

Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East

Gwenann S. Manseau *

Abstract

This article discusses domestic and international responses to the issue of abuse of female domestic workers in the Middle East, and concludes that a standard working contract, such as that in use in Jordan at this time, provides a promising solution. The article begins with a brief overview of the migrant labour situation in the Arabian Gulf, the costs and benefits to workers who travel to the region, and the increasing feminisation of the workforce due to the demand for domestic workers. It then describes the conditions of employment for domestic workers, including the sponsorship system in place in Arab countries for temporary workers and its negative effects on working conditions in the home. Domestic workers are ill-protected by cultural and legal structures in both receiving and sending countries. Ultimately, despite the far-reaching reservations based on Islamic Shari'ah law that many Arab countries have made to human rights treaties, international law still requires them to monitor the private sector to prevent abuse of workers by employers. Just such regulation could be achieved through a standardised working contract which could help towards improving workers' bargaining power, allow workers to bring complaints to a judicial authority, provide for fairer and more efficient judicial proceedings, and encourage domestic and international monitoring of the enforcement of judgments.

1. Introduction

Since the 1970s, migrant labourers, especially those who perform domestic work, have been in high demand in the Middle East. Currently, approximately 10 million migrant workers, primarily from Southeast Asia, South Asia or Africa, live and work in the countries of the Arabian Gulf region. Their native countries benefit greatly from these workers' remittances and encourage migration; the host countries also benefit from cheap labour but provide almost no protection against abuse of workers by the private sector that hires them. The workers themselves flock to the region for the promise of high salaries, but as temporary workers tied to their employers, they are frequently placed in positions of extreme vulnerability with little recourse to justice. This article argues that one solution to the problem of abuse of domestic workers is to establish and enforce a standard working contract for all domestic workers in a country.

* J.D., University of Virginia School of Law, 2005; A.B., Princeton University, 1996. I would like to thank the following for their valuable assistance: Ray Jureidini, Simel Esim, Shatha A. Mahmoud, Margaret L. Satterthwaite, Rip Verkerke, and the Solidarity Center.

In Part 2 of this article, I give a brief overview of the migrant labour situation in the Arabian Gulf, the costs and benefits to workers who travel to the region, and the increasing feminisation of the workforce due to the demand for domestic workers. Part 3 describes the conditions of employment for domestic workers, including the sponsorship system in place in Arab countries for temporary workers and its negative effects on working conditions in the home. Part 4 assesses the structural and legal implications of migration to show how domestic workers are ill-protected by both receiving and sending countries. Ultimately, despite the far-reaching reservations based on Islamic Shari'ah law that many Arab countries have made to human rights treaties, international law still requires them to monitor the private sector to prevent abuse of workers by employers. Just such regulation could be achieved through a standardised working contract that is brought into line with existing human rights standards, supported and closely monitored by sending and receiving countries and an international body, and required in order for employers to procure work permits. Standard contracts would improve workers' bargaining power, allow workers to bring complaints to a judicial authority, provide for fairer and more efficient judicial proceedings, and encourage domestic and international monitoring of the enforcement of judgments.

2. Background

The 1973 oil boom in the Arabian Gulf region created an unprecedented demand for labour in the oil, construction and industrial sectors whilst rising standards of living for citizens of Middle Eastern countries created a demand for domestic workers in the home.¹ While in the 1960s and early 1970s, oil exporting countries in the Middle East attracted manpower from the surrounding Arab countries, local labour markets could not keep pace with capital and labour intensive programs meant to develop the infrastructure and diversification of Middle Eastern economies.² This demand for labour has translated into high numbers of migrant labourers travelling to the Middle East in search of high-paying jobs. Most workers who travel to Middle Eastern countries for employment are from the countries of South and Southeast Asia, especially the Philippines, Indonesia, Sri Lanka, India, Pakistan, and Bangladesh. To a lesser extent, migrant workers also travel from other countries such as Egypt, Sudan, Ethiopia and the Seychelles.³ These workers travel mainly to the countries of the Arabian Gulf and also to Jordan and Lebanon. The six states of the Gulf Cooperation Council (GCC), Bahrain, Kuwait, Qatar, Oman, Saudi Arabia, and the United Arab Emirates (UAE), host approximately 10 million foreign workers, with the largest number (8.8 million) in Saudi Arabia.⁴ In several cases, the number of foreign workers in the country exceeds the native population substantially.

¹ Eelens, Mook and Schampers, 'Introduction', in Eelens, Schampers & Speckmann (eds), *Labour Migration to the Middle East: From Sri Lanka to the Gulf* (London: Routledge, 1992) 1.

² Ibid.; Serageldin et al., *Manpower and International Labor Migration in the Middle East and North Africa* (New York: Oxford University Press, 1983) 3.

³ See Human Rights Watch, *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia*, 2004, at 12 ['HRW Saudi Arabia Report'] available at: <http://hrw.org/reports/2004/saudi0704/>; and Moreno-Fontes Chammartin, 'Women Migrant Workers' Protection in Arab League States', in Esim & Smith (eds), *Gender and Migration in Arab States: The Case of Domestic Workers* (International Labour Organization, 2004) 11.

⁴ HRW Saudi Arabia Report, *ibid.* at 11-2.

Table 1: Percentage of foreign workers in labour force in certain Arab states.

Country	Saudi Arabia	UAE	Bahrain	Kuwait	Lebanon
% of Labour Force	67% (2004) ⁵	> 80% (2000) ⁶	63.6% (2000) ⁷	82% (2000) ⁸	> 30% (2002) ⁹

Temporary work overseas may be very beneficial to workers, since jobs in the Middle East offer wages that eclipse those available in sending countries, and provide employment opportunities which may not exist at home. Increased financial stability available to workers after working for several years in the Middle East may enhance a worker's social status at home and provide a means of support for children, education and investment that would be inaccessible otherwise.¹⁰ However, workers are frequently victims of exploitation by employers, government officials and recruiters, and they are vulnerable to financial, physical and sexual exploitation that may reduce their earnings and social worth to less than they had when they arrived.¹¹ Further, they are unprotected by legal or procedural safeguards.¹² Though migrant workers are often able to support their families financially by travelling for work, the social cost of their absence to their families can be extremely high.¹³ As one report described, 'the exodus has reconfigured family life. Women dispense maternal love through letters, cash and cassettes sent home. Divorce, children leaving school, husbands turning to alcohol, and child sexual abuse have become routine by-products of the women's absence.'¹⁴ There is also evidence that while households experience a higher standard of living during the period of migration, this cannot be maintained after the migrant's return. The long-term effects of migration are meagre and often lead to dependency on Middle Eastern remittances.¹⁵ This dependency, compounded with the difficulty women face in re-integrating into their home, society and economy, especially in finding employment, compels women to return to the Gulf to again find employment.¹⁶

Despite the exploitation that migrants face, migration from the Philippines, Sri Lanka, Indonesia, Bangladesh and India to countries of the Middle East has increased dramatically in the last few decades. Notably, the composition of the workforce has shifted markedly towards increasing feminisation: 'the percentage of women workers in the total foreign labour force has

⁵ Ibid. at 12.

⁶ Sabban, 'Women Migrant Domestic Workers in the United Arab Emirates', in Esim & Smith (eds), supra n. 3, 87.

⁷ Sabika al-Najjar, 'Women Migrant Domestic Workers in Bahrain', in Esim & Smith (eds), supra n. 3, 25.

⁸ Godfrey, et al., 'Migrant Domestic Workers in Kuwait: Findings Based on a Field Survey and Additional Research', in Esim & Smith (eds), supra n. 3, 42.

⁹ Ray Jureidini, 'Women Migrant Domestic Workers in Lebanon', in Esim & Smith (eds), supra n. 3, 65.

¹⁰ Eelens and Schampers, 'Survival Migration: The Sri Lankan Case', in Eelens, Schampers & Speckmann (eds), supra n. 1, 35.

¹¹ See infra Section 3B.

¹² See infra sections 4A and 4B.

¹³ One 1984 survey conducted in Sri Lanka found that over three-quarters of the females departing for foreign employment were married. From an average family size of 5.7 persons, 90 per cent of the women left children behind, many of them under five years old. Eelens, Mook and Schampers, supra n. 1 at 6. See also Heyzer, 'Introduction: Creating Responsive Policies for Migrant Women Domestic Workers', in Heyzer et al. (eds), *The Trade in Domestic Workers: Causes, Mechanisms and Consequences of International Migration* (Kuala Lumpur, Asian and Pacific Development Centre, 1994) xxix; Ehrenreich and Hochschild, 'Introduction' in Ehrenreich and Hochschild (eds), *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* (New York: Metropolitan Books, 2003) 1; and Rhacel Salazar Parreña, 'The Care Crisis in the Philippines: Children and Transnational Families in the New Global Economy', *ibid.* at 39.

¹⁴ Waldman, 'Sri Lankan Maids Pay Dearly for Perilous Jobs Overseas', *New York Times*, 8 May 2005.

¹⁵ Eelens and Schampers, supra n. 10 at 35.

¹⁶ Heyzer, supra n. 13 at xxix.

doubled or tripled in GCC countries compared to the mid 1970s and early 1980s. ... [I]n Saudi Arabia and the United Arab Emirates ... the stock of women migrants has multiplied to represent five to seven times the percentages they used to represent in the mid 1970s and early 1980s.¹⁷ The data show that by 2000, Filipina migrants composed 70 per cent of the total number of migrant Filipinos, and in 2001, Sri Lankan women migrants represented 65 per cent of Sri Lankan migration.¹⁸ In Indonesia the figure is even higher: in 2002, 76 per cent of all legal overseas Indonesian migrant workers were women.¹⁹ This increase in the numbers of women in the migrant labour force is due almost exclusively to the demand for domestic labour, a sector in which the vast majority of workers are women. Interestingly, though the 1991 Gulf War dramatically reduced the demand for male labourers in construction and agriculture, the demand for domestic work showed itself to be inelastic, the product of much deeper social changes.²⁰

Today, domestic work is the single most important category of employment among women migrants to the Gulf states, as well as to Lebanon and Jordan.²¹ Historically, domestic work in Middle Eastern countries was performed by poorer men or women from within the same country.²² This has shifted in the last few decades as increasingly wealthy families have hired domestic workers from overseas. The increase of Arab women in the labour force, and changing conceptions of women's responsibilities, has resulted in a shift in household responsibilities to hired domestic workers.

Scholars have linked the growing dependence on household domestics to the political and social stability of the Gulf states. Kingdoms such as Saudi Arabia and the UAE may be specifically implementing immigration policies that, by importing a labour force, strengthen political power: '[t]he increasing dominance of domestic house workers is part of an unspoken 'bargain' between the state and the emerging civil society, by which the state provides a leisure life in exchange for complete political control.'²³ Further, the cheap and easy availability of female domestic workers serves an important role in perpetuating the traditional societies of Arab states, by keeping the social reproductive roles of women intact and retarding the cultural evolution in male-female roles.²⁴ In this way a nation's immigration practices avoid the need for alteration in state responsibility for care of children and the elderly, 'preserving cultural norms that stress private family responsibility and plac[ing] the practical burden of these tasks on women.'²⁵

¹⁷ Chammartin, *supra* n. 3 at 11. See also Moreno-Fontes Chammartin, *The Feminization of International Migration* (International Labour Organization 2002), 39, available at: www.ilo.org/public/english/dialogue/actrav/publ/129/7.pdf.

¹⁸ Chammartin, *supra* n. 3 at 13.

¹⁹ Human Rights Watch, *Help Wanted: Abuses Against Female Migrant Domestic Workers in Indonesia and Malaysia* (2004) 9 ['HRW Indonesia Report']. Available at: <http://hrw.org/reports/2004/indonesia0704>.

²⁰ Chammartin, *supra* n. 3 at 15.

²¹ *Ibid.* at 13.

²² Al-Najjar, *supra* n. 7 at 26; and Jureidini, *Migrant Workers and Xenophobia in the Middle East* (United Nations Research Institute for Social Development 2003), 1.

²³ Sabban, *supra* n. 6 at 90. However, a political analysis of the role of migrant labour on state authority is beyond the scope of this paper.

²⁴ See Henshall Momsen, 'Maids on the Move: Victim or Victor', in Henshall Momsen (ed.), *Gender, Migration and Domestic Service* (New York: Routledge, 1999) 5: 'the migrant worker is seen as substituting for the labor of the wife.... In this way, domestic patriarchy is maintained, yet, at the same time, society is imposing a backlash on working mothers'.

²⁵ Fitzpatrick & Kelly, 'Gendered Aspects of Migration: Law and the Female Migrant', (1998) 22 *Hastings International & Comparative Law Review* 47 at 65.

The imbalance created by the reliance on increasing numbers of foreigners for essential labour in the community is causing social tensions and a negative backlash in the media against heavy reliance on foreign female domestic workers,²⁶ on the community in general, but also on Arab women in particular.²⁷ Domestic workers have become a scapegoat in the disrupted social order, such that the maltreatment of foreign female workers, whether through restriction of freedom of movement and organisation, lack of coverage under labour laws, or physical, verbal, and sexual abuse, has become normalised into the structure of these societies.²⁸ Notably, the localisation of maids from Africa, South Asia, and Southeast Asia, has resulted in a radicalisation of domestic work. Domestic work in the GCC countries is now only performed by people of African or Asian origin, whereas workers who are nationals of the receiving countries refuse to perform this work even if persistently poor and unemployed.²⁹ In some countries like the UAE and Saudi Arabia, racialisation of domestic work can simply be described as a continuation of the social structure of slavery, which was legal in these countries until the 1960s.³⁰

3. Conditions of Employment for Migrant Workers

Despite the benefits of domestic work to migrant workers, many become victims of exploitation by employers, the government and recruiting agents. Workers routinely experience humiliation and xenophobic behaviour. At times abuse can reach the level of basic violations of human rights. Even when workers are not victims of sexual or physical violence, treatment of domestic workers that has become accepted as normative, such as the lack of freedom of movement, violates basic labour and human rights. Exploitation of workers is in large part a result of the legal structures of the receiving Arab states, which have been crafted to ensure the temporary nature of domestic work contracts and the resulting lack of protection of these workers under the law.

A. Sponsorship of Foreign Workers

All foreign workers come to the Middle East as contract workers under the *kafala*, or 'sponsorship' system. In this system, employers or other individuals sponsor workers to come

²⁶ See for example, Al -Fawzan, Al-Watan, 'The Widening Generation Gap', *Arab News*, 23 April 2005: '[I]nstead of bringing up their children, parents have left the job to maids and modern technology. While unique and treasured family traditions are disappearing, the culture of maids and technology is taking root....How can you expect a child brought up in the maid and technology culture to feel any link with either the older generation or its traditions and values?'

²⁷ See for example, Sabban, *supra* n. 6 at 91: '[A]cademics place the main responsibility for this problem on the mothers themselves, portraying United Arab Emirates women as careless and superficial in their preference for a luxurious life over the wellbeing of their children.'; and Siddiqui, 'A Maid Alone Is a Maid at Risk', *Arab News*, 8 April 2005: 'The maids gradually become nonentities, stuck with sets of spoiled kids who think nothing of them while their mothers go out to work, to the beauty parlour, the mall or a cafe.'

²⁸ See for example, Sabban, *supra* n. 6 at 91: 'The General Director of the Dubai Migration Office states, "United Arab Emirates society suffers from the degrading perception of the foreign female domestic worker. This negative perception is causing major problems in the relationship between the worker and her sponsors."'

²⁹ See Jureidini, *supra* n. 22 at 3.

³⁰ See Sabban, *supra* n. 6 at 88; and HRW Saudi Arabia Report, *supra* n. 3 at 1.

from abroad for a period of (generally) two years, using the services of manpower recruitment agencies in sending countries to find workers. The sponsors must pay a fee to the recruiter and pay for the worker's airfare, all employment visas, work permits, their wages and airfare home.³¹ Saudi Arabia, as is typical, characterises migrant labourers not as immigrant workers, but 'workers by contract'.³² 'Workers by contract' is a loose term and is interpreted in a variety of ways in different countries. In Saudi Arabia, foreign workers must have employment contracts, written in Arabic, signed by the sponsor and themselves in order to be issued a work permit.³³ In other countries in the Middle East, such as Kuwait, contracts may be written or oral.³⁴ In Bahrain, only 44.1 per cent of the house workers interviewed by the International Labour Organisation (ILO) had actually signed contracts prior to their arrival.³⁵

In reality, domestic workers 'do not engage in legal binding contracts that set out their protections, rights, responsibilities, terms of reference to their situation, earnings, hours of work, relationship to the employer or other aspects.'³⁶ For example, in many cases, workers will sign contracts before leaving their home countries. However, contracts signed by workers in the sending country are often confiscated when workers arrive in Saudi Arabia, and replaced by Arabic-language contracts with different terms.³⁷ In the UAE, none of the domestic workers interviewed by the ILO had a contract in her possession.³⁸ In Kuwait, the terms required in a contract 'are at times not adhered to as there have been reports of discrepancies in pay and in the understanding of what tasks would be performed. In addition, ... there is little recourse for workers when a worker's contract is not followed.'³⁹

Sponsors are not necessarily the *de facto* employers of foreign workers and may easily disassociate themselves from sponsorship responsibilities, leaving workers in the lurch when they have complaints or need to return home.⁴⁰ Once the two year work period is over, or if workers lose their jobs for any reason, workers must find another employer willing to sponsor them, or return to their nation of origin within a short time. If they fail to do this they may be imprisoned for violating immigration laws.⁴¹ Unscrupulous employers sometimes do not renew the worker's documents on purpose and falsely accuse the employee of theft in order to render the migrant worker undocumented and avoid payment of taxes and the price of an airplane ticket. The worker is then usually jailed without the benefit of due process of law and financially penalised for running away.⁴²

Recruiters in sending countries assist in the *kafala* process by finding workers. They frequently charge high fees to prospective employees to obtain employment visas, averaging between \$2000 and \$2500 in Bangladesh and India, although fees are sometimes lower in other sending countries.⁴³ The heavy fees incurred by workers on leaving their countries usually

³¹ Shadid et al., 'Labour Migration and the Policy of the Gulf States', in Eelens, Schampers & Speckmann (eds), supra n. 1, at 71-2.

³² HRW Saudi Arabia Report, supra n. 3 at 19.

³³ Ibid. at 20.

³⁴ Godfrey et al., supra n. 8 at 53.

³⁵ Al-Najjar, supra n. 7 at 32.

³⁶ Sabban, supra n. 6 at 98.

³⁷ HRW Saudi Arabia Report, supra n. 3 at 20.

³⁸ Sabban, supra n. 6 at 98.

³⁹ Godfrey et al., supra n. 8 at 54.

⁴⁰ HRW Saudi Arabia Report, supra n. 3 at 19.

⁴¹ Shadid, supra n. 31 at 72-3.

⁴² Chammartin, supra n. 3 at 21.

⁴³ See HRW Saudi Arabia Report, supra n. 3 at 12-3; and HRW Indonesia Report, supra n.19 at 23.

causes them to enter into debt, either to banks or relatives, before leaving their homes. The debt causes workers to work for a certain period of time without a salary to cover these fees.⁴⁴ This system is, in practice, debt bondage, where a worker's labour is demanded as a means to repayment of a loan, or of money given in advance.⁴⁵ Bonded labour has been defined as a 'slavery-like' practice that is banned by the ILO's Convention on the Abolition of Forced Labour.⁴⁶

Debt bondage is in fact one of the only means for poor women to seek jobs abroad, since the sums required to pay for work permits and travel are usually beyond their means. In Indonesia, for example, women are channelled into domestic work because it is the cheapest option at the beginning:

[w]hile other migrants who seek employment in plantations, factories, and construction often pay large fees up front, many women choose domestic work because there is no initial fee. Instead, they agree to have the first four or five months of their salary ... withheld. Women who find employment through illegal agents have to pay a large sum, usually 1.5-2 million rupiah (U.S. \$183-244). They typically raise these funds by borrowing money from the agent, village moneylenders, family, or friends at usurious interest rates. Most of the women interviewed ... who had borrowed money had to repay their lenders double the original amount of the loan.⁴⁷

Debt bondage encourages the practice of international labour migration by allowing women in situations of poverty to find jobs overseas and pay off their debts through work. However, the practice also breeds corruption and worsens the economic and social vulnerability faced by domestic workers. One example is the recent situation of a Sri Lankan woman: 'As wrenching as it was to leave her children, shame was prodding her toward Saudi Arabia. She and her husband borrowed \$398 from fellow villagers. The first repayment date had come and gone, and the lenders wanted her gone, too, and earning money.'⁴⁸

The first three months of employment for domestic workers is generally considered a probationary period, during which an employee or employer can terminate the contract if unsatisfied with the working conditions or work performed. However, the ILO reports that although a worker could refuse to work for a new household if she is treated badly, in reality 'when disputes arise the domestic worker is forced to continue working with a sponsor regardless of the situation. Unfortunately, an employer that abuses a domestic worker is never blacklisted from hiring future employees nor do agencies ever refuse their services to such employers.'⁴⁹

It is common for the employer or the sponsor to retain the employee's passport and other identity papers as a form of insurance for the amount an employer has paid for the worker's work

⁴⁴ Chammartin, *supra* n. 3 at 20.

⁴⁵ Anti-Slavery and Development and Peace, 'Debt Bondage: Slavery Around the World', available at: <http://www.devp.org/slavery/bondage.html>.

⁴⁶ Article 1, Abolition of Forced Labour Convention 1957, ILO No. C105; 320 UNTS 291, provides 'Each Member ... undertakes to suppress and not to make use of any form of forced or compulsory labour ... (b) as a method of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; ... (e) as a means of racial, social, national or religious discrimination.'

⁴⁷ HRW Indonesia Report, *supra* n. 19 at 23.

⁴⁸ Waldman, *supra* n. 14.

⁴⁹ Al-Najjar, *supra* n. 7 at 31.

permit and airfare⁵⁰ - a practice that denies workers the freedom of movement guaranteed in the Universal Declaration of Human Rights.⁵¹ As Ray Jureidini points out, the denial of freedom of movement and withholding of passports is:

a normative practice, condoned even by foreign diplomats ... as well as human rights lawyers, priests, and the like. It is generally accepted that the initial investment of the employer justifies this until such time that trust has been established and there is a sense that the risk that the employee will abscond has been minimised.⁵²

B. Working Conditions in the Home

Domestic workers perform all kinds of work in the home: cleaning, cooking, child care and care of the elderly. Often they will accompany the family during outings and provide help for the family's relatives as well.⁵³ Wages are high compared to the wages they would receive in their home countries: about \$120 per month for Sri Lankan housemaids (more than twice what their husbands could make at home),⁵⁴ and up to \$300 for Filipina workers.⁵⁵ Remuneration differs greatly according to nationality, ostensibly depending on language skills and education level. In reality these skills are now no longer as distinguishable by nationality, while wages continue to be determined by country of origin. For example, most Filipina domestic workers receive a higher remuneration than Sri Lankan and Ethiopian nationals.⁵⁶ Non-wage benefits include free housing and sometimes healthcare provisions.⁵⁷ These wages are enough to draw workers from their home countries in the hope of saving and remitting home a large percentage of their salaries, since the promised salaries usually amount to many times the wages they would earn at home. Nonetheless, problems with the payment of wages were cited by a fifth of interviewed workers in Lebanon and in Bahrain.⁵⁸ One newspaper in Saudi Arabia reported that maids working there legally often receive less than 20 per cent of their wages, with the balance going to middlemen who arrange the employment.⁵⁹ In Jordan, the Sri Lankan embassy's first floor is crowded with runaway Sri Lankan domestic workers who are seeking recourse for non-payment of wages. The Embassy official in charge of employment affairs has stated that the biggest problem, for Sri Lankan workers especially, is that they often wait to be paid for their years of service at the end of their term. In many cases, the workers then discover that the employer has no intention of paying any wages at all:

⁵⁰ Shadid, *supra* n. 31 at 72.

⁵¹ See Article 13, Universal

⁵² Jureidini, *ibid* at 71.

⁵³ Chammartin, *supra* n. 3 at 19.

⁵⁴ Waldman, *supra* n. 14.

⁵⁵ Chammartin, *supra* n. 3 at 19.

⁵⁶ *Ibid.* at 19-20.

⁵⁷ In Kuwait, 84 per cent of domestic workers polled were provided with free housing, and 77 per cent had healthcare fees paid by employers. Godfrey et al., *supra* n. 8 at 52.

⁵⁸ See Chammartin, *supra* n. 3 at 18.

⁵⁹ Nahhas, 'Human Black Market Thrives in Cities', *Arab News*, 4 April 2005.

[a] worker might work here 3 or 4 years and have to go back without being paid. This is applicable only for Sri Lankans. They will work so many years without salary, expecting to be paid at the end—but this doesn't happen. More than 85 percent of the cases [that the embassy sees] are like this.⁶⁰

The conditions for domestic workers are also extremely difficult. Domestic workers work an average of over 100 hours weekly, and overtime pay is virtually non-existent.⁶¹ Most workers receive one or two days off per month, if any at all.⁶² Their freedom of movement is strictly controlled and limited by their physical surroundings and Arab/Islamic behaviour codes.⁶³ In Lebanon, for example, '[i]f not actually locked in the apartments, employees are denied access to keys and are usually forbidden to leave without express permission.'⁶⁴ Employers or sponsors generally keep the worker's passport and identification papers, rendering them immobile and vulnerable to arrest by authorities.⁶⁵ Domestic workers face the unique problem of being workers in the home who are unable to access support networks, receive or send letters, or worship according to their religion. It is rare that the workers are allowed to go outside, visit friends, or just go for a walk.⁶⁶ In one study, as many as one third of female domestic servants sampled stated that they had no contact at all with friends or relatives during their stay in the Gulf.⁶⁷ This contributes to feelings of isolation and desperation; as one household worker in Jordan said, 'It is like a prison.'⁶⁸

Some NGOs are active in trying to encourage domestic workers to leave their houses of employment for brief periods of time, for educational opportunities, worship and social time. A nun working for Caritas Jordan explained,

We try to visit those inside, try to make them gather in some place to make them have a relaxed time. Sometimes a housemaid doesn't have a free day to go out, or even a few hours. Some employers let maids be free. But we find some houses don't send them anywhere. They should have a little free time, to go to church, but some employers don't like our visits. We see so much exploitation—too much work, no place to sleep, [and very few who have] no food. Some come and are uneducated and don't know what to do. The worst cases, we cannot reach.⁶⁹

The most frequently cited concern by the majority of female migrant domestic workers interviewed by the ILO in Kuwait, Bahrain, and the UAE was the presence of physical, sexual, psychological and verbal abuse.⁷⁰ Domestic workers face serious problems with abuse, and

⁶⁰ Interview with Indranath Rodrigo, Counsellor, Employment & Welfare, Embassy of Sri Lanka, in Amman, Jordan, May 2004 [on file with author].

⁶¹ Chammartin, *supra* n. 3 at 18.

⁶² *Ibid.*

⁶³ Spaan, 'Socio-economic Conditions of Sri Lankan Migrant Workers in the Gulf States', in Eelens, Schampers & Speckmann (eds), *supra* n. 1.

⁶⁴ Jureidini, *supra* n. 9 at 71.

⁶⁵ Chammartin, *supra* n. 3 at 20.

⁶⁶ *Ibid.*

⁶⁷ Spaan, *supra* n. 63 at 97.

⁶⁸ Interview with Kumari, Sri Lankan freelance domestic worker in Amman, Jordan, May 2004 (on file with author).

⁶⁹ Interview with Sister Ursula, Caritas Jordan, in Amman, Jordan, May 2004 (on file with author).

⁷⁰ Chammartin, *supra* n. 3 at 20. The data for Lebanon showed a lower percentage of women concerned about abuse (37 per cent).

vulnerability to sexual violence by male employers, as well as by other male members of the household or staff, because of their isolation. With no telephone access, control over correspondence and social isolation from other domestic workers or friends, domestic workers are rarely able to escape or seek help when needed.⁷¹ Though by no means a new problem, several recent high-profile cases of physical and sexual abuse of domestic workers have generated shock and discussion of the problem in Saudi Arabia and the rest of the Middle East, for example, several Indonesian maids have been subjected to sadistic torture and rape by their employers;⁷² and a Sri Lankan maid, one of many recent abuse cases in a shelter in Sri Lanka, told of being assaulted daily by her Lebanese male and female employers who ‘cut her with a knife, kicked and stomped on her, tied her hands with rope and denied her food.’⁷³ One commentator in Saudi Arabia acknowledges that ‘[p]ouring hot water on [the maids], burning them with hot irons and cigarettes, throwing acid in their faces and beatings (blows and kicks) are regularly reported in dailies worldwide.’⁷⁴ Abuse of workers is a common response by employers frustrated with the quality of work performed by maids, and this reaction is anticipated by workers. In a training facility for Sri Lankan women, the prospective domestic workers are told that if their housework is faulty in any way, “‘Mama,” as the aspiring maids [are] instructed to call their female employers, “will be angry and she will hammer and beat you.” ... “Mama beats you and burns you - when you do anything wrong.”’⁷⁵ The reported cases are just the tip of the iceberg—‘Reports of foreign workers ... being mistreated, denied their wages or sexually abused have become so routine that they rarely attract attention.’⁷⁶ It is only some of the most gruesome and shocking cases that receive any attention from the media and authorities.

Domestic workers do frequently complain about exploitative situations: in fact, in 1996, the Sri Lankan Bureau for Foreign Employment reported 8,087 complaints presented by domestic workers: one half of these were from Saudi Arabia, and other countries such as Jordan and Oman.⁷⁷ In Saudi Arabia, 19,000 domestic workers fled from their employers citing mistreatment, non-payment of wages and other grievances in 2000, and the number of complaints received per year has increased since then.⁷⁸ When workers complain, there are few outlets in either labour exporting countries or labour receiving countries that exist to provide an effective voice and remedial action for domestic workers. For example, in Kuwait, most workers complain to their sponsor about salary or physical abuse problems; but in situations in which the sponsor does nothing to help, few other means of assistance are available: ‘complaints to the embassies are rarely successful and complaints to the Kuwaiti government are always unsuccessful.’⁷⁹ In Jordan, one domestic worker stated, ‘I never go to the embassy for troubles. I cannot believe that our people would go to the police [either].’⁸⁰ If women do seek help at their

⁷¹ Chammartin, *supra* n. 3 at 20.

⁷² Ali Khan, ‘Another Maid Fights to Stay Alive After Rape, Torture’, *Arab News*, 10 April 2005; and Hardy, ‘Saudi Arrested for Abusing Maid’, *BBC News*, 1 April 2005, available at: http://news.bbc.co.uk/1/hi/world/middle_east/4400895.stm.

⁷³ Waldman, *supra* n. 14.

⁷⁴ Siddiqui, *supra* n. 27.

⁷⁵ Waldman, *supra* n. 14.

⁷⁶ Hardy, *supra* n. 72.

⁷⁷ Chammartin, *supra* n. 3 at 17.

⁷⁸ *Ibid.*

⁷⁹ Godfrey et al., *supra* n. 8 at 56.

⁸⁰ Interview with Kumari, *supra* n. 68.

country's embassy, they may be caught in a legal and financial 'no man's land', with few alternatives: 'Many housemaids who run away from their employers are kept in limbo at Sri Lanka's embassies because no one wants to pay their way home. Last year, after their plight was publicized, the government airlifted home 529 maids who had been living for months, packed as tightly as in a slave hold, in the basement of the embassy in Kuwait.'⁸¹ Workers who do not seek assistance after running away from abusive or low-paying working conditions find themselves to be illegal workers vulnerable to arrest, part of a thriving black market in maid service that exists to help employers avoid the costs and strictures of the *kafala* system.⁸²

4. Structural and Legal Implications of Migration

Migrant domestic workers are not adequately protected either by national or international legal regimes, leaving them vulnerable to exploitation by their employers, recruiters, and government officials. Protections are nearly non-existent for migrant workers for several structural reasons.

First, financial benefits accrue to countries traditionally known as the labour exporting nations when their workers leave the country and send remittances home. These benefits have resulted in governmental policies of exporting labour with little oversight of workers once they arrive at their country of employment.

Second, receiving countries obtain labour at a low cost that relieves the state from providing more social services such as child care and for the elderly, duties traditionally performed by women in the home. In addition, temporary migrant workers are not covered by labour laws, which reduces threats of organised labour to the non-democratic regimes of the GCC and Jordan and Lebanon. When protective laws are put in place, there is little enforcement.⁸³

Third, international legal instruments have been largely ineffective. The United Nation's Migrant Workers Convention has not been ratified by any receiving country, nor has the ILO Migrant Workers Convention, which supplements the Discrimination (Employment and Occupation) Convention. The ILO conventions specifically exclude legal temporary workers and discrimination based on nationality from coverage.⁸⁴ In sum, '[t]he current dilemma particularly for foreign domestic workers in the Middle East, as in other countries, is that there are no direct references to their occupational status in local labour law or in international conventions that are in force.'⁸⁵

However, certain legal remedies may be fashioned. The major human rights conventions in existence today arguably provide existing protections for female migrant workers despite the

⁸¹ Waldman, *supra* n. 14.

⁸² Nahhas, *supra* n. 59.

⁸³ For example, Saudi Arabia has introduced legislation that prohibits the withholding of migrant passports, but the widespread practice continues. See Jureidini, 'Management and Regulation of Human Resource in the Arab World', in *Arab Migration in a Globalized World* (International Organization for Migration, 2004) 14.

⁸⁴ ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 24 June 1975, 1120 UNTS 324 (ILO Migrant Workers Convention); ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation, 25 June 1958, 362 UNTS. 31 (Discrimination (Employment and Occupation) Convention).

⁸⁵ Jureidini, *supra* n. 83 at 14.

apparent failure of the Migrant Workers' Convention.⁸⁶ When violations of *jus cogens* principles occur, scholars have proposed recourse to international courts of law, or the United States federal courts under the Alien Tort Claims Act.⁸⁷ Scholars have also suggested that countries work through the General Agreement on Tariffs and Services (GATS) to protect low-skilled temporary migrant workers, though a significant obstacle to this plan is the lack of interest in this solution on the part of receiving countries.⁸⁸

However, it is argued that the most practical and potentially effective solution to abuse of domestic workers lies in contract principles that are enforced by state action: enforcement of standard contracts between employers and employees would affect working conditions for domestic workers in ways that current international law cannot reach. The standardisation of working contracts for domestic workers has been attempted most lately by the United Nations Development Fund for Women (UNIFEM) and Jordan, through the 'Special Working Contract for Non-Jordanian Domestic Workers' in place in Jordan since 2003. Other countries may develop similar standard contracts for workers, which would provide recourse for workers to domestic courts. While this solution is not perfect, it provides more transparency to allow governments, NGOs and the workers themselves to improve conditions for domestic workers.

A. Labour-Exporting Countries

Sending countries rely heavily on the financial benefits of the exportation of their labour forces to the Middle East. Remittances from overseas workers reached \$100 billion in 2003.⁸⁹ Remittances are vital sources of national income to many labour exporting countries in South and Southeast Asia. In 2001, migrants' remittances home 'were double the amount of foreign aid and ten times higher than net private capital transfers.'⁹⁰ For instance, remittances received by the Philippines totalled more than \$6 billion in 2000 (much of this amount was from the United

⁸⁶ Satterthwaite, 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers', (2005) 8 *Yale Human Rights & Development Law Journal* 1.

⁸⁷ Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law', (1999) 39 *Virginia Journal of International Law* 303 at 349.

⁸⁸ See Sands, 'Temporary Movement of Labor Fuels GATS Debate', *Migration Information Source*, 1 June 2004, available at: <http://www.migrationinformation.org/feature/display.cfm?ID=231>; see also Dommen, 'Migrants' Human Rights: Could GATS Help?', *Migration Information Source*, 1 March 2005, available at: <http://www.migrationinformation.org/Feature/display.cfm?id=290>

Attempts to improve levels of legal migration within the WTO framework can provide means for individuals around the world to seek legal income in countries where employment is available. By offering new, predictable opportunities for legal migration, particularly for lower-skilled workers, GATS could reduce illegal migration and the human rights violations that come with it, issues that concern all countries and human rights advocates. ... [But] Although Mode 4 could be useful in solving the problems underlying migrant workers' human rights violations, it does not address migrations human dimension. It considers movement of labour essentially in terms of numbers ... and with reference to purely local situations, as countries limit their Mode 4 commitments to their own economic needs and political priorities, with little regard for the international dimensions.

⁸⁹ Waldman, *supra* n. 14.

⁹⁰ HRW Saudi Arabia Report, *supra* n. 3 at 11, citing Kapur and McHale, 'Migration's New Payoff', *Foreign Policy*, 1 November 2003.

States).⁹¹ In the same year, Bangladesh received almost \$2 billion, almost half of which was sent from Saudi Arabia, and 85 per cent from Arab League states; Indonesia and Sri Lanka both received over \$1.1 billion.⁹² In some cases remittance of a specified percentage of a worker's earnings is encouraged through official government remittance schemes.⁹³

Labour exporting countries rely so heavily on remittances that they have developed government policies to increase and encourage the exportation of their labour force.⁹⁴ The Philippines officially implemented such a policy in 1985,⁹⁵ and this remained in place until 1995 when it passed the Migrant Workers and Overseas Filipinos Act. This Act retracted its earlier policy, and removed the government from active recruitment of workers, effectively transferring this role to the private sector by extending incentives to local service contractors.⁹⁶ Sri Lanka has been called 'an assiduous marketer of its own people,'⁹⁷ and indeed the Sri Lanka Bureau of Foreign Employment continues to have, as one of its objectives, to 'promote and develop overseas employment opportunities for Sri Lankans'⁹⁸ Main functions include the promotion of exportation of manpower as well as the protection and provision of assistance to potential, actual and former expatriate workers.⁹⁹ The Philippines and Indonesia have heavily regulated the export of migrant workers, and do provide training programs and other services for their nationals going abroad.¹⁰⁰ Other nations, such as Sri Lanka, Bangladesh and India, have very few regulations covering emigration, and these date from the 1980s.¹⁰¹ However, these countries are also beginning to offer training programs to prepare their nationals for work abroad.¹⁰²

Though sending countries may have inclinations to protest the treatment of their nationals abroad, it is not always in the best interest of a government to argue on behalf of its workers' interests. When governments have backed their citizens' demands for better treatment in the

⁹¹ Chammartin, *supra* n. 3 at 14.

⁹² *Ibid.*; and HRW Saudi Arabia Report, *supra* n. 3 at 12.

⁹³ See, for example, Philippines: Overseas Workers' Investment (OWI) Act, Labour Code, No. 711 (1991).

⁹⁴ Geertje Lycklama à Nijeholt, 'The Changing International Division of Labour and Domestic Workers: A Macro Overview (Regional)', in Heyzer, Lycklama and Weerakoon (eds), *The Trade in Domestic Workers: Causes, Mechanisms and Consequences of International Migration* (Kuala Lumpur: Asian and Pacific Development Centre, 1994) 14; and Forman, 'Protecting Philippine Overseas Contract Workers', (1994) 16 *Comparative Labor Law Journal* 26 at 78.

⁹⁵ Philippines: Philippines Overseas Employment Administration, New Rules and Regulations on Overseas Employment, (21 May 1985) (since revised); see Forman, *ibid.* at 28.

⁹⁶ Philippines: Migrant Workers and Overseas Filipinos Act of 1995, Labour Code, No. 8042, (1995). Section (2)(c) states: 'While recognizing the significant contribution of Filipino migrant workers to the national economy through their foreign exchange remittances, the State does not promote overseas employment as a means to sustain economic growth and achieve national development. The existence of the overseas employment program rests solely on the assurance that the dignity and fundamental human rights and freedoms of the Filipino citizen shall not, at any time, be compromised or violated. The State, therefore, shall continuously create local employment opportunities and promote the equitable distribution of wealth and the benefits of development.'

⁹⁷ Waldman, *supra* n. 14.

⁹⁸ Nijeholt, *supra* n. 94 at 14.

⁹⁹ Sri Lanka Bureau of Foreign Employment Act 1985, amended by Sri Lanka Bureau of Foreign Employment (Amendment) Act No. 4 of 1994.

¹⁰⁰ Indonesia heavily regulates recruitment and limits the age of its migrant workers to over 28 years; see The Recruitment of Workers Domestically and Overseas, Regulation of the Minister of Manpower No. PER-02/MEN/1994.

¹⁰¹ Bangladesh, India and Sri Lanka each have only one law regarding the export of migrant workers. See Bangladesh, Emigration Ordinance No. 29 of 1982; India Code, Emigration Act No. 31 of 1983; see *supra* n. 99.

¹⁰² See Waldman, *supra* n. 14; and Rasooldeen, 'Dhaka Willing to Provide Skilled Workers to Kingdom', *Arab News*, 13 April 2005.

past, receiving countries have simply turned to other sending countries whose workers are willing to accept lower standards.¹⁰³ The sending countries may also be dependent upon foreign aid donations by wealthier receiving countries and can be deterred from seeking better treatment of its nationals because of this reliance.¹⁰⁴

B. Receiving Countries

Receiving countries throughout the Middle East simply do not protect workers: national labour codes do not cover domestic workers, and laws that serve to protect them in other ways are rarely enforced. Labour laws throughout the Middle East (and in most countries of the world) do not cover workers in the informal sector, including agricultural workers and domestic workers—persons employed as domestic help in private homes.¹⁰⁵ A typical view was voiced by a Ministry of Labour spokesman from Bahrain: ‘[h]ouse workers are to be treated as part of the family, or else the privacy of the household is desecrated.’¹⁰⁶ Because workers are effectively tied to their employers under the *kafala* system, workers are at the mercy of their employers or sponsors and rarely have recourse to justice when they have complaints. Employers who abuse their domestic servants are not blacklisted from hiring future employees,¹⁰⁷ and though they may be negotiated with to pay some missing wages or flights home for runaway employees,¹⁰⁸ only a tiny minority face criminal charges for infliction of physical or sexual abuse.¹⁰⁹

Migrants are extremely vulnerable to exploitation because of their powerlessness within the legal system.¹¹⁰ Structural and cultural conditions serve to maintain and reproduce migrant vulnerability in power relations that enable abuse and exploitation of migrants. A cultural element provides ideological legitimation and reinforcement of power relations through derogatory ‘stereotypes, prejudices, racism, xenophobia, ignorance and institutional

¹⁰³ Forman, *supra* n. 94 at 46-7; and Waldman, *supra* n. 14, who notes: ‘Too many demands for housemaids’ rights, the government fears, will simply prompt the gulf countries to seek housemaids elsewhere’.

¹⁰⁴ Forman, *supra* n. 94 at 56.

¹⁰⁵ See, for example, Qatar: Article 3, Part 1, Law No. 14 (2004); Oman: Article 2, Part II, Labour Code of 26 April 2003, Royal Decree No. 35/2003 (2003); Jordan: Article 3, Chapter 1, Law No. 8 for the Year 1996, No. 80 (1997); Bahrain: Article 2, Labour Law for the Private Sector, Amiri Decree Law No. 23 (1976).

¹⁰⁶ Chammartin, *supra* n. 3 at 17.

¹⁰⁷ Al-Najjar, *supra* n. 7 at 31.

¹⁰⁸ Interview with Indranath Rodrigo, *supra* n. 60.

¹⁰⁹ See HRW Saudi Arabia Report, *supra* n. 3 at 57. Those who do face criminal charges are the very worst, or those who abuse Arab domestics. See Hardy, *supra* n. 72 ‘[P]olice have arrested a Saudi man and are questioning him about claims that he beat and locked up an Indonesian maid.... Her hands and feet developed gangrene after she was locked up for a month. Reports of foreign workers in Saudi being mistreated, denied their wages or sexually abused have become so routine that they rarely attract attention. But the case of Nour Miyati is so gruesome that the Saudi media have publicised it, and the Saudi authorities have been forced to take action.’; and ‘Wafa Makky’s 10-year Prison Sentence Lessened to 3 Years’, *Al-Bawaba*, 29 June 2003 ‘The thirty-six year old actress was convicted [in Egypt] in December 2002 for torturing her two housemaids, sisters (Marwa, 16, and Hanadi Abdul Hamid, 19)’.

¹¹⁰ Migrant vulnerability is defined as: ‘a social condition of powerlessness ascribed to individuals with certain characteristics that are perceived to deviate from those ascribed to the prevailing definitions of a national. Vulnerability is a social condition associated with the outcomes of impunity for those who violate the human rights of those migrants labelled as deviants.’ Bustamante, ‘Immigrants’ Vulnerability as Subjects of Human Rights’, (2002) 36 *International Migration Review* 333 at 340.

discrimination.’¹¹¹ For example, the gender discrimination faced by domestic workers in Saudi Arabia can be understood partly as an extension of discrimination faced by Saudi women:

The forced confinement that Saudi employers impose upon many low-paid women workers can be viewed as an extreme extension of the power that men can and do wield over the movement of Saudi women under law and social custom. Women migrants, like their Saudi counterparts, face a system of Islamic jurisprudence under which women’s testimony carries half the weight of the testimony of men. Victims of sexual violence, including rape, have little prospect of holding their assailants accountable in *shari’a* courts.¹¹²

Recruiters in receiving countries control a great deal of the comings and goings of migrant workers, and often are the worst abusers of the system. In many ways the *kafala* system removes responsibility for oversight from the government and places it squarely upon recruiters and individual employers, who are often motivated more by financial gain than concern about the working conditions and human rights of the people they import. Arguably these roles put private individuals in place as informal immigration officials, removing such burdens from the government.

C. International Legal Regimes

The United Nation’s Migrant Workers’ Convention¹¹³ seeks to protect workers by extending existing labour rights to workers who migrate for temporary work.¹¹⁴ It is of limited effect currently because of most countries’ reluctance to ratify it. Indeed, only labour-exporting countries have ratified it. The only Arab states who have signed the Convention are Egypt and Libya, traditionally countries who export labour to other Arab nations. Because of the limited applicability of the treaty to the actual protection of migrant workers, a dominant focus on the Migrant Workers’ Convention could in fact be detrimental, by allowing states to undermine the obligations they owe to women migrants under existing human rights law if they have not acceded to the new treaty.¹¹⁵

Relevant ILO conventions are unhelpful in this analysis. For example, the definition of the term ‘discrimination’ in the Discrimination (Employment and Occupation) Convention ‘does not mandatorily include distinctions on the basis of nationality,’ leaving open the legality of discrimination based on foreign nationality to ratifying states.¹¹⁶ Further, the ILO Migrant Workers Convention, which is not ratified by any receiving country, only covers permanent

¹¹¹ Ibid. at 339.

¹¹² HRW Saudi Arabia Report, supra n. 3 at 18.

¹¹³ International Convention on the Protection of the Rights of All Migrant Workers and Their Families 1990, 2220 UNTS 93; 11 IHRR 269 (2004).

¹¹⁴ See Yau, ‘Promise and Prospects of the UN’s Convention on Migrant Workers’, available at: <http://www.migrationinformation.org/Feature/display.cfm?id=288>.

¹¹⁵ Satterthwaite, supra n. 86 at 2.

¹¹⁶ Preamble, ILO Migrant Workers Convention.

migrants, not temporary legal workers.¹¹⁷ This would seem to specifically exclude domestic workers operating under the *kafala* system in the Middle East.

Scholars have argued that despite the limitations of the UN Migrant Workers' Convention and ILO conventions, other existing international treaties are applicable:

[w]hile advocates and scholars should welcome the Migrant Workers' Convention as an interpretive tool and as a potential site for the development of best practices, they should also refocus their attention on the entire range of human rights treaties, insisting that the rights of women migrants are already included in the panoply of standards set out in those instruments.¹¹⁸

This 'intersectionality' approach to human rights treaty law 'allows us to identify and articulate a set of robust standards relating to women migrant workers that can be applied to states ... by shifting the focus from the single variable of "migration status" to the multiple variables relevant to women who migrate for work—including gender, race or ethnicity, and occupation.'¹¹⁹

Several articles from the Universal Declaration of Human Rights¹²⁰ are relevant to foreign domestic workers in the Middle East. For example, the provisions against cruel, inhuman or degrading treatment (Article 5); the right to freedom of movement (Article 13); the right to work and join trade unions (Article 23); and the right to rest and leisure (Article 24).¹²¹ The rights of female migrants are already included in the standards set out in other international treaties: the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),¹²² the International Covenant on Social, Economic and Cultural Rights (ICESCR),¹²³ the International Covenant on Civil and Political Rights (ICCPR),¹²⁴ and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹²⁵

For example, the ICCPR, which contains strong general non-discrimination and equal protection guarantees, is applicable to citizens and non-citizens equally.¹²⁶ The ICESCR includes strong non-discrimination guarantees in social and cultural rights, and some guarantees

¹¹⁷ Article 1, Part II, The ILO Migrant Workers Convention, which states that the Convention excludes, among others: 'employees of organizations or undertakings operating within the territory of a country who have been admitted temporarily to that country at the request of their employer to undertake specific duties or assignments, for a limited and defined period of time, and who are required to leave that country on the completion of their duties or assignment.' While it should be noted that this exclusion applies only to Part II of the convention, Part I is largely irrelevant to workers who arrive to receiving countries legally. See also Jureidini, *supra* n. 83 at 201-16.

¹¹⁸ Satterthwaite, *supra* n. 86 at 5.

¹¹⁹ *Ibid.* at 4. Satterthwaite defines intersectionality as 'an approach to combating discrimination in which the various forms of subordination that people face are taken into consideration as they act together. Instead of conceiving of a Filipina domestic worker, for example, as separately or consecutively disadvantaged by gender and racial discrimination...intersectionality calls attention to the ways in which race and gender interact – or intersect – to create specific forms of discrimination and oppression.' *Ibid.* at 8-9.

¹²⁰ 217(III), 10 December 1948, A/810 at 71.

¹²¹ Jureidini, 'Migrant Domestic Workers in Lebanon' (2002) *International Labour Organization, International Migration Papers (No 58)*.

¹²² Convention 1249 UNTS 14

¹²³ 993 UNTS 3.

¹²⁴ 999 UNTS 171.

¹²⁵ 660 UNTS 195.

¹²⁶ Article 2, ICCPR; Satterthwaite, *ibid.* at 15.

for economic rights, with wording that prohibits discrimination on the basis of nationality.¹²⁷ While CERD does not prevent distinctions made between citizens and non-citizens, that convention requires that otherwise possible distinctions between citizens and non-citizens may not be applied in a racially discriminatory manner.¹²⁸ CEDAW obliges states parties to prohibit discrimination against women, requiring them explicitly in Article 2 to ensure that women have ‘effective protection’ against discrimination, through courts and other institutions. In effect, ‘these standards would require a state in which a disproportionate number of women migrant workers were subjected to violence within their employer’s home—for instance, in states where violence against women domestic workers is widespread—to take steps to ensure effective protection from such abuse.’¹²⁹

While the human rights obligations under the above treaties were assumed to function as a check on state actions, most of the abuse faced by domestic workers is carried out by private actors: individual employers and recruiters, as well as government officials. However, the rights framework of the treaties has evolved to respond to abuses that are carried out by private actors as well: ‘[u]nder human rights law, the state has a broad set of positive and negative obligations concerning both private and public conduct.’¹³⁰ A state is obligated under international human rights law to prevent violations, ‘even when the abuses are occurring in private at the hands of non-state actors, since the state is ultimately responsible for setting up regulatory systems and monitoring schemes to halt such abuses.’¹³¹

The protections accorded under international human rights treaties are fundamentally limited by two things: the state may not have signed the treaty or treaties, or may have signed with significant reservations. The human rights guarantees under the above treaties are clearly only applicable to those countries that have ratified the treaties. In the case of the GCC countries studied here, some are not bound by the treaties at all, and those who are bound have made reservations to the texts that challenge the effectiveness of the treaties.

Table 2: Ratification status of human rights treaties by certain Arab states.

	CERD	ICCPR	ICESCR	CEDAW
Bahrain	✓ *			✓ ✕ *
Jordan	✓	✓	✓	✓ ∅
Kuwait	✓ *	✓ ✕	✓ ✕	✓ ✕ *
Lebanon	✓ *	✓	✓	✓ ✕ *
Oman				
Qatar	✓			
Saudi Arabia	✓ ✕ *			✓ ✕ *
UAE	✓			

✓ = Ratified treaty
 ✕ = Not bound by provisions of treaty incompatible with Islamic Shari’ah.
 ∅ = Not bound by Article 15(4), according men and women the same rights with regard to the movement of persons.
 * = Not bound to submit to arbitration and referral to International Court of Justice in case of dispute on interpretation and application of treaty.

¹²⁷ Article 2, ICESCR; Satterthwaite, *ibid.* at 18.

¹²⁸ Article 1, CERD; Satterthwaite, *ibid.* at 19.

¹²⁹ Satterthwaite, *ibid.* at 21.

¹³⁰ *Ibid.* at 12.

¹³¹ *Ibid.*

Most of the studied countries that have ratified CEDAW have done so subject to the strictures of Islamic Shari'ah law. Though Shari'ah is interpreted in various ways by different countries,¹³² this reservation fundamentally affects the rights of women to freedom of movement and equal testimony in court. Further, many of these countries have rejected provisions in the treaties that bind them to arbitration and subsequent referral to the International Court of Justice in case of dispute regarding the interpretation and application of the treaty. This makes them virtually immune to litigation by other states in the International Court of Justice regarding claims of treaty violations.

Despite their lack of ratification of core human rights treaties, or ratification with reservations, the countries analysed here may still be held accountable for human rights violations that are prohibited by customary international law, such as slavery and the slavery-like practice of debt bondage.¹³³ In those cases, litigation may be possible in United States courts under the Alien Tort Claims Act (ATCA) against a private individual or government official for a violation of the *jus cogens* law prohibiting slavery.¹³⁴ Though this is encouraging in the framework of human rights law, in practice it is difficult to see how the vast majority of domestic workers affected might reach United States federal courts and institute an action against their former employers. Another more practical and far-reaching solution is required.

D. International Human Rights Law and the Role of Shari'ah

Such a solution can be found in international treaty law as it reaches employment in the private sector, and the crucial role of Shari'ah as it applies to employment. Both bodies of law require the state to actively protect the rights of employees from violation by their employers. This approach shifts the focus on abuse of domestic workers from race and gender discrimination issues to fair employment practices. It is not meant to undermine the importance of race and gender to the problems faced by domestic workers, but instead to find the strongest argument for fair treatment of migrant workers generally. In practice, this approach can be a very effective solution to employment problems experienced by migrant workers such as lack of payment of wages, adequate rest, physical and mental abuse, and exploitation by employers and recruiters; it is less effective, however, for the protection of freedom of movement for female domestic workers, an issue which is very much a matter of debate in Shari'ah law.¹³⁵

International treaty law requires that the countries that have ratified treaties subject to the requirements of Shari'ah must uphold those treaties as agreed, to the extent consistent with Islamic law. The affirmative duties of the state to reach into the private sphere of the home to prevent human rights violations remain in force, and the state continues to be obliged to set up regulatory systems and monitoring schemes to halt abuses that occur in private at the hands of non-state actors.

Further, scholars have argued that Muslim states, even those that have not ratified human rights law treaties, are obliged under Islamic law to protect workers from abuses at the hands of

¹³² Otterman, 'Islam: Governing Under *Shari'ah*', *Council on Foreign Relations*, 14 March 2005, available at: http://www.cfr.org/background/islam_Shari'ah.php.

¹³³ Rassam, *supra* n. 87 at 349.

¹³⁴ 28 *United States Code* 1350; Rassam, *ibid* at 350.

¹³⁵ See Baderin, *International Human Rights and Islamic Law* (Oxford: Oxford University Press, 2003) at 90. This topic will be discussed further in the next section.

private employers: ‘the State has the duty under Islamic law to ensure that the right of everyone to enjoy just and favourable conditions of work is ensured both in the private and public sectors of labour. The State may enact legislation and create institutions through which the rights of workers can be ensured.’¹³⁶ The right to adequate working conditions, while not specifically codified as such under traditional Islamic law, is recognised within the provisions of the Shari’ah:

[t]he Shari’ah injunctions on non-exploitation, equity, humane treatment of peers and underlings etc, provide the basis in Islamic law for ... ‘wages of labour and hours of work together with the rules on the relations of the employees and the employers.’ For example, the Qur’an provides [for] ... fair trade, fair and equitable wages for workers as well as equal remuneration for work of equal value under Islamic law. There are also many Prophetic Traditions that specifically encourage equity and fairness in wages of workers. In one Tradition the Prophet is reported to have enjoined that: ‘When anyone of you hires a worker he should inform him of his wages,’ and in another he enjoined that the employee should be paid his or her wages before his or her labour sweat dries out.¹³⁷

The employer and employee also have the duty to perform their contracts fully: ‘under Islamic law, “work is looked upon more as a partnership between employer and employee than as a relationship of superiority and subordination” and that the “right to a fair wage and of the employer’s obligation to implement the contract justly are deeply ingrained in Islamic doctrine.”’¹³⁸

Therefore, the state may be required under Shari’ah law as well as international law to actively protect the rights of employees from violation by their employers. Measures to do so could be accomplished by the regulation, monitoring, and enforcement of contracts made between domestic servants, recruiters, and employers. Countries could, for example, establish standard employment contracts that follow existing human rights standards and international law, enforceable under the provisions of Shari’ah law.

E. Contractual Solutions to Abusive Employment

Some countries, such as the Philippines and Sri Lanka, have attempted to establish standard contracts for their workers.¹³⁹ Despite these efforts, receiving countries routinely ignore such contracts, replace them with inferior contracts, or contracts written in Arabic only, and may

¹³⁶ Ibid. at 185.

¹³⁷ Ibid. at 183: a translation reads ‘Woe to those who give less in measure and weight. Those who, when they receive from Men demand full measure; But when they have to give by measure or weight, give less than due.’ Q83:1-3; ‘Give just measure and weight, and do not withhold from people things that are their due and do not do mischief on earth after its perfection, that is best for you if you had faith.’ Q7:85.

¹³⁸ Baderin, supra n. 135 at 184, citing Weeramantry, *Islamic Jurisprudence: An International Perspective* (Malaysia: Islamic Book Trust, The Other Press, 1988) 63-4.

¹³⁹ Forman, supra n. 94 at 55-6; Sri Lanka Bureau of Foreign Employment, Model Employment Contract (1990); Philippines Overseas Employment Administration, Sample Employment Contract for Various Skills (2006), available at: <http://poea.gov.ph/docs/contract.PDF>.

refuse to give copies of contracts to workers.¹⁴⁰ Yet, contracts are supported by Islamic law and can provide a legitimising factor for rights given to domestic workers. In Saudi Arabia, for example, support among the religious establishment exists for extending contractual rights to migrant workers. Human Rights Watch reported:

No less than the kingdom's highest Muslim religious authority, the Grand Mufti Sheikh Abdul Aziz Al Sheikh, has already acknowledged that migrants suffer 'exploitation and oppression.' His comments ... included the observation that 'Islam does not permit oppressing workers, regardless of religion *As we ask them to perform their duty, we must fulfil our duty and comply with the terms of the contract.*' The Grand Mufti criticized intimidation of migrant workers, and said that it was 'illegal and a form of dishonesty' to withhold their salaries of delay payment of wages under threat of deportation. He counselled that Islam prohibits 'blackmailing and threatening [foreign] labourers with deportation if they refuse the employers' terms which breach the contract.'¹⁴¹

One example of a contractual solution lies with a standardised contract that is brought into line with existing human rights standards and international law, supported by both the sending and receiving countries, and required for the employers in order to procure work permits and other papers. Just such a contract was established in Jordan in 2003, promoted by UNIFEM in order to protect domestic workers specifically: the 'Standardized Work Contract for Non-Jordanian Domestic Workers.'¹⁴² A spokesperson for the UNIFEM Arab States Regional Office reports that 'having an endorsed contract is definitely a major step in the right way to regulate the migration process and hold the recruiting agencies accountable and responsible for any violation that may occur from their side.'¹⁴³ UNIFEM believes that the Jordanian Ministry of Labour will be 'firm when it comes to implementing the contract as they would not process or renew residency and working permits without getting full documentation from the licensed recruiting agencies including a signed copy of the contract.'¹⁴⁴ Jordan has been the pilot country in this region to formulate and endorse the standardised working contract. However, Bahrain has showed an initial interest in replicating this initiative.¹⁴⁵ In addition, the UAE is reputedly in the process of preparing a contract that is binding internally, aimed at protecting both the employer and employee, and regulating recruiting agencies.¹⁴⁶

Two issues arise with this system: first, the provisions of the contract itself may be inadequate; and second, enforcement of the contract must be robust in order for the initiative to succeed.

The Jordanian standard working contract addresses many human rights concerns: it specifies the wages to be paid, the need for humane treatment, access to medical care, meals,

¹⁴⁰ Satterthwaite, *supra* n. 86 at 22-3.

¹⁴¹ HRW Saudi Arabia Report, *supra* n. 3 at 6, citing 'Saudi Cleric Preaches Workers' Rights', *BBC News World Edition*, 3 September 2002; and 'Saudi Mufti Warns Employers Against Breach of Contract', *Agence France-Presse*, 2 September 2002.

¹⁴² Heresh, 'MoL, UNIFEM Endorse Contract for Foreign Domestic Workers', *Jordan Times*, 22 January 2003.

¹⁴³ Email from Shatha A. Mahmoud, Migrant Women Workers Project Coordinator, UNIFEM Arab States Regional Office, to Gwenann Seznec (9 March 2005) [on file with the author].

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Sabban, *supra* n. 6 at 99.

clothing and accommodations, and requires copies of the contract to be given to the employee in both Arabic and English. It denies employers or agencies the right to hold an employee's passport or personal documents. Most importantly, both parties have the right to refer disputes to the judicial authority in order to solve them according to relevant laws. However, the contract, as currently drafted, has been criticised as continuing the normative practice limiting the freedom of movement of domestic workers. Clause 8 of the contract stipulates that one rest day per week shall be granted. However, it also stipulates that the employee 'shall not leave the residence without the permission of the employer.' The sixth clause underscores this by stating, '[t]he [Employee] shall not leave the Employer's residence or be absent from work without the Employer's approval.' These conditions allow for the severe restriction of movement of the worker.¹⁴⁷ Similarly, the contract being drafted in the UAE would supposedly be similar to contracts provided by sending countries, with the exception of the weekly day off.¹⁴⁸ Clearly, standard working contracts must do more to guarantee freedom of movement and days of rest. Depriving women of their liberty by confinement within the house may violate Article 9 of the ICCPR ('everyone has the right to liberty and security of person'), and though it is sometimes alleged that Islamic law requires the confinement of women within the house, many Muslim scholars and jurists deny this.¹⁴⁹

The UNIFEM initiative relies upon the state to monitor the issuance of contracts and process residency and working permits only upon receipt of a validly signed contract. In addition, it relies upon the judicial authority to solve disputes in a balanced and non-discriminatory manner. Further, the judgments issued in such cases must then be enforced by the police authority in a non-discriminatory manner. These are difficult hurdles to overcome in countries whose judicial systems have been condemned as 'not meet[ing] basic international human rights standards of due process and fairness.'¹⁵⁰ While the bureaucratic process of issuance of work permits will generally proceed in a smooth manner, many Arab states may not be trusted to be non-discriminatory in enforcement. For this reason, oversight of judicial and enforcement processes by international bodies such as UNIFEM is crucial to the success of standardised working contracts.

The standardised contract initiative also relies upon the actions of employees to assert their contractual rights when they are violated. Several things presuppose the ability of employees to do so: the employee must understand and agree to the provisions of the contract, must not be intimidated in seeking to assert their contractual rights, and must be able to reach the appropriate embassy or judicial authority in order to state their claims.

First, the employee must understand the provisions of the contract that is presented to her. A partial solution is for the contract to be made available in both Arabic and English, as is the Jordanian standard contract. However, this does not help workers who cannot read either language.¹⁵¹ One benefit of a standardised working contract is that the terms of the contract are not easily deviated from. Once similar contracts are promulgated, over time, workers will begin to know by reputation what terms to expect and to be suspicious if these terms are not met. In the best situation, workers will be able to compare the terms of standardised working contracts

¹⁴⁷ Jureidini, *supra* n. 83 at 15.

¹⁴⁸ Sabban, *supra* n. 6 at 99.

¹⁴⁹ Baderin, *supra* n. 135 at 90.

¹⁵⁰ HRW Saudi Arabia Report, *supra* n. 3 at 85.

¹⁵¹ Another partial solution would be to require states to provide standardised working contracts in the native languages of the domestic workers. However, the practicalities of implementing such a program would require further study.

from different countries to choose the best working situation for themselves.¹⁵² The standard contract makes this comparison highly efficient, and allows individual actors to evaluate the options available to them when previously they had no bargaining power.

The standard contract is especially important to workers who have historically been unable to form labour unions to bargain on their behalf. While it is unreasonable to expect individual employees to bargain for better contractual terms, labour unions that could be formed to perform this bargaining on behalf of a group of workers are illegal under the laws of the Arab states discussed.¹⁵³ As one economist has pointed out:

The benefit of the market is that it allows one to compare and price different products. If there were a relatively small number of employment contracts, with easily understood conditions for termination and dispute resolution, a market could evolve to compare and price these different contracts. This would then allow one to learn the costs and benefits of different levels of employment protection, at least as measured by market participants.¹⁵⁴

In a market of employment contracts for domestic workers, standard contracts could impart a measure of bargaining power upon employees. One structural benefit of this increased bargaining power is that this avoids being a solution based solely on ‘victimisation rhetoric’ in which ‘women—usually from the global South—are presented as nothing other than the sum of their vulnerability, abuse, and victimhood.’¹⁵⁵

Standard working contracts would assist the employee in seeking to assert her contractual rights. They would also contribute to fairer and faster judicial proceedings: ‘standard terms would simplify the task of the courts as they developed experience with a small set of contracts.’¹⁵⁶ Experience on its own will not force courts to be non-discriminatory in their judgments, however with precise and unchanging standard contractual terms, the risk of judicial abuse is lessened.

The missing pieces to the solution are the lack of information to workers about where to go to assert their contractual rights; the lack of freedom of movement that will persist under Jordan’s existing terms, resulting in the inability of workers to physically reach their embassies or judicial authority; and enforcement of judgments by the police authorities. Better information and support should be given to workers on a continual basis by their sending countries and local publicity; workers should be given the right to leave the home on their days off; and international and domestic scrutiny should focus on the enforcement of domestically-rendered judgments.

5. Conclusion

In the end, no standard working contract will solve underlying problems of the rule of law in countries with the most egregious human rights violations, such as Saudi Arabia. However, as

¹⁵² Thanks to Professor Rip Verkerke for suggesting this line of argument.

¹⁵³ MacLeod, ‘Regulation or Markets? The Case of Employment Contracts’, (2005) 51 *CESifo Economic Studies* 1 at 40; see also the legal provisions cited supra n. 105.

¹⁵⁴ *Ibid.* at 40-1.

¹⁵⁵ See Kapur, ‘The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics’, (2002) 15 *Harvard Human Rights Journal* 1 at 5-6.

¹⁵⁶ MacLeod, supra n. 153 at 41.

this article argues, Arab countries may not avoid their obligations to core human rights standards simply by hiding behind their reservations to international treaties for reasons of Islamic Shari'ah law. These governments have affirmative obligations to regulate and monitor private actions that cause the abuse of domestic workers. One already existent means of doing so is for the state to establish a standardised working contract between employers, recruiters, and employees, with guidance from an international body such as UNIFEM. While this solution is not perfect, it provides bargaining power to employees, increases the supply of information and experience to parties and domestic courts for more efficient decision-making and judgments, and demands global attention. Continued pressure at the international level for governments to fulfil their obligations under international treaties may cause Arab countries to view standardised working contracts as solutions that benefit themselves on a national level as well.