain requires that the cause(s) of dismissal be communicated in writing.

In this matter, there may again be a conflict between the worker's rights at her/his place of employment and the employer's rights over her/his home. Blackett (1996: 17) notes that while legislators may wish to protect domestic workers' rights, they nevertheless hesitate to intervene with the employer's discretionary choice over whom to admit to their homes.

A related issue is the right of the worker to resign from her employment:

A worker's freedom to end an employment relationship of indeterminate duration, subject to an obligation to give notice, is a basic guarantee of the freedom of labour protected by the Forced Labour Convention, 1930 (no. 29) and the Abolition of Force Labour Convention, 1957 (no. 105).<sup>25</sup>

However, many migrant domestic workers, in particular, are hindered in exercising this right. For example, penalties may be imposed on them by their employment agencies, which may require them to pay for 'the replacement maid's air-ticket'<sup>26</sup> and their own air-ticket.<sup>27</sup> Should the migrant domestic worker wish to change her employer, she may be required to obtain a 'release letter' from her current employer.<sup>30</sup> This situation is tantamount to forced labour.

To complicate this situation, some governments are known to intervene to end the employment of migrant domestic workers. For example, the Singapore government deports and thereby terminates the employment of any foreign domestic worker who:

<sup>24</sup> Gulati (1993), cited in Blackett (1996), mistakenly mentions Singapore, Saudi Arabia and Malaysia as countries with minimum wages for foreign domestic workers.

<sup>25</sup> Article 4 of Protection against Unjustified Dismissal: Report of the Committee of Experts on the Application of Conventions and Recommendations (Genera: ILO, 1995) at paragraph 77.

<sup>26</sup> Handout of a Singapore employment agency, cited from *First World...for whom?* An SDP report on labour and poverty in Singapore (2002: 33).

<sup>27</sup> 'Your employer may not sign your transfer letter to effect your transfer if they are very angry with you' (*Ibid.*) The Singapore government requires the current employer to write a release letter allowing the migrant domestic worker to transfer to a new employer. It is at the discretion of the former whether or not to do so. Should he/she not agree to the transfer, he/she may simply dismiss the worker, compelling her to leave the country immediately.

- Becomes pregnant.
- Fails the compulsory six-monthly medical check-up for sexually transmitted diseases and AIDS.
- Is caught working at an address different from that registered.
- Is caught violating any laws.

International labour standards stipulate that employment should not be terminated on the basis of 'race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin'.<sup>28</sup> The assumption is the regulation of employment termination by the employer. But when a government terminates a foreign domestic worker's employment on such grounds as pregnancy, what redress is there? This is a clear case for international monitoring to ensure national legislation that is in accordance with internationally established human rights and labour rights.

### **Freedom of association and the right to organise**

In addition to the issues raised above, another key issue for domestic workers is freedom of association and the right to organise.<sup>29</sup> Notions of labour organising and collective bargaining, as currently conceived and developed, based on the public sphere as the norm, need to be re-thought where the domestic work sector is concerned. Innovative labour organising is needed to break through the strictures of domestic work. Some examples of this have indeed emerged-for example, in the form of coalitions between domestic workers' unions and non-governmental organisations, such as those in Hong Kong, The Philippines and Indonesia.

Nevertheless, it is very difficult for such organisations to reach out to the mass of domestic workers who are individually isolated in different households. To compound such isolation, domestic workers often do not enjoy freedom of association or the right to organise, particularly if they are migrant workers.<sup>30</sup> In this matter, they are often hindered not only by employers but also by governments. In Hong Kong, for example, Indonesian migrant workers are, upon arrival, brought by their agents to the Indonesian consulate where they are told by the consul in charge not to join any workers' union. Employment agencies are also known to stop client domestic workers from interacting with other workers.<sup>31</sup> Furthermore, organised labour often adopts ambiguous attitudes towards domestic workers, particularly if they are migrant workers.

### **Labour recruitment**

Another issue that must be considered in specific legislation on domestic work is labour recruitment, which can also lead to the exploitation of the worker by recruitment agencies, even before actual employment begins. This is particularly important since the majority of domestic workers are migrants, whether internal or international.

The ILO Convention Private Employment Agencies Convention, 1998 (no.181) refers specifically to the following protections for workers in the labour market:

- The need for laws and regulations which provide for penalties, including prohibition of agencies that are fraudulent and abusive towards migrant workers.
- Encouragement of bilateral agreements between countries.
- Adequate machinery and procedures to investigate complaints, alleged abuses and fraudulent practices.

This Convention, however, does not mention domestic work specifically. Given the frequent abuses inflicted by some employment agencies on the domestic workers they recruit-for example, debt bondage, physical and mental violence, captivity, forced labour and slavery-there is an urgent need to include the issue of labour recruitment in any specific legislation enacted on domestic work.

### **F. Conclusion**

For all the reasons shown above, there seems to be a clear need for specific regulation on domestic work. In addition to Blackett's (1996) six issues, such regulation should, as discussed above, also cover the issues of

<sup>28</sup> Article 5 of *Protection against Unjustified Dismissal: Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva: ILO, 1995).

<sup>29</sup> Of relevance in this context are Article 8 of *The International Covenant on Economic, Social and Cultural Rights* (1966), as well as the ILO Conventions-*Freedom of Association and Protection of the Right to Organise Convention*, 1948 (no. 87), *Right to Organise and Collective Bargaining Convention*, 1949 (no.98).

<sup>30</sup> ILO Report III (Part 1A), International Labour Conference, 86th session, 1998, Report of the CEACR, Part 1, General Report, paragraphs 49 and 44.

<sup>31</sup> The handout of a Singapore employment agency advises migrant domestic workers thus: 'Do not talk to neighbouring maids'. Cited from *First World...for whom?* An SDP report on labour and poverty in Singapore (2002: 33). See Annex 3.

worksite, freedom of movement, freedom of association, the right to organise, and labour recruitment. The expanded list of issues is as follows:

1. Definition of domestic work
2. Accommodation
3. *Worksite inspection*
4. Hours of work
5. Minimum wages
6. Leave periods
7. Termination of employment
8. *Freedom of movement*
9. *Freedom of association and the right to organise*
10. *Labour recruitment*

[*Italics* mark additional issues not mentioned by Blackett.]

However, it would be advisable to formulate an international instrument devoted to domestic workers, detailing their specific needs and rights, especially those of migrant domestic workers. Simply leaving the design of specific legislation to national governments may not be enough, particularly since their agendas may be driven by concerns other than the protection of domestic workers' rights.

For example, as noted by Wee (2002), the demand for foreign domestic workers 'reflects a particular developmental trajectory where the economy is developed through the labour force participation of its female citizens, without the government compensating for the withdrawal of their labour in social reproduction'. In this situation, the government may be said to be abdicating from its responsibility in the provision of community services, especially childcare and the care of the elderly and the disabled. Instead, these caring services are left to the informal devices of individual households, specifically to the women of these households.

Arguably, this implies that the greater concern of the government is that working women of their country should be able to afford low-cost household help, rather than to ensure that domestic workers are paid adequate wages. In some cases, not only have governments privatised community services to the informal care of individual households, they have re-interpreted any domestic help that such households hire as a privilege that should be taxed.

For example, the Singapore government imposes a compulsory monthly levy of S\$345 on the employer for each migrant domestic worker employed. In many cases, this has led to the lowering of workers' wages as employers strain to pay both the levy and the worker's salary out of a limited household budget. Malaysia also imposes a levy of 30 *ringgit* per month on the employer. Hong Kong is currently attempting to impose a levy on employers, as well as impose a wage tax on the domestic workers of HK\$500 per month. The reasons given for the imposition of the levy by these governments are:

- Immigration control of the inflow of migrant domestic workers.
- Increasing state revenue.

What the impact of this and other government policies would be on the conditions and rights of domestic workers is not addressed at all.

Therefore, as stated by Blackett (1996), 'a specific international instrument addressing labour, social and immigration aspects of domestic work would be helpful to Member States and enable more of them to regulate domestic work in an effective manner' and in accordance with the range of human rights and labour rights already established through the various UN and ILO instruments.

Ultimately, the international regulatory supervisory mechanisms only function when states ratify a particular convention and incorporate its principles into national law. If no national legislation is enacted to implement these international standards, if there is no political will to stop the exploitation of domestic workers and if the country's justice system does not work to protect domestic workers' rights, then nothing will change.



### Section 3

## An examination of the applicability of the new UN Trafficking Protocol for addressing issues of domestic work

### A. The start of a global anti-trafficking strategy: moving from 'exploitative nature of work' to 'exploitative conditions of work'

The link between conditions of work and 'trafficking' has been made by various organisations, governmental and non-governmental, and rights advocates since the 1980's. In 1997, the Global Alliance Against Traffic in Women (GAATW), based in Thailand, and the Foundation against Trafficking in Women in the Netherlands completed and published a worldwide investigation on *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*.<sup>32</sup> This investigation was undertaken specially to inform the UN Special Rapporteur on Violence against Women, whose mandate included reporting on the causes and consequences of the global trafficking in women. The investigation was based on the practical experiences of direct support work, legal and political advocacy, on behalf of migrant women caught in 'trafficking' in many countries round the world.

The most important need at that moment was to develop a clear definition of 'trafficking', which is contextualised within both internal and cross-border migration, as well as within a labour instead of a moral framework. It was necessary to dispel the then prevailing erroneous conflation of 'trafficking' with 'prostitution', which was causing great confusion among all parties addressing the issue.<sup>33</sup>

The basic argument was that women travelling within or across their country's borders to find work, are restricted in this endeavour because they have access neither to the means for travelling independently nor to jobs, because of traditional, gender or social or legal constraints. For some women, mobility, economic independence and personal liberation are closely connected. To achieve a degree of independence or autonomy and control of their own lives, women may have to move away from their families and communities, sometimes leaving their countries altogether. Migrating women thus tend to be dependent on third parties to organise the migration process for them, and even to find jobs, which makes them vulnerable to exploitation.

But women from poorer countries are invariably faced with one of three work choices: marriage, domestic work or prostitution. These are also the three forms of female labour which society consistently refuses to recognize as work, although domestic work is generally more recognized as work than prostitution, and prostitution more than reproductive work in marriage. These are the 'informal labour sectors' where the lack of basic legal protection through labour or other regulations render women vulnerable to trafficking practices, forced labour and slavery-like practices.

A two-part working definition<sup>34</sup> was formulated to address equally both exploitative brokerage practices (i.e. 'trafficking' in the migration process) and exploitation in working conditions at the point of destination (i.e. 'forced labour and slavery-like practices'):

- 'Trafficking in women': All Acts involved in the recruitment and/or transportation of a woman within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.
- 'Forced Labour and Slavery-like Practices': The extraction of work or services from any woman or the appropriation of the legal identity and/or physical person of any woman by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.

The questionnaire sent out by the researchers was couched in the framework of 'forced labour' and 'slavery-like practices' as the concrete and demonstrable situation of exploitation and violations of the rights of working women in these sectors, based on the ILO Forced Labour Convention, 1930 (No.29) and the UN Slavery Conventions of 1926 and 1956.

<sup>32</sup> Wijers, Marjan and Lap-Chew, Lin, 1997, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, Utrecht, Foundation against trafficking in Women (STV), Global Alliance Against Traffic in Women (GAATW).

<sup>33</sup> The UN Convention for the Suppression of the Traffic in Persons and of the exploitation of the prostitution of others (1949) was then the only international standard addressing 'trafficking'; it did not have a clear definition, but calls for the abolition of prostitution by criminalising all third parties in any way involved in the prostitution business.

<sup>34</sup> This definition necessarily evolved through several versions during the advocacy process, but the basic elements underlying the concepts of 'moving people into and keeping them in forced labour and slavery-like conditions of work' have been integrated into the definition of the newly adopted Trafficking Protocol.

Definitions from the Conventions formed the underlying concepts:

The term 'forced labour' is defined in art. 2.1 of the ILO Forced Labour Convention No. 29 as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'

The term 'slavery' is defined in art. 1.1 of the UN Slavery Convention, 1926 as 'the status or condition of person over whom any or all of the powers attaching to the right of ownership are executed.'

'Slavery-like practices' are contained in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and institutions and practices similar to Slavery, 1956, art.

- (a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.
- (b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status.
- (c) Any institution or practice whereby:
  - A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or
  - The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or
  - A woman on the death of her husband is liable to be inherited by another person.
- (d) Any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

### Results of the investigation

The situation of 'forced labour' and 'slavery-like practices' was operationalised in three areas:

- The forms of coercion encountered.
- The extent of exploitative and abusive living and working conditions.
- The presence of barriers preventing escape from the situation.

Respondents organisations working with domestic workers were asked to indicate the extent in which 'forced labour' and 'slavery-like practices' occur in the domestic work site for different categories of domestic workers, both nationals and migrants, documented and undocumented workers, as well as out-migrants (i.e. women from their countries working in other countries).

The responses indicated the following:

- That forced labour and slavery-like practices occurred systematically within the domestic work sector.
- The frequency of the occurrence of forced labour and slavery-like practices in the living and working conditions of domestic workers for both internal and cross-border migrants were dependent on 2 factors:
  1. Whether domestic workers live-in or live-out of their employers' houses.
  2. Whether domestic workers have a legal immigration status.
- Situations of forced labour and slavery-like practices were thus most often reported by *undocumented, living-IN domestic workers*, who also experienced most acutely the constraints that formed the obstacles preventing them from leaving exploitative situations.

- These constraints were a combination of financial obligations to their families, debt incurred before departure, compounded by employment and immigration restrictions (not being allowed to change employers and jobs, not having proper papers). Many were further intimidated by agents and employers, subject to threats of arrest and real or threatened violence and severe restrictions on their movements.

The process and results of the investigation served to focus anti-trafficking activism on problematising the abusive conditions of work, characterised by forced labour and slavery-like practices, as the concrete evidence of the occurrence of trafficking. It launched the call for the formulation of a new clear definition of trafficking, which would be based on the long-established international standards against forced labour and slavery, and facilitate the elimination of practices which hold women captive in these situations.

It has succeeded in moving forward the discussion over the necessity of legal recognition of informal female labour, including prostitution (more and more called sex work) and domestic work as work. It was less successful in the case of reproductive work of wives and mothers within marriage.

Next to this project to promote the development of a better definition and strategy to combat trafficking, GAATW, together with the International Human Rights Law Group (Washington) and the Foundation Against Trafficking in Women, developed the *Human Rights Standards for the Treatment of Trafficked Persons*, first drafted in 1994 and revised in 1999.<sup>35</sup> These standards aim to protect and promote respect for the human rights of individuals who have become victims of trafficking. They contain a comprehensive list of measures that states should implement to provide effective legal remedy, legal protection, non-discriminatory treatment, and restitution, compensation and recovery. These standards have stood as a model for governmental and non-governmental initiatives to promote and develop effective human rights protections for victims of trafficking.

These standards were also the basis for the advocacy strategy of the NGO Human Rights Caucus which had lobbied to ensure the inclusion of a comprehensive definition of trafficking and human rights protections in the provisions of a new UN instrument to combat trafficking in persons, which was then in process of negotiations, and which has since been adopted.

#### **B. The UN Trafficking Protocol and its relevance for addressing the situation of domestic workers**

In December 2000, the long-awaited new international instrument on trafficking in persons was promulgated, in the form of a *Protocol to Prevent, Suppress and Punish Trafficking in persons, Especially Women and Children*,<sup>36</sup> (henceforth called the Trafficking Protocol), as a supplement to the United Nations Convention against Transnational Organised Crime (the Crime Convention).

#### **Summary of the main features of the Trafficking Protocol<sup>37</sup> and their relevance to the domestic work sector**

The Trafficking Protocol, as a supplement to the Crime Convention, should be interpreted together with the Convention. Article 2 states its three objectives:

- Prosecution of perpetrators
- Assistance and protection of victims
- Prevention of trafficking

States that have ratified both the Crime Convention and the Trafficking Protocol are enjoined to enact national legislation on trafficking in persons in accordance with the principles set out in the Protocol.

#### **1. Prosecution (Articles 3, 4, 5)**

The first necessary element for the effective prosecution of any crime is a clear and unambiguous definition. The definition of 'trafficking in persons' is contained in Article 3 of the Protocol:

- (a) 'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat of or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or (the abuse of) a position of vulnerability, 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.*' [Italics added] Exploitation shall include, at a minimum, the exploitation of the prostitution

<sup>35</sup> The Human Rights Standards (HRS) can be used as a guide in providing assistance to women and taking legal action against traffickers.

<sup>36</sup> See full text of the Protocol at [http://www.odccp.org/odccp/trafficking\\_protocol.html](http://www.odccp.org/odccp/trafficking_protocol.html)

<sup>37</sup> Readers are recommended to refer to *The Annotated Guide to the Complete UN trafficking Protocol*, by Ann Jordan, Initiative against Trafficking in Persons, IHRIG at [www.hrlawgroup.org/resources/content/Protocol\\_annotated.pdf](http://www.hrlawgroup.org/resources/content/Protocol_annotated.pdf)

of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in subparagraph (a) of this article.
- (d) 'Child' shall mean any person under eighteen years of age.

### Relevance to the domestic work sector

In simple language, the Protocol criminalises moving any man, woman or child in order to hold them in a situation of forced labour and services, slavery and slavery-like practices, through physical force or psychological forms of coercion. It has been shown above that domestic workers almost systematically find themselves in such situations, to a lesser or greater degree.

Criminalising all the separate activities in the whole process of trafficking-recruitment, transportation, transfer, harbouring or receipt-makes it possible to prosecute not only the agencies who are involved in 'exploitative brokerage' aspects of the crime, but also abusive agencies and employers who intentionally hold ('receive' and 'harbour') workers in forced labour and slavery conditions by any of the coercive means listed in the definition.

Although the Protocol itself applies only to 'transnational' trafficking, by 'organized' criminal groups, it can be argued that according to Article 34.2 of the Convention, national legislations enacted to implement the Protocol should go further and penalize all forms of trafficking, including by individuals and within state borders. [italics added] (Jordan 2002: 13), and regardless of the 'organised' nature of the alleged perpetrators, which generally is not applicable to the domestic work sector.

Within the definition of trafficking above, when the situation of exploitation (i.e. forced labour and services, slavery and slavery-like practices), has been established, the evidence which is relevant for the prosecution and indicative of the intent to bring or keep a person in that situation includes:

- Lying to the victim, giving false information about the nature and conditions of work.
- Keeping her passport and other identity papers, falsifying her papers.
- Not paying her, obstructing her free access to her own income.
- Keeping her in prison-like conditions (e.g. locked in a house without a key).
- Physical and psychological coercion of the worker and her family.
- Obstructing her from leaving by any of the listed forms of coercion to work .
- Keeping her in debt bondage.

Children found in a situation of forced labour or slavery are by definition trafficked.

## 2. Assistance and Protection (Articles 6, 7, 8)

The Protocol instructs states to consider the following:

- Protect the confidentiality of victims.
- Provide assistance in criminal proceedings.
- Provide victims with information on relevant court and administrative proceedings.
- Provide necessary services for physical, psychological and social recovery of victims, in cooperation with NGOs and other relevant organisations. Assistance includes:
  - Appropriate housing;
  - counselling and information about their rights in the language of the victim;
  - medical, psychological and material assistance;
  - employment, educational and training opportunities;
  - consideration of age, gender and special needs of victims;
  - consideration of the special needs of children (with reference to the UN Convention on the Rights of the Child);
  - providing for the physical safety of victims within their territories;
  - alerting victims to the possibilities of obtaining compensation.

- Issue temporary or permanent stay permit, on humanitarian and compassionate grounds.
- Conduct repatriation actions 'with due regard for the safety of that person'.

Articles 24 and 25 of the Convention give victims and witnesses the following rights:

- Art. 24: effective protection from potential retaliation or intimidation of witnesses in criminal proceedings, including relocation if necessary. [Note: this refers to all witnesses, not only the victim-witness.]
- Art. 25: assistance and protection to victims, in cases of threat of retaliation or intimidation.

### **Relevance to the domestic work sector**

This section of the Protocol contains the provisions which, taken in the intention and spirit of the Crime Convention, enjoins governments to take measures to assist and protect the victims of trafficking practices. Domestic workers certainly need all these forms of assistance, especially migrants, since they will have no family or community support if they are going through a judicial process in the country of employment. At the moment domestic workers in Hong Kong can stay in the country as long as they are awaiting resolution of cases either before the Labour Tribunal or the Courts. But they are not allowed to work and receive no assistance whatsoever from the government. Domestic workers everywhere in Asia lack support and resources to even begin lengthy arbitration or juridical processes, so an international standard that enjoins governments to provide for assistance and protection is very relevant to domestic workers.

### **3. On Prevention and protection from re-victimisation (Article 9)**

The Protocol enjoins:

- The conduct of research to understand the causes and processes of trafficking.
- Measures to decrease vulnerability (as caused by poverty, under-development, lack of equal opportunities).
- Discouraging the demand that fosters all forms of exploitation, especially of women and children, leading to trafficking.

### **Relevance to the domestic work sector**

The 'Prevention' objective offers possibilities to include long-term strategies in a national legislation to address various factors which contribute to the persistence of 'forced labour or services, slavery and slavery-like practices' in domestic work, including measures to address the structural causes of vulnerability of domestic workers.

The demand that fosters exploitation is the demand for cheap and submissive workers in unprotected labour sectors without rights and thereby vulnerable to exploitation. This can be countered by making it easier for migrant workers to enter a country and to work legally with a secure status and access to mechanisms of complaint, should their rights be violated. This would be very relevant for domestic workers. Thus it would be necessary for states to examine their immigration and employment policies, since it is the combination of these policies which is a principal factor causing the vulnerability of migrant domestic workers.

The Trafficking Protocol is a significant step forward in that it offers a comprehensive description of what constitutes the crime of trafficking, so that prosecution of the crime is facilitated. It obliges ratifying states to enact national legislation to criminalise and combat all the activities involved in trafficking, while taking care to assist victims and protect their human rights. Another important aspect for our purposes is that 'forced labour and services, slavery and slavery-like practices' are explicitly named as the material conditions of the crime of trafficking, thus at the least, application of the Protocol will establish further the criminal nature of these practices.

## **C. Application of the principles of the Trafficking Protocol to cases of migrant domestic workers in Hong Kong**

### **1. Adek**

Adek is a 25-year-old domestic worker from East Java (Indonesia) in Hong Kong. Her experience is typical of practically all Indonesian domestic workers, who are legally compelled by official Indonesian government regulation to go through an employment placement agency to organise their migration. Adek's story illustrates clearly the elements of forced labour, slavery and slavery-like practices' in both the recruitment process and the employment situation, as well as the means of coercion utilised to hold her in the exploitative situation.

**Adek's narrative**<sup>38</sup>

*I went to a broker in the town to help me to go to Hong Kong, because I heard from a relative working there that the salary was higher and I would get Sundays off. The broker brought me to the PT. SPJ employment agency in Sidoarjo, Surabaya.*

*I had to pay Rp. 60,000<sup>39</sup> to the broker for a medical test, but he did not pay for the test. I also paid Rp. 250,000 to the employment agency for my uniform and Rp. 80,000 for Cantonese language and cookery books. I was told that I would not receive any salary for the first four months (HK3670x4) as I had to pay this amount as agency fees to process everything. The agency arranged everything: passport, ticket, visa, employer, and medical test.*

*I waited four months before I could leave for Hong Kong. I did not know that I had to wait for that long. During that time I stayed in the 'training camp' of the PT. Surry Pacifik Jaya in Surabaya, East Java. There were around 1000 women in this camp, all going to Hong Kong, Singapore, Malaysia and Taiwan.*

*I could eat three times a day, but the food was not healthy. They gave us a small amount of vegetables (we were not allowed to serve ourselves) and sometimes they gave us a piece of salty fish or tempe<sup>40</sup> or tofu only. Since the food was insufficient I had to buy my own food from vendors outside the gate of the camp. We had to find roundabout ways to buy food from that vendor, since we were not allowed to leave the training camp.*

*Many women were sick there. They had fever, cold, and many of us had skin problems since the water was not clean. I had to take a bath with 10 persons in the same bathroom. The water was dirty and not enough for all of us.*

*Many of my friends were always screaming and while I was staying in that training camp one of my friends died. She died after being sick for a long time in the camp. Actually her family was trying to take her home she was seriously ill, but the agency did not allow it because her family refused to pay Rp. 2,000,000 to the agency as guarantee that she would come back to the camp. One day later the agency brought her to the hospital but she died a day after.*

*The agency told the women who were going to Taiwan that they should not pray; I do not know why. The agency allowed those of us going to Hong Kong to bring a prayer cloth so long as the color is not white. According to them, Hong Kong people are afraid of white color.*

*The agency staff treated us very badly. They sounded like kings, commanding us to do many things for their personal needs. We had to do whatever they asked very fast, and they are shouted at us if we made a little mistake.*

*We were not allowed to go out of the training camp. We were isolated from the community. Our families couldn't contact us since there were no telephones. If our families or relative sent a letter, the agency staff will censor it first. Often they opened our letters or did not give our letters to us.*

*Our families were allowed to visit us once every 2 weeks on Saturday between 8.30 am and 3.00 pm only. Since many of us came from villages very far away, sometimes our families or relatives did not arrive for a visit at the right time. Then we were allowed to meet them for one to two hours only.*

*The agency was very strict with timing. If we were late even five minutes, they would punish us by making us do extra cleaning of the camp.*

*If we wanted to go back home for some important things we had to deposit a guarantee of around Rp 1,000,000 to 2,000,000. If we wanted to cancel our employment process the agency would fine us around Rp 3,500,000. One of my friends got pregnant and since that was not allowed she had to cancel her process, for which the agency asked her to pay Rp 3,500,000.*

<sup>38</sup> This narrative was documented through field interviews conducted in Hong Kong in November 2002.

<sup>39</sup> USD1 = approximately RP10,000

<sup>40</sup> Tempe is a fermented bean-cake.

*If we refused to pay, then the agency would bring us to another place, where we would have to work without any payment for an unlimited time, until our families are able to buy us out.*

*Almost all the women in this training camp stayed more than 5 to 6 months and some of them stayed for almost 1 or 2 years. I was lucky because they did not ask me to do part time work. They told me because there was an employer in Hong Kong for me already. Almost all my friends there were forced to do part time work for only Rp 75,000 to Rp 100,000 per month. They can't refuse it since this is also one of the regulations in this training camp.*

*In this training camp we were forced to learn Cantonese, from 8 am to 5 pm. During lunchtime we were allowed to take a rest for one hour. Those going to Hong Kong soon had to continue studying from 8pm to 11 pm.*

### **My documents**

*I signed employment contract papers when I was still in the training camp. But they did not explain much about these to me; they just pointed to the places to be signed by me. So from signing these I knew that I had a contract already. But in fact I never kept any of my documents myself, including contract and passport. I just held these in my hand during my trip to Hong Kong and as soon as I arrived at Hong Kong airport, the agency staff who picked me up took all the documents away from me. However, I did not object because at that time I did not know that this is illegal in Hong Kong. I thought it was common that domestic workers were not allowed to keep their documents themselves.*

### **Arrival in Hong Kong**

*I arrived in Hong Kong in August 2001. From the airport the agency staff brought me to their flat, where I had to stay and do domestic work for the people in that house for two days without pay. Then my employer picked me up and brought me to their flat.*

### **Payment of salary**

*On 30 of August my agency brought me to the Hong Kong Shanghai Bank in Central where they told me to open a bank account. But the agency did not give me the passbook. They told me that my employer would pay my monthly salary into this bank account. The agency seriously told me that I was allowed to get money from that account only after my first five months employment, and not more than HK\$2000 per month. 'If you get more than that your employer will terminate you,' the agency said to me. However, I did not ask or object since I did not know that there is a minimum wage in Hong Kong.*

*After a month of my employment, my employer gave me an ATM card of my account. But she told me that I could not withdraw money in this account yet since I still have to pay my agency fee. I just obeyed what my employer said.*

*On February 2002 (after working my first five months), I withdrew money from on my ATM card. But my employer was angry with me whenever I withdrew money; she said that I had to tell her in advance how much and for what I withdrew money.*

*Later on (after I was terminated), from the bank records I received upon request from the bank, I discovered that my employer had deposited HK\$3670 every month in my account. From that record I also learnt that a finance company was withdrawing money from my bank account. In the first four months they withdrew HK\$3,570 per month and then after that they withdraw HK\$1,670 per month.*

*I had never borrowed money from any finance company and I also never gave anyone authorisation to withdraw money from my account. Then I remembered that in the training camp, the agency had asked me to sign a paper. Since that paper was in English I did not know what was written there. Since all my friends also had to sign such papers, I thought it is one of the requirements if we wanted to go abroad.*

### **Rest day and public holidays**

*During the 9 months of my employment I only had one rest day-on 16 December 2001, which was a Muslim celebration. My employer gave me the rest day because I asked for it, but complained to the agency, and I was scolded by my agency. My employer never gave me any money as compensation for not*

*I was allowed to stay alone in the flat, but I was not allowed to do any shopping alone, not even to buy personal things like sanitary napkins for myself. So had to wait until my employer had time to go with me to buy that. I had to pay for these articles myself.*

*Although I was not asked to do anything I thought a domestic worker should not do, she treated me as if I was not a human being. Often she called me 'black' and 'stupid'. Whenever she was angry with me because of some mistake, she said bad words to me, like 'You had better eat shit.' She often called the agency to complain that I could not work properly. Then the agency would call me and get angry with me.*

## 2. Santi

Santi's story illustrates the serious forms of degrading and inhumane treatment experienced by domestic workers in the very performance of their daily work.

### **Santi's narrative** <sup>41</sup>

*All of them-the three sisters and the young girl-gave me orders. Mostly I had to clean the house. But right from the beginning, I was badly treated by the family.*

*They controlled my movement every moment of the day. I did not even have privacy in the toilet. I was not allowed to lock the door when I was in the toilet; any one of the women could just enter the toilet to do whatever they wanted, even when I was there. They said, 'We are all women anyway', but I am not used to that.*

*They kept my passport; I was not allowed to go out to shop. Only sometimes I had to fetch the boy from school.*

*I was not given enough to eat. I had to ask permission even to drink water. I had to eat only leftover food from the previous day and I was not allowed to eat as much rice as I needed. Because I do not eat meat, only vegetables, I need more rice. But if my employer thought I had taken too much rice on my plate, she would put back some into the pot. As a result I lost about 15 kg in the time I worked for them.*

*They controlled my work to the minutest detail, including the time I spent on the different duties I had to complete during the day. I had to ask the old lady to record the time when I started on a task and again when I finished. My list of duties also stated the length of time I should spend on each task. If I took less time on a task I would be fined.*

### **Deduction of wages**

*If I spent less time than allotted for a task, my employer would penalize me by deducting money from my wages. This happened for every mistake or accident I had while working. For example, if I dropped a piece of meat on the floor while cleaning it, I would have to clean the whole floor thoroughly. I would then be fined and would have to pay for the extra time I had to spend cleaning the floor, for the extra water and detergents needed to clean the floor. I had to pay this immediately. Sometimes the total amount came up to about HK\$50 per item. Some months I had to pay so many fines that I had nothing left from my salary.*

*The cleaning is where the family had really strange habits. I had to clean all surfaces ten, sometimes twenty, times. After each time I had to go to the bathroom and rinse out the washcloth or mop one hundred times by hand. I had to count out loud, so that they could hear me.*

*As a result of this excessive cleaning and rinsing with detergents, my hands were ruined. My skin became dry and flaky, my nails all black and worn out. And I was so tired out by the continuous cleaning.*

## 3. Flora

The following case, recounted by Constable (1997: 126-131) illustrates the structural inequality of power between a domestic worker and her employer, which is a factor of the latter's vulnerability. When this is not recognised as such, it becomes an obstruction in the worker's attempt to obtain legal redress and compensation.

<sup>41</sup> This narrative was documented through field interviews conducted in Hong Kong in November 2002.



Flora, a domestic worker, was dismissed by her employer without any notice given. She filed a case with the Labour Department in Hong Kong, to demand payment in lieu of notice. During the hearing, a document was produced, which appeared to be a resignation letter signed by her, stating that she voluntarily terminated her contract and that she had no waiving all rights to make claims. This apparently exonerated the employer. But Flora claims that she had been forced to sign the letter. The Judge said that she would have to 'prove that it was signed under duress'.

### **Case analysis using the principles of the Trafficking Protocol**

In Hong Kong, cases such as those described above are brought before the Labour Tribunal.<sup>42</sup> However, as the cases above illustrate, there are many elements pertaining to trafficking, forced labour and slavery-like conditions, which are not addressed by the Employment Ordinance.

For example, Adek was recruited, transported, transferred, harboured and received in a way that may be understood as 'trafficking'. She was subjected to illegal confinement, forced labour and slavery-like practice in the training camp, with coercion used against her.

She had signed a contract without being able to read it, only discovering later that it stated that she should receive the minimum wage. She had also signed a promissory note and a contract without understanding their contents. She did not know that the exorbitant amount charged for her recruitment process was illegal, according to Hong Kong laws. As a result, she entered into a situation of debt bondage, with no control over her salary and the manner in which she would pay her imposed debt. This situation may be understood as fraud and deception by the agency, which thereby abused Adek's position of vulnerability.

The agency held her passport and other official documents. This meant that she could not leave the employment situation, even though she felt psychologically oppressed and threatened. This resulted in an exploitative situation of forced labour.

Santi was physically as well as psychologically abused, through the employers' control of every minute of her time, their restriction in her freedom of movement, their confiscation of her passport and their illegal financial penalties that severely reduced her salary. She was subjected to cruel, humiliating and degrading treatment. This too was an exploitative situation of forced labour, tantamount to slavery-like conditions.

A key element in these cases is the hidden coercion of the worker by the agency and/or the employer, who thereby abused the worker's position of vulnerability. This was certainly so in the case of Flora, who was made to sign under duress a waiver to claims but could not produce evidence of this duress. As a result, many such cases are settled to the disadvantage of the worker, whether inside or outside of court. The underlying problem is the unequal balance of power between the parties involved, whereby a migrant domestic worker, with no legal standing apart from her employment contract, who is thereby dependent on the goodwill of her agent and employer for her work and immigration status, can be easily prevailed upon to sign documents which are to her disadvantage.

Under the Trafficking Protocol, one of the forms of 'coercion' listed is 'the abuse of power or of a position of vulnerability'. This acknowledges the implicit coercive effect of unequal relationships. The UN Interpretative Note explains that 'the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse'. An understanding of this principle could have helped to convince the judge that Flora signed the letter of waiver 'under duress', particularly since it would not have benefitted her at all to have signed such a letter.

However, in an unusual case that appeared before the Hong Kong Court of First Instance-an appeals court-the judge showed a rare awareness of this imbalance of power.<sup>43</sup> This was an appeal case of an Indonesian Employment Agency, seeking to overturn the judgement of the Small Claims Tribunal that they should pay restitution to a domestic worker for overcharging recruitment fees. The judge of the appeals court ruled in favour of the domestic worker, acceding to the arguments put forward by the domestic worker's counsel:

- That there was 'economic duress' exercised by the agency: she had no choice but to pay the exorbitant recruitment fees (HK\$10,000) demanded.

<sup>42</sup> The Labour Tribunal was set up in 1973 to settle monetary disputes between employees and employers. It hears cases related to failure to comply with the of the Employment Ordinance, under which domestic work is regulated.

<sup>43</sup> High Court Case HCSA000006/2001.

- That the parties were not *in pari delicto* (i.e. there was an imbalance in power between the agency and the domestic worker).

The judgement stated:

There was exploitation by the defendant of the claimant's situation in that the defendant had declined to help her with her application until she had paid the amount demanded in full. There was oppression on the part of the defendant. I consider that the claimant would be able to establish that she is not *in pari delicto* with the defendant on this ground.

But despite the judge's awareness of the economic duress experienced by the worker as a result of the unequal balance of power between her and the agency, the agency was penalised only in terms of having to make restitution to the worker. The agency was not prosecuted even though it had committed an offence according to Hong Kong law.<sup>44</sup> Arguably, an integration of the Trafficking Protocol into national legislation would strengthen the possibility of prosecution. Apart from dealing with such offences as civil matters of compensation and restitution, prosecution could serve as deterrent, thereby preventing repeated occurrences.

#### **D. Shortcomings of the Trafficking Protocol and possible solutions**

##### **1. The definition of trafficking is complicated and contains controversial terms, especially the means of coercion listed. This may complicate prosecution because of unclear terms.**

In seeking to address this problem, Jordan (2002) suggests in The Annotated Guide to the Protocol that national legislation enacted on the principles of the protocol need only specify the criminalisation of moving a person from one place to another in order to hold them in forced labour, slavery or slavery-like practices. She maintains that this is broad enough to cover every form of trafficking and that it is not necessary to include all the means of coercion listed in the Protocol, as no one can consent to forced labour or slavery, making the listing of the coercive means with regard to these situations irrelevant.

However, as seen in the examples above, in an unregulated domestic work sector, where the workers, especially migrants, have a vulnerable legal status and are multifariously dependent on their employers, 'use of a position of authority' and 'abuse of a situation of vulnerability' can bring and keep a person in a situation of forced labour or slavery. These can be significant forms of coercion used to keep domestic workers from escaping oppressive situations.

The new *Trafficking Victims Protection Act*, 2000 (TVPA) of the United States is a good example of national legislation that is based on the Trafficking Protocol. In different sections, it separately criminalises trafficking, slavery, as well as forced labour and services, so that a prosecutor can use whichever of these provisions is easier to prove to charge traffickers (Pearson 2002: 119-121). The TVPA also uses a simplified definition of 'trafficking' (section 1590), without listing the means of coercion, as suggested by Jordan (2002). However, it includes both physical and psychological means of coercion in the section on forced labour (section 1589), which, as mentioned above, can be used to constrain persons in relatively powerless positions.

However, in countries where legislation on trafficking already existed before the adoption of the Trafficking Protocol (2000), such as Thailand, Philippines, Cambodia, there is great lack of clarity around the definition of the crime of trafficking. Most of these laws are based on the concepts of the 1949 *Convention for the Suppression of the Traffic in Persons and of the exploitation of the prostitution of others*, which, in effect, criminalise the activities around prostitution as such. Even some of the more recent (reformed) legislation-for example, in the Netherlands and United Kingdom-only deal with trafficking for prostitution, thereby implying all the complicated attitudes and concepts towards prostitution and prostitutes as victims of violence (Pearson, 2002: 37-39).

##### **2. An equally important aspect of the Protocol is the provision for human rights protection for victims and witnesses. Although the Crime Convention itself clearly states that assistance and protection measures should be taken, these are usually the least of the concerns of governments.**

An instance of such protection is the temporary stay provision for victims of trafficking, which is generally

<sup>44</sup> According to Hong Kong's Employment Agency Regulations, Cap. 57A, employment agencies are permitted to charge not more than ten percent of the worker's first month's wages as recruitment fee.

applicable only when the 'victim' cooperates with the prosecution process. As soon as she is no longer necessary for this purpose, she has to leave the country. This provision is in place only in the Netherlands,<sup>45</sup> Belgium, USA and Italy,<sup>46</sup> where victim-witnesses are allowed a temporary stay in the country, if they agree to testify in the process against the alleged trafficker; they may stay in a shelter and receive basic social securities. In Belgium, Italy and USA, they may work, but not in the Netherlands (Pearson, 2002).

In Hong Kong, domestic workers who have filed labour dispute or criminal cases against their employers or agencies are already permitted to stay in the country until their cases are resolved, which may sometimes take up to a year. Also in this case, the women are not allowed to work. There are no provisions for any financial or social assistance from the government and they are dependent on the ad hoc charity of others, such as NGOs and religious organisations. In Asia, only Thailand has provisions for assistance and protection of victims of trafficking, but this is in a non-binding legal agreement.<sup>47</sup>

To apply the Trafficking Protocol to the domestic work sector in this regard thus requires advocacy work, including advocacy for good legislation, assistance and protection provisions, and above all, implementation of the adopted measures.

## **E. Two main criticisms of the trafficking framework**

### **1. Criticism of the 'anti-crime' and 'anti-migration' thrust of anti-trafficking policies.**

This critique emphasises that migration is the general phenomenon and trafficking is only a mode of migration. Over-emphasising trafficking and taking it out of context (in relation to migration) is strategically counter-productive in the fight for human rights for the following reasons:

- Trafficking puts migration in a crime control, crime prevention context, rather than talking about migrants' human rights first and then talking about trafficking in the context of human rights; and
- Trafficking is being used by governments as a vehicle to develop more restrictive approaches to migration in general.

(Patrick Taran, Migrants' Rights International, at the 6th Regional Conference on Migration, March 2000, Thailand; cited by AMY 2000)

### **2. Criticism of the 'victim paradigm' inherent in the anti-trafficking framework**

This critique holds that the designation 'trafficked person' imposes a victim identity. The whole discourse around the definition of trafficking, culminating in its final framework as a 'transnational crime', including the formulation of specific protections and humanitarian considerations for 'trafficked persons', requires the definition of the 'victim' and the perpetrator or 'trafficker'. Prostitutes' rights advocates are the most vociferous about this, because of the traditional conflation of trafficking with the exploitation of prostitution, as (iii) defined in the 1949 UN Convention on Trafficking (now supplanted by the Trafficking Protocol). The anti-trafficking advocacy was seen as harming and obstructing the movement for recognition of the legitimacy of sex work because of its focus on the violations of rights, in spite of concomitant calls for strengthening the rights of migrant workers, including those in the sex industry, as the best way to reduce their vulnerability to trafficking practices.

## **F. Comments on the two criticisms above**

### **1. Trafficking and migration**

Both critiques are grounded, since there are many examples to show how governments are generally more inclined to take repressive and restrictive measures in addressing migration issues, under which most governments place the issue of trafficking. Measures against 'trafficking' based on this approach, both in sending and receiving countries, are aimed at stopping illegal migration, and not principally to protect the rights of the person(s) involved.

The argument that tightening immigration controls will also serve to protect migrants' rights is fallacious, since the policy requirements for the two objectives are totally different, if not completely contradictory. On the contrary, tightening immigration controls increases the dependence of migrants on middle-agents, who might not be bona fide, thus increasing possibilities for human rights abuses, including trafficking. All migrant workers, including sex

<sup>45</sup> In the Netherlands, the temporary stay provision is not available to migrant domestic workers, but only those trafficked for the sex industry.

<sup>46</sup> In Italy, the temporary stay provision is also available to victims of trafficking who do not testify, but are willing to participate in a social integration programme under Art. 18 of the Immigration Law--Law 286 of 1998.

<sup>47</sup> Memorandum of Understanding on Common Guidelines of Practices among Concerned Agencies for Operation in Case Women and Children are Victims of Human Trafficking, B.E. 2542 (see Pearson 2002: 174)

workers and domestic workers and workers in other informal sectors, experience the criminalising effect of anti-migration policies, even though they may be couched in terms of 'regularising' and 'managing' migration flows as a means to protect the rights of 'regular' migrants.

The relation of trafficking to migration is that 'trafficking' is a crime that occurs in the context of the movement of people, both within and across national borders. Indeed, exploitation and migration are not essentially linked, but the aim of the Protocol is to address the forms of exploitation, which take place when people are on the move. It is those who are not from the privileged class, sex or 'race' who face the most obstacles when they attempt to exercise independently their freedom of movement. It is their dependence on others to facilitate their movement, which renders them vulnerable to any criminal intentions of those who organise their migration and labour recruitment.

The activities of migrant labour brokerage-recruitment, transportation, transfer, harbouring or receipt of persons-do not constitute 'trafficking' in themselves. They can be seen as the activities of normal labour brokerage, when the worker is fully informed about the nature and conditions of work for which she/he is contracted and when there are concrete and negotiated contractual agreements as to payments and other obligations of both parties. These activities are punishable when they are carried out using violent or coercive means, with the intent of placing or keeping a person in an exploitative situation.

## **2. Trafficking, crime prevention and human rights**

It is also true that in a strategy to stop violations of human rights it is necessary to identify the 'victim' and the 'perpetrator'. This in itself can be damaging to efforts to create and promote an empowered image, as well as public recognition of informal female labour, particularly sex work, as legitimate work. The argument can also be extended to the organising strategies of domestic workers.

The fact that trafficking is formally integrated into the sphere of crime prevention does not mean that it has nothing more to do with human rights. Serious crimes that violate the physical or psychological integrity of persons, or their life-security are indeed violations of human rights. Every society must take steps within the legal system that is operable to combat these violations and protect every one whose rights are thus violated. It is a recognised principle of international human rights law, reflected in Article 2.3 of the ICCPR and Articles 2 and 3 of CEDAW, that states have a duty to protect the rights of individuals to exercise their human rights, and to investigate alleged violations of human rights, punish violators and provide effective remedies to victims of human rights violations (Haverman and Wijers, 2001).

Conversely, victims of violations should be encouraged and assisted to exercise their rights to demand redress and reparation or compensation. This necessitates the existence and accessibility of relevant legal mechanisms, including relevant legislation.

The legal notion of a 'victim of crime' is not necessarily a denotation of passivity and the possibility of legal action to obtain redress may bring a sense of vindication. Even a person who has escaped from a 'trafficked' situation in the past can still start a legal process against the perpetrator as long as the crime is not superannuated.

## **G. Conclusion**

The Trafficking Protocol can be used as an instrument to criminalise and combat 'forced labour, slavery and slavery-like practices and servitude' in domestic work when, as in the US, national legislation under the Protocol explicitly criminalises forced labour and slavery. As with other international instruments, the application of the Trafficking Protocol requires its integration into national legislation. This entails much legal advocacy work, especially to ensure that the definition of trafficking which is formulated for national legislation will cover the relevant crimes and that the legislation will not contain provisions which would be detrimental for the situation of domestic workers.

Such national legislation should include at least the following:

- A definition covering both exploitative labour brokerage and exploitative working conditions (including trafficking, forced labour and slavery-like practices).
- Trafficking within and across borders.
- Human rights protections and measures for assistance for victims and witnesses.
- Anti-corruption provisions.
- Provisions for the confiscation of assets of traffickers (where these assets represent the profits of forced labour and slavery to be used to compensate the victims).

## Section 4

### Conclusions and strategy recommendations

Section 1 of this paper describes the specific vulnerabilities of domestic workers, indicating the different factors that impact on the conditions experienced by domestic workers, including men, women, children, migrants and non-migrants. The 'red thread' that runs through all the evidence reveals issues of structural insecurity and vulnerability to exploitation and abuse, deprivation of basic freedoms and rights, as well as systemic constraints, which prevent workers from leaving oppressive work situations which can amount to forced labour.

Section 2 focuses on the long-standing and growing concern of the international community for the human rights and labour rights of workers. This is manifested in the range of international standards promulgated and in the continuing search for more effective strategies and measures to address as fully as possible the specific situation of domestic workers. One call, which is being taken up in many regions of the world, is for the formulation of specific regulation on domestic work to address all the structural and systemic causes of the vulnerability of workers in this sector.

In the same search for more effective ways to protect the rights of domestic workers and to prevent the structural threat of trafficking, forced labour and slavery, Section 3 discusses the applicability of the new UN Trafficking Protocol.

#### A. Conclusions

Summing up the discussions in the previous sections, the following factors systematically contribute to the vulnerability of domestic workers-including nationals and migrants, men, women and children-resulting in serious violations of their human and labour rights, in many cases leading to forced labour and slavery-like conditions of work.

#### Factors of relevance to all domestic workers, including children

- Non-recognition of domestic work as work (e.g. issues of non-regularisation under labour laws, insecurity of employment and livelihood, vulnerability to exploitation, forced labour, debt bondage, multiple dependencies on employers and placement agencies).
- The impunity enjoyed by the perpetrators of human and labour rights violations (e.g. government agencies, recruitment agencies, employers), when there is no or insufficient access to redress and compensation for the domestic worker, and when the existing legal mechanisms do not work adequately and/or efficiently and without discrimination.
- Discrimination in working conditions and remuneration between migrant and national workers, between migrants from different countries, and between men and women domestic workers.
- Limitations in the choice of work or employer for different groups of domestic workers.
- Specific conditions of domestic work-especially the hidden nature of domestic work in the employer's house, irregular hours of work, and so on (see Sections 1 and 2 above).

#### Factors of particular relevance to child domestic workers

- The lack of a legal identity (e.g. issues of birth registration, basic rights, registration as child workers, extreme 'invisibility' of children in domestic work, especially when they migrants).
- Extreme imbalance of power between adult employers and child workers (e.g. lack of payment amounting to slavery and slavery-like conditions, physical and psychological abuses).
- Low prioritisation by governments and society concerning the rights of children.

#### Factors of particular relevance to women and girl domestic workers

- Patriarchal power relations (e.g. issues of vulnerability to sexual abuse and rape, exacerbated by their hidden worksite, extra restrictions on mobility, conflicting gender roles).
- Different types of work for men and women in domestic service (e.g. only men are taken on as gardeners, chauffeurs, watchmen, and sometimes as (head) cooks, while women usually do the cleaning, washing clothes and caring for children, the disabled and the elderly).

### Factors of particular relevance to migrant domestic workers

- Restrictive and discriminatory labour migration policies (e.g. issues of state control and corruption, collusion of government officers, dependence on agencies and employers).
- Compulsory live-in system (e.g. issues of personal privacy, right to a personal life, isolation, vulnerability to abuse by employers, physical control on freedom of movement by employers and agencies).
- Restrictions on choice of employers and type of employment (e.g. issues of possibility to leave oppressive/exploitative situations, skills development possibilities).
- Dependence of immigration status on employment status (e.g. time limitation (usually two weeks) for migrants to find a new employer, subject to the approval of the Immigration Office).
- Non-recognition of the educational and other qualifications of migrant domestic workers.

The combination of these factors results in a systemic grip on domestic workers as a group, keeping many (as yet unknown numbers) in illegal confinement, debt bondage and forced labour and slavery-like conditions for varying periods of time. In extreme cases, serious physical and psychological damage, suicides and homicides of domestic workers have been reported. These reports reveal a pattern, which indicates that the exploitation and abuse of domestic workers is of a structural nature.

Despite this, for millions of women and children all over the world, domestic work is still one viable economic option. Just like all workers everywhere, workers in the domestic work sector demand:

- Recognition of their status as workers.
- Safe and humane conditions of work.
- Secure legal employment and immigration status.
- Mechanisms to eliminate discrimination with regard to their status and conditions of employment.
- Respect as human persons who are entitled to the rights accorded all human beings, in accordance with international human rights and labour standards.

It is thus important to bear in mind that regulatory efforts should not result in the condemnation of domestic work and labour migration. In spite of structural vulnerabilities, a significant number of migrant domestic workers do manage to exercise independence and autonomy, to escape oppressive discrimination, and to benefit from their working experience. The aim here should be to ensure that all domestic workers, national and migrant, should benefit likewise in a systematic manner, and not just through random chance.

### B. General strategies

A human and labour rights framework for analysis and action on domestic work issues should include:

1. Application of International UN Human Rights Standards and International Labour Standards (ILO Conventions and Recommendations), and **improvement of their mechanisms for monitoring and implementation** for the protection of domestic workers' human rights.

Of special relevance to the focus of this meeting are:

- ILO Forced Labour Conventions no. 29 and 105.
- ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour no.182).
- UN Convention on Slavery, Servitude, Forced Labour and Similar Institutions and Practices (1926) and the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956).
- International Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990);
- UN Trafficking Protocol, supplementary to the UN Transnational Crime Convention (not yet in force).

2. Further research to understand and address holistically the complex **gender, class, ethnic and migration implications** of the contemporary paid domestic work system in the context of the human struggle for equality and non-discrimination.

3. Advocacy for **national labour legislation and mechanisms**, including:

- Adoption of specific legislation on domestic work, which recognises and regulates the conditions of work in the domestic work sector, and upholds all the rights of domestic workers-men, women and children-according to international human and labour rights standards.

- Anti-trafficking legislation to implement the UN Trafficking protocol to protect domestic workers from forced labour, slavery and slavery-like practices.
4. Advocacy for national and regional **immigration legislation, policies and mechanisms** to recognise the roles, rights and needs of migrant workers and their families, in accordance with, specifically, the UN Migrants' Convention, as well as all other international human rights standards which may not be integrated into this Convention.
5. Advocacy for **reform of national judicial systems/processes** in order to make them more responsive to the rights of domestic workers, whether national or migrant and to ensure accessible and effective channels and mechanisms for obtaining redress and compensation in cases of physical and psychological abuse, infringement of labour and human rights, including the right to be free from forced labour, slavery and slavery-like practices.
6. Support (in expertise, financial and other resources) for the **organisation of domestic workers**, so that they can engage in collective bargaining, undertake other collective measures to defend and enhance their basic human and labour rights and participate fully in the formulation of policies and measures which affect their work and lives.
7. Creation and maintenance of **systems of support and assistance** to domestic workers whose rights have been violated, who are engaged in legal or political processes to obtain redress and compensation for specific violations of their rights, and who are in particularly vulnerable positions, especially migrant women and children.
8. Development of **prevention strategies** which are designed to:
- Remove those laws, policies and eliminate those practices that contribute to the vulnerability of domestic workers, both national and migrant.
  - Remove the obstacles and constraints in the domestic work site, which prevent domestic workers from escaping from situations of exploitation.

For each of these eight strategies, specific action recommendations can be made for different agencies, taking into consideration the needs of specific groups in domestic work. Discussions during the meeting could lead to a common list of recommendations.

### C. Two specific strategies

Two specific strategies have been considered in this paper:

- Specific regulation to regulate the domestic work sector.
- Application of the trafficking and forced labour framework to address situations of forced labour, slavery and slavery-like practices in domestic work.

#### 1. Specific regulation for the domestic work sector

The call for specific regulation to address the specific issues of the living and working conditions of domestic workers is becoming stronger. Significant research has been done, especially under the auspices of the International Labour Organisation to prepare the ground for concrete action in this direction. (See Section 2 above) Blackett (1996) argues the following:

- General forms of regulation, even if they include domestic workers, often continue to perpetuate domestic workers' invisibility.
- General regulations largely ignore the specificity of the complex working and living situation of domestic workers and do not expressly consider their needs, especially those arising from living in the house of the employer, and does not protect them.
- Specific regulation, first and foremost, is a recognition of the social importance of domestic work and valorises it.

Blackett cautions that the above can be achieved only with the support of the following:

- The mobilisation and organisation of domestic workers into unions or associations, as well as the organisation of public support, in order to guard against even more unfavourable regulations coming into force.
- Strong mechanisms of enforcement that are accessible to domestic workers.

## **2. Application of the trafficking and forced labour frameworks to address situations of forced labour, slavery and slavery-like practices in domestic work.**

The Trafficking Protocol, supplementing the UN Convention on Transnational organised crime, expressly addresses trafficking in persons for exploitation, characterised by forced labour and slavery-like conditions of work.

Despite many reservations as to its relevance and efficacy, it seems logical, from strategic considerations, to use all possible means available to combat situations of forced labour, especially in the elusive domestic work sector. The new US anti-trafficking legislation-Trafficking Victims Protection Act 2000-in line with the Trafficking Protocol, is an example of good practice in this area.

A legal advocacy strategy will also be needed to promote the adoption of domestic legislation on trafficking which would comply with the provisions of the Protocol and address situations of forced labour, as well as ensure that all assistance and protection provisions for victims are made mandatory. Here, Blackett's cautionary remarks also apply.

### **D. Recommendation: a three-prong strategy for the elimination of forced labour in domestic work and the protection of the rights of domestic workers.**

From the discussion of Sections 2 and 3, as summarised above, it would seem necessary to combine both the regulation of domestic work under a labour regime and the effective combat of forced labour and slavery-like conditions of work through prosecution of the criminal activities that promote them. On the one hand, regulation without penal sanctions is 'without teeth'; and on the other hand, for effective criminal prosecution, it is necessary to carefully circumscribe the crime that should be punished. For this, it is necessary to distinguish between the legal norm and the criminal deviant and hence punishable situation. Thus, regulation of the domestic work sector is necessary for the punishment and elimination of forced labour, although this is not to say that only regulation by itself will achieve this. As pointed out in previous sections, implementation of the adopted measures remains a big problem in this sector, which will have to be addressed.

In addition, heeding Blackett's caution and from the shared experiences of advocacy work, the organisation and participation of domestic workers themselves is essential for the success of any strategy on their behalf. The innovative 'collectivisation' of domestic workers is exactly the element that is needed to counter the isolation and invisibility of their situation.

Thus what is needed is a three-prong strategy combining the three elements above-namely, regulation of the domestic work sector, application of the Trafficking Protocol and innovative labour organising.



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Anti-Slavery International  
Thomas Clarkson House, The Stableyard  
Broomgrove Road, London SW9 9TL

Tel: **+44(0)20 7501 8920** Fax: +44(0)20 7738 4110  
e-mail: [antislavery@antislavery.org](mailto:antislavery@antislavery.org)  
website: [www.antislavery.org](http://www.antislavery.org)