



**CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE WORKING PAPER
ECONOMIC AND SOCIAL RIGHTS SERIES
NUMBER 8, 2006**

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**BEYOND NANNYGATE:
USING HUMAN RIGHTS LAW
TO EMPOWER MIGRANT DOMESTIC WORKERS
IN THE INTER-AMERICAN SYSTEM***

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* This article is a draft of a chapter which has been accepted for publication in Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements* (forthcoming, Routledge 2007).

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Abstract

This article evaluates the potential role of the Inter-American human rights system in efforts to advance the rights of migrant domestic workers in the United States. For many years, the only significant power that migrant domestic workers seemed to possess was the ability to ruin the chances of high-level political appointees. Ironically, this power has come through their vulnerable position in the legal order of the United States. Migrant domestic workers suffer abuse based on both their migration status and their status as workers in the "home," factors that exclude them from certain protections under U.S. law. In addition to these formal exclusions, migrant domestic workers often experience discrimination based on gender, race and ethnicity. Although these violations are the very kinds of exploitation that human rights law was created to prevent and remedy, advocates and scholars have not focused on using human rights to advance the rights of migrant domestic workers in the United States.

The article considers the causes for this failure, and argues that there are compelling reasons to use human rights law to advance migrant domestic workers' rights. First, U.S. actions and inactions can be scrutinized in certain international institutions charged with monitoring compliance with human rights law. Second, human rights law allows advocates to clearly articulate the obligations of the state to halt abuses that occur in the "private" realm. Finally, human rights law already binding on the United States can provide robust norms for migrant domestic workers fighting overlapping forms of discrimination that may not be easily challenged under U.S. law.

The paper demonstrates that the Inter-American human rights system - through its expansive norms, progressive interpretive practices, and venues for complaint and investigation - provides promising opportunities for U.S.-based advocates fighting the interlocking forms of vulnerability and discrimination that migrant domestic workers face.

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I. INTRODUCTION

a. The Nannygate Phenomenon

For many years in the United States, the only significant power that migrant domestic workers seemed to possess was the ability to bring down high-level political appointees. Ironically, this power has come through their vulnerable position in the legal order of the United States: through their relative rightslessness. Starting with the sequential nominations of Zoë Baird and Kimba Wood by then-President Clinton for the position of Attorney General in 1993, the foreign nanny who was employed illegally has halted the ascension of those nearing the heights of the social and political system; this ability has come, ironically, through their status as underpaid, unprotected, and undocumented workers.¹ Because recent nominees for the offices of Secretary of Labor and Secretary of the Department of Homeland Security have not paid taxes, arranged for visas, or ensured that their domestic workers were authorized to work, they too were forced to withdraw their candidacies from prized positions in Presidential Cabinets.²

* This article is a draft of a chapter which has been accepted for publication in Nicola Piper, ed., *New Perspectives on Gender and Migration: Empowerment, Rights, and Entitlements* (forthcoming, Routledge 2007).

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¹ See “A Spoonful of Sugar: Watch Out for Problems with Mary Poppins’ Visa,” *The Financial Times*, 1 Dec. 2004.

² Linda Chavez was nominated for the position of Secretary of Labor by President George W. Bush in 2001, and was forced to step down when it was alleged that she employed an undocumented Guatemalan woman as a domestic helper. Chavez denied that the woman had been her employee, explaining that the woman has done “chores” for Chavez, but that the money Chavez gave her was charity, not money in exchange for work performed. See Ron Fournier, “Chavez Withdraws as Labor Nominee,” *Washington Post*, 9 Jan. 2001. Bernard Kerik was nominated by President Bush to the post of Secretary of Homeland Security in 2004, but was forced to withdraw when it was disclosed that he had employed a likely undocumented domestic worker. Mr. Kerik’s nomination was subsequently marred by numerous other allegations of wrongdoing. See Robert Scheer, “Kerik’s ‘Nannygate’ Was the Least of It,” *Los Angeles Times*, 14 Dec. 2004.

The unasked questions in these debates concern the treatment and rights of the “nannies” themselves. Powerful economic and legal forces ensure that such women remain exploited yet ubiquitously present in the intimate spaces of the well-to-do in the United States, as well as in other industrialized countries in the Global North. U.S. law defines migrant domestic workers out of many of the protections available for other workers under U.S. labor and employment law. For example, domestic workers are explicitly excluded from certain legal protections available to other workers under U.S. law in part because of the status of their workplace: private homes that are not easily conceptualized as workplaces. Migrant domestic workers are also vulnerable to abuses based on their migration status: while even undocumented workers are entitled to the most basic worker’s rights – including the right to be paid minimum wage for their labor – they are often unable to access those rights due to threats of deportation or reprisal should they seek remedies. Because many domestic workers are undocumented, they are rendered vulnerable to abuses on the basis of their status as migrants *and* as workers in the home.

In addition to these formal exclusions, migrant domestic workers often suffer racial and ethnic discrimination, which takes the form of assumptions about their documentation status and discrimination on that basis, lower pay scales, inferior working conditions and lack of opportunities for certain “unpopular” nationalities, and verbal and sexual harassment on the job. These forms of discrimination are often not remediable by U.S. non-discrimination law because the discrimination takes place in workplaces – “homes” – that are not covered by federal non-discrimination statutes.

These abuses are the very types of discrimination and exploitation that human rights law was created to prevent and remedy. So why have advocates not focused on using human rights law, institutions, and language to advance the rights of migrant domestic workers in the United States? Certainly, it is in part because human rights norms have not been systematically incorporated into U.S. domestic law, and the United States actively works to insulate itself from human rights norms and oversight bodies. This insulation is accomplished through selective treaty ratification, imposition of substantive reservations to the covenants that it does ratify, and the non-recognition of the jurisdiction of key human rights bodies over disputes arising within the United States.³ Another reason is that advocates for migrants’ rights have focused much of their attention on convincing states to ratify the International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, a treaty the U.S. is nowhere near ratifying.⁴ Finally, as many advocates for migrant domestic workers have emphasized through campaigning and legal actions, domestic workers are already protected by some labor laws in the U.S.: a major part of the problem for such workers is lax enforcement rather than a lack of standards, making recourse to international norms seem irrelevant.

³ Harold Hongju Koh, “On American Exceptionalism,” *Stanford Law Review* 55 (2003): 1479-1527.

⁴ Margaret Satterthwaite, “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers,” *Yale Human Rights and Development Law Journal*, 8 (2005). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=680181.

Compelling reasons remain, however, to use human rights law in campaigns to advance migrant domestic workers' rights in the United States. First, U.S. actions and inactions *can* be scrutinized in certain international institutions charged with monitoring compliance with human rights law. Second, human rights law allows advocates to clearly articulate the obligations of the state to halt abuses that occur in the "private" realm. Finally, human rights law already binding on the United States can provide robust norms for migrant domestic workers fighting overlapping forms of discrimination that may not be easily challenged under U.S. law. Through its expansive norms, progressive interpretive practices, and venues for complaint and investigation with jurisdiction over the United States, the Inter-American system can provide useful norms and procedures for U.S.-based advocates fighting the interlocking forms of vulnerability and discrimination that migrant domestic workers face. This article will evaluate the potential role for this human rights system in empowering migrant domestic workers.

b. Map of the Article

The article begins by setting out some of the forces that contribute to the exploitation of migrant domestic workers in the United States, and will then move on to consider the potential role of regional human rights standards and institutions in improving the lives of migrant domestic workers in the United States. Because the article examines the Inter-American human rights treaties and conventions that could be brought to bear on the actions of the U.S., it does not discuss the International Convention on the Protection of the Rights of All Migrant Workers and their Families and the other U.N. treaties, except insofar as they could be examined by the Inter-American human rights bodies. The Inter-American human rights norms, most prominently embodied in the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man, address many of the forces of vulnerability relevant to migrant domestic workers, seeking to prevent such women from the abuses they widely suffer. After uncovering a significant gap between the protective standards applicable to migrant domestic workers and the reality on the ground, the article will consider the possibilities for bridging that gap through human rights advocacy and litigation. Against a backdrop of hegemonic American power and official disdain for the work of regional human rights bodies, advocates have achieved some small successes by using legal norms and bodies indirectly – through media coverage, work actions, and the integration of human rights language and rules into private contracts and local legislation. Litigation efforts have been successful in some cases, allowing women to access wages and contract damages; in such instances, there may be a role for increased use of human rights law, perhaps through the filing of amicus briefs.

There are several troublesome obstacles for those seeking vindication through U.S. courts, however. These include the sense of vulnerability to retaliation or deportation that many domestic workers feel when pressing their individual claims through private legal actions. Immunity is also a significant problem in the United States, where diplomats and employees of international institutions may hire migrant domestic workers through a special visa program, but also enjoy immunities within the legal system that can block enforcement of judgments. These obstacles also create

impediments for litigation within the Inter-American system, where petitioners must demonstrate that they have “exhausted” available domestic remedies before seeking international remedies. While litigation is not always possible, a number of options remain to vindicate the rights of migrant domestic workers through the Inter-American system. In the final section of the article, potential avenues for human rights-related action are considered.

Although the article does not examine the norms and institutions in other regional systems, it may be helpful to advocates considering engagement with the Council of Europe system (encompassing the European Court of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms) or the African Union system of human rights protection (encompassing the African Court on Human and Peoples’ Rights, the African Commission on Human and Peoples’ Rights and the African Charter on Human and Peoples’ Rights). These systems are significantly different from the Inter-American human rights system –and from each other – so the discussion here will not be easily mapped onto those regions. It may, however, raise useful points for discussion and research.

II. PROFESSIONAL WOMEN, NANNIES, AND EXPLOITATIVE TERMS OF WORK

a. The Global Division of Reproductive Labor

The International Labor Organization (ILO) estimates that there are between 80 and 100 million migrant workers in the world today, 18 million of whom live in North America.⁵ Women account for about half of these workers, and in some countries⁶ they make up more than half of all migrant workers.⁷ Indeed, many analysts – most notably the ILO – speak of the increasing feminization of migration (ILO Booklet 1, 9).⁸ This feminization results from a number of worldwide forces in which gender roles and sex discrimination are intertwined with globalization. Trends contributing to this include: the growing demand for labor in fields dominated by women (especially the service sector); the lower cost of production when labor-intensive tasks are shifted to women migrant workers⁹; and the sex-stereotyping of large business enterprises and governments that

⁵ International Labor Organization, *About MIGRANT*. Available at <http://www.ilo.org/public/english/protection/migrant/about/index.htm>.

⁶ “[I]n 2000, women represented 68 per cent of the 2.55 million Indonesian migrant workers abroad; 46 per cent of the 2.945 million Filipino documented and 1.840 million irregular migrant workers abroad; and 75 per cent of some 1.2 million Sri Lankan migrant workers abroad.” International Labor Organization [hereafter “ILO”], *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide – Booklet 1: Why the Focus on Women International Migrant Workers* (Geneva: ILO, 2003), 9; hereafter cited in text as ILO Booklet 1.

⁷ ILO, *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide – Booklet 4: Working and Living Abroad* (Geneva: ILO, 2003), 2; hereafter cited in text as ILO Booklet 4.

⁸ See also Patrick A. Taran and Eduardo Geronimi, *Globalization, Labor and Migration: Protection is Paramount* (Geneva: ILO, 2002), 10; hereafter cited in text.

⁹ See Saskia Sassen, “Notes on the Incorporation of Third World Women into Wage Labor Through Immigration and Offshore Production,” *International Migration Review* 18 (1984): 1144.

may see women as cheap, temporary, or supplemental laborers whose “docile” nature makes them easily exploitable (ILO Booklet 1, 19).

In the Americas, women’s widespread participation in the wage labor market in the North has combined with global income disparities in the global South and persisting demands for Northern women to retain responsibility for household and childrearing tasks. This combination creates a dynamic in which Northern women’s reproductive labor is transferred to women migrants working as domestics, whose reproductive labor is in turn shifted to family members or poor women in home countries.¹⁰ The United States is the largest receiving country for migrants in the Americas, with an estimated 35 million migrants residing in the U.S.¹¹ It is impossible to know the exact proportion of migrants who are undocumented; reputable estimates vary from 7.8 to 8.5 million.¹² Of the undocumented workers, it has been estimated that 80% are from Latin American countries.¹³ For many of the women within these groups, domestic work will be the first job obtained in the United States.

¹⁰ Scholars have noted that many migrant women workers are part of what one analyst calls the “international transfer of caretaking”:

the international transfer of caretaking refers to the three-tier transfer of reproductive labor among women in sending and receiving countries of migration. While class-privileged women purchase the low-wage services of migrant [women] domestic workers, migrant [women] domestic workers simultaneously purchase the even lower wage services of poorer women left behind in the[ir home countries]. In light of this transnational transfer of gender constraints that occurs in globalization, the independent migration of [women] domestic workers could be read as a process of rejecting gender constraints for different groups of women in a transnational economy.

Rhacel Salazar Parreñas, *Servants of Globalization: Women, Migration and Domestic Work* (Stanford, Calif.: Stanford University Press, 2001), 62; hereafter cited in text. See also Donna E. Young, “Working Across Borders: Global Restructuring and Women’s Work,” *Utah Law Review* (2001): 9 (explaining that “As middle class women enter the workforce, a vacuum is created within the home and housework becomes a commodity exchanged between women. The phenomenon of immigrant women’s domestic work can be scrutinized, therefore, within the context of women’s position within global labor markets and the intimate family setting.”); Pierrette Hondagneu-Sotelo, *Doméstica: Immigrant Workers Cleaning and Caring in the Shadows of Affluence* (Berkeley: University of California Press, 2001), 19-22 (noting the same dynamic concerning immigrant women in the United States); Hope Lewis, “Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas,” *Journal of Gender, Race & Justice* 5 (2001): 218 (noting that many Afro-Caribbean women migrate to North America to work as domestics “while leaving their own children and parents in the care of relatives or lower-paid women or girls from rural areas in the Caribbean.”); and Jan Aart Scholte, *Globalization: A Critical Introduction* (New York: St. Martin’s Press, 2000), 251-253, 252 (discussing the global dynamics that have created more opportunities for women in wage labor markets while failing to take away family burdens, leading to, *inter alia*, “[e]xpanded global markets in domestic servants. . .”).

¹¹ Beth Lyon and Sarah Paoletti, “Inter-American Developments on Globalization’s Refugees: New Rights for Migrant Workers and their Families,” *European Yearbook of Minority Issues* 3 (2003/4): 63-87.

¹² These figures are from the Pew Hispanic Center and the Migration Policy Institute respectively. See Rebecca Smith Lyon, “Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies are Restricted Based on Workers’ Migrant Status,” *Seattle Journal for Social Justice* 1 (2003): 803-804.

¹³ Inter-American Commission on Human Rights, *Annual Report 2004* (citing Migration Policy Institute estimates).

Most job opportunities for women migrants are in unregulated (or under-regulated) sectors, including domestic work, informal/“off the books” industries or services, and criminalized sectors, including the sex industry (Taran & Geronimi, 10). This means that even women who cross borders legally may find themselves in unregulated – and often irregular – work situations.¹⁴ In addition, the majority of opportunities that offer legal channels of migration are in male-dominated sectors such as agriculture and construction work, putting women at a great disadvantage (Taran & Geronimi, 10). In the United States, a significant exception to this general state of affairs exists for migrant domestic workers working for diplomatic officials; such officials can obtain special visas for their domestic workers. The ILO explains that “the demand for foreign labor reflects the long term trend of informalization of low skilled and poorly paid jobs, where irregular migrants are preferred as they are willing to work for inferior salaries, for short periods in production peaks, or to take physically demanding and dirty jobs” (Taran & Geronimi, 5).

In sum, globalization has ushered in increasing “pull” and “push” factors for women’s migration for labor at the same time as it has resulted in decreasing regulation of the labor market, growth in the informal sector, and the emergence of new forms of exploitation, many of which are gendered. In the midst of these trends, many governments are tightening migration controls while simultaneously allowing private employers and recruiting agencies to operate unchecked by regulation or inspection. This interplay of competing incentives sets the scene for abuse of those already disadvantaged through systems of discrimination and marginalization that operate along axes of gender, race, poverty and position within the global economic order. For women in many parts of the world, these trends spell increased vulnerability to exploitation and abuse, while simultaneously presenting opportunities for empowerment.

In the United States, these forces in combination produce both new opportunities for women who find positions as domestic workers, as well as setting the scene for interlocking forms of abuse and discrimination in which migrant domestic workers are often left largely without remedy.

b. Creating the Rightsless Nanny: Exploitative Terms of Work

A number of forces combine to render migrant domestic workers vulnerable to exploitative terms of work in the United States, especially in relation to pay, hours of work, and contracts. Restrictions on the right to enter the United States for work, for example, create incentives for legal and illegal agents alike to take advantage of migrant domestic workers. Immigration laws in the United States are widely recognized as

¹⁴ The ILO identifies four types of “irregular” migrant workers: (1) “Those who enter the country legally but whose stay or employment contravene the law,” (2) “Those whose stay and entry are lawful but who do not have the right to work and are engaged in illegal or illicit employment,” (3) “Those who enter the country illegally and who seek to change their status after arrival to find legitimate employment,” and (4) “Those who enter the country illegally, whose stay is unlawful, and whose employment is illegal.” ILO, *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide – Booklet 2: Decision-Making and Preparing for Employment Abroad* (Geneva: ILO, 2003), 18; hereafter cited in text as ILO Booklet 2.

extremely strict, and the large number of undocumented workers in the U.S. attests to the gap between U.S. immigration law and the economic demand for cheap labor.

Two categories of special visas are available to women entering the United States to work temporarily as live-in domestic workers for foreign business persons, employees of international organizations, and foreign diplomats.¹⁵ U.S. citizens seeking domestic help may also sometimes sponsor migrant women for employment visas,¹⁶ though it is generally easier to locate a domestic worker through an agency or the informal job market. In practice, the proportion of domestic workers on special visas is probably rather small. Though statistics are hard to come by in this under-studied sector, the United States Bureau of Labor Statistics reported that in 2004, 92.2% of all persons employed in services within “private households” were women (*Women in the Labor Force*), and a recent survey of domestic workers in New York found that 99% were born outside the United States, with only 1% identifying as white.¹⁷

In theory, all migrant domestic workers with special visas are given contracts, since a contract is a requirement for those entering on such visas.¹⁸ The U.S. Department of State requires that certain elements be included in these contracts as a condition for issuance of a domestic worker visa. These elements include: an undertaking that the domestic worker will be paid at the applicable minimum wage; a promise to the employee that her passport will not be confiscated by the employer; and a statement that both parties understand that the domestic worker may not be required to be on the premises of the employer without being paid for her time.¹⁹ In practice, even when they are validly concluded, contracts are often taken from workers or considered irrelevant by employers once they arrive in the United States. Human Rights Watch reports that many migrant domestic workers are told by their employers that their contracts are not binding:

[D]omestic workers explained to Human Rights Watch that their employers explicitly told them that their employment contracts were signed to satisfy U.S.

¹⁵ Live-in domestic workers may enter and work legally under two different special visa programs: they may work for diplomats through the A-3 visa program or officials of international organizations using a G-5 visa. Migrant domestic workers may also be eligible to work legally for other foreigners or U.S. citizens with a B-1 visa. See U.S. Embassy, *Domestic Employees* (“Personal or domestic servants who are accompanying or following to join an employer in the United States are eligible for B-1 visas; those accompanying or following to join an employer who is a foreign diplomat or official are eligible for A-3, G-5 or NATO-7 visas, depending on the visa status of their employer. This category of persons includes, but is not limited to, cooks, butlers, chauffeurs, housemaids, parlormaid, valets, footmen, nannies, au pairs, mothers' helpers, gardeners, and paid companions. Please refer to the appropriate section for further information.”). Available at www.usembassy.org.uk/cons_web/visa/niv/apply.htm.

¹⁶ Ibid.

¹⁷ Domestic Workers United & DataCenter, *Home is Where the Work Is: Inside New York's Domestic Work Industry*, 2006, executive summary and powerpoint presentation available online at <http://www.domesticworkersunited.org/> (hereafter cited as *Home is Where the Work Is*), 3.

¹⁸ U.S. Department of State, *Foreign Affairs Manual*, vol. 9, secs. 41.31, note 6; 41.21, note 6.2. Available at <http://foia.state.gov/regs/fams.asp?level=2&id=10&fam=0>.

¹⁹ Ibid.

consular offices' requirements, were not binding, and were not intended to govern their employment relationships in the United States.²⁰

U.S. government officials have told human rights workers that they do not have the capacity to monitor these contracts; nor do they maintain files of such legal documents (*Hidden in the Home*, 23-24). Further, the requirement that employers conclude a contract with their domestic workers is a condition of obtaining a visa, meaning that the only federal "remedy" that exists for breach of this rule is the non-issuance of the visa in the first place. Domestic workers do not have the right to file a civil complaint against their employer for non-compliance with the State Department policy (though they may sometimes be able to file a traditional contract claim in court).

Regardless of their means of entry, women migrants face myriad forms of exploitation in the United States, including extreme forms of abuse such as trafficking, forced labor, and enslavement.²¹ Contract problems abound for those who enter on special visas as well as those who do not. Women who actually receive a contract may not understand the language in which it is written. They may find that the contract they sign is later replaced by an inferior version stripped of worker protections, or they may be refused a copy entirely.²² Sometimes, contracts are concluded between the employer and the recruitment agency alone, leaving the worker without any protection. As may be expected, undocumented women are rarely given contracts.

While there are no specific remedies or procedures for domestic workers seeking to vindicate their rights, women who have signed contracts do have the right – like anyone else harmed by breach of contract – to file a claim in court seeking contract remedies. A number of organizations take such cases on behalf of migrant domestic workers, and some have seen results, including significant payments for workers who did not receive adequate payment from their employers.²³ Even domestic workers who did not have a contract may recover lost wages: recently, a jury awarded \$226,000 to a

²⁰ Human Rights Watch, *Hidden in the Home: Abuse of Domestic Workers with Special Visas in the United States* (New York: Human Rights Watch, 2001), 24; hereafter cited in text as *Hidden in the Home*.

²¹ As noted above, these extreme forms of exploitation are not the focus of this article, though they have been repeatedly documented in relation to domestic workers in the United States. See, for example, Free the Slaves & The Human Rights Center of the University of California, Berkeley, "Hidden Slaves: Forced Labor in the United States." *Berkeley Journal of International Law* 23 (2005): 47-111.

²² ILO, *Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers: An Information Guide – Booklet 3: Recruitment and the Journey for Employment Abroad* (Geneva: ILO, 2003), 22-23; hereafter cited in text as ILO Booklet 3. See also Break the Chain Campaign, "Assisting the Enslaved in the Land of the Free," (website with various pages devoted to information about domestic workers) <http://www.ips-dc.org/campaign/index.htm> <http://www.ips-dc.org/campaign/index.htm>; hereafter cited in text as *Break the Chain*.

²³ Ai-Jen Poo (Organizer, CAAAV: Organizing Asian Communities), interview by author, New York, NY, 9 May 2005; Mayra Peters-Quintero, interview by author, New York, New York, 29 June 2006; and Claudia Flores, Staff Attorney, Women's Rights Project, American Civil Liberties Union, personal communication, 11 July 2006. Successes include a recent settlement for \$60,000 for breach of contract for a domestic worker in New York who was summarily fired after a dispute with her employers. The settlement also included a letter of reference from the employers, something that can be as valuable as years of wages in some instances, since prospective employers insist on such letters from previous employers before hiring domestic workers.

domestic worker from Nepal who sued in Federal Court to recover the reasonable value of her services.²⁴

Recruitment agencies in home countries – even when working legally – often charge steep fees for placement and travel. When working irregularly or without government oversight, such agencies often charge fees that are close to impossible to repay, trapping women migrants into conditions akin to debt bondage.²⁵ Others house migrant workers in “collection” centers in the sending country for as long as several months before the receiving country processes the needed papers; conditions in such centers are sometimes horrendous, with women held incommunicado and given inadequate or rotten food (ILO Booklet 3, 24). Finally, agents who are working in direct contravention of U.S. and sending countries’ national laws by facilitating women’s crossing of borders illegally, may use coercion, force, or false promises, placing women in clandestine domestic settings, illegal sex work, or exploitative sweatshops – practices that amount to trafficking. The ILO reports that “[w]omen tend to be more likely than men to make use of these illegal recruitment and migration channels because of their limited access to information, lack of time to search for legal channels and lack of financial resources to pay the fees. The nature of the work and the forms of migration open to women often force them to rely on fraudulent recruiters and dubious agents” (ILO Booklet 1, 18).

Migrant domestic workers in the United States face a range of abuses connected with compensation.²⁶ Even when paid on time and according to the law and the terms of any contract they may have been given, they are often paid substandard wages. Under national law, domestic workers are entitled to the federal minimum wage and employment record-keeping requirements, though live-in domestic workers are explicitly excluded from the requirement that employers pay workers one and a half their usual hourly rate for hours worked in excess of forty hours per week.²⁷ Human Rights Watch reports that the migrant domestic workers in a study conducted in the United States received an average of \$2.14 per hour – less than half the required minimum wage (*Hidden in the Home*, 17). A study conducted by Domestic Workers United and DataCenter found that only 13% of domestic workers in New York City receive living wages (defined as wages more than 1.5 times above the federal poverty line), and that 67% do not receive overtime pay for hours they work overtime (*Home is Where the Work Is*, 4-5).

In addition to failing to pay fair wages, employers have been found to deduct dubious or blatantly unfair charges, including fees for health services that are never received, or fees for rent in situations of squalor.²⁸ While the law allows employers to deduct the “reasonable cost” of room and board for live-in domestic workers, federal

²⁴ Mayra Peters-Quintero, interview by author, New York, NY, 29 June 2006.

²⁵ See ILO Booklet 1, 18 (discussing exorbitant fees, deceptive contracts, and other practices used by migration agents), and ILO Booklet 3, 20-21 (exploring debt bondage).

²⁶ See ILO Booklet 4, 23 for a discussion of the range of payment-related abuses.

²⁷ *Fair Labor Standards Act, U.S. Code*, title 29, secs. 206(f) (minimum wage); 207(l) (maximum hours); 213(b)(21) (exemption of live-in domestic workers from maximum hour requirements).

²⁸ See ILO Booklet 4, 25 for a discussion of accommodations for migrant domestic workers.

regulations place limits on these deductions.²⁹ Workers on certain sets of special visas are entitled to free room and board.³⁰

Despite these protections, payments are often delayed, improperly calculated, or withheld arbitrarily. In one exemplary case, an employer placed her domestic worker's wages into a joint bank account that she opened for the domestic worker, but then withdrew the money for her own use.³¹ In another case, wages were paid directly to the husband of a domestic worker from Bangladesh, with none of the payments going into the hands of the worker herself (*Hidden in the Home*, 10). A similar case was reported recently in Los Angeles, where an Indonesian woman worked for a couple for seven years without receiving any pay directly; her family in Indonesia was being paid less than two dollars per day for her labor.³² At the extreme end of the spectrum, women who are in conditions of debt bondage or slavery may not receive wages at all.³³ Although there has been less attention to the issue in the United States than in Asia,³⁴ anecdotal evidence shows that domestic workers are often paid salaries that are based more on their nationality, ethnicity, or race, than their actual experience or skills (Poo, interview). This kind of race and ethnicity discrimination is exemplary of other forms of discrimination on multiple bases within the labor market in the United States.

Another major obstacle to full equality and rights for migrant domestic workers in the United States is the way in which their work may define them out of certain workers' rights protections under domestic law. Domestic workers as a category are specifically excluded from the protections of the National Labor Relations Act ("NLRA"), which protects workers' rights to bargain collectively, organize, and strike:

The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home. . . .³⁵

In practice, this means that domestic workers do not have legal remedies under federal law if they are fired or otherwise sanctioned by their employers for organizing a union or

²⁹ Regulations concerning such limits are set out at *Code of Federal Regulations*, vol. 29, sec. 552.100(b).

³⁰ U.S. Department of State, *Foreign Affairs Manual*, vol. 9, sec. 41.21 N6.2(A)(1) (February 9, 2000).

³¹ See *Break the Chain*, describing the case of a Tanzanian woman working on a special visa for a member of the Tanzanian diplomatic staff in Washington, D.C.

³² The worker subsequently filed suit against the couple, prevailing with a jury award of \$832,000 for overtime wages and back pay, plus \$5,000 in emotional damages. See Peter Micek, "Indonesian Trafficking Victim Wins Settlement," *New American Media* (24 May 2006), available at:

http://news.newamericamedia.org/news/view_article.html?article_id=610a56fa6feb55b166125e7c5543dc4d.

³³ See *Break the Chain*, 19-22 (describing the cases of several migrant domestic workers in the United States whose cases amounted to servitude or forced labor).

³⁴ Noorashikin Abdul Rahman, Brenda S.A. Yeoh & Shirlena Huang, "'Dignity Over Due': Transnational Domestic Workers in Singapore," paper presented at the International Workshop on Contemporary Perspectives on Asian Transnational Domestic Workers, 2004 (on file with author); Noorashikin Abdul Rahman, "Negotiating Power: A Case Study of Foreign Domestic Workers in Singapore," Ph.D. diss., Curtin University of Technology, 2003.

³⁵ *National Labor Relations Act*, U.S. Code, title 29, sec. 152(3).

striking.³⁶ Live-in domestic workers are also excluded from the health and safety protections of the federal Occupational Safety and Health Act through the regulations that implement the legislation.³⁷ Domestic workers are also functionally excluded from coverage by Title VII of the Civil Rights Act, the federal anti-discrimination statute, which applies only to individuals working for employers with fifteen or more employees.³⁸ This exclusion is especially unfortunate for migrant women who work as domestic workers, since the kind of sex- and race-based discrimination and abuse they face is that which is normally outlawed by Title VII.³⁹ Although domestic workers are covered by the minimum wage and employment record keeping requirements, live-in domestic workers are explicitly excluded from the overtime provisions, as noted above.⁴⁰ In such circumstances, many employers take advantage of the vulnerability of migrant domestic workers by coercing them to work long hours, often without breaks or leisure time.⁴¹ Indeed, “unscheduled availability at all times” is a characteristic of unpaid household work for women, an expectation modeled on gendered assumptions about women’s roles in the home.⁴² Further, women working as domestics in the United States are often denied days off, including sick days.⁴³ While the families who employ domestics may explain the long hours by saying that such women are “part of the family,”⁴⁴ this feeling often is not shared by the employees themselves.⁴⁵ One researcher

³⁶ An additional hurdle for domestic workers is that even if they were covered by the National Labor Relations Act, those who were undocumented would not be eligible for the standard remedy of back pay for non-compliance with the Act. In a 2002 case, the U.S. Supreme Court determined that workers who were not authorized to work legally in the United States may not recover pay lost when an employer illegally firing them in retaliation for organizing efforts. *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002).

³⁷ The Occupational Health and Safety Act (OSHA) does not exclude live-in domestic workers; the exclusion is included in the regulations promulgated to enforce the statute. See OSHA, *U.S. Code*, title 29, sec. 651(b); and the Department of Labor regulations, *Code of Federal Regulations*, title 29, sec. 1975.6.

³⁸ See *Code of Federal Regulations*, title 29, sec. 1604.11(a), implementing Title VII of the *Civil Rights Act, U.S. Code*, title 29, sec. 651(b).

³⁹ Even if domestic workers were covered by Title VII, they may be ineligible for some remedies if they are undocumented. Employers have argued that the Supreme Court’s reasoning in *Hoffman Plastics* should be adopted in the Title VII context to bar awards of back pay for illegal discrimination. This issue has not yet been definitively determined. The Ninth Circuit has considered the argument, leaning toward rejecting it, though not reaching a holding on the issue. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir., 2004).

⁴⁰ *Fair Labor Standards Act, U.S. Code*, title 29, sec. 206(f) (minimum wage); 207(l) (maximum hours); 213(b)(21) (exemption of live-in domestic workers from maximum hour requirements).

⁴¹ See *Hidden in the Home*, 16-17 (domestic workers in the United States required to be on call 24 hours a day); Bridget Anderson, “Just Another Job? The Commodification of Domestic Labor,” in *Global Woman: Nannies, Maids and Sex Workers in the New Economy*, ed. Barbara Ehrenreich and Arlie Russell Hochschild (New York: Metropolitan Books, 2003), 104, 106; hereafter cited in text.

⁴² See Parreñas, 164 (finding that Filipina live-in workers in Los Angeles and Rome have complained of the “absence of set parameters between their work and rest hours”).

⁴³ *Hidden in the Home*, 16-17, 19-22; *Home is Where the Work Is*, 9.

⁴⁴ For a discussion of the “part of the family” phenomenon and the ways in which migrant domestic workers have attempted to subvert the familial discourse to their benefit, see Parreñas, 179-195.

⁴⁵ Parreñas found that Filipina domestic workers “regularly found themselves subject to food rationing, prevented from sitting on the couch, provided with a separate set of utensils, and told when to get food from the refrigerator and when to retreat to their bedrooms. These attempts by employers to regulate their bodies are described by domestic workers as part of the larger effort by employers to own them.” Parreñas, 165.

in the United States found that many migrant domestic workers were asked to use a separate set of utensils and told when and how much to eat.⁴⁶

Although some laws exist to protect the rights of migrant domestic workers, these laws are subject to lax enforcement and widespread disregard. The U.S. Department of Labor's Wage and Hour Division is the federal agency charged with monitoring compliance with the Fair Labor Standards Act, the law that provides standards for hourly wages, overtime pay, recordkeeping and allowable deductions for room and board. Human Rights Watch reports that the Wage and Hour Division has developed initiatives to enforce labor laws in industries where abuses are common but complaints are not; these initiatives have targeted the following industries: agriculture, garment, security guard, janitorial services, restaurant, hotel, day-haul, and health care (*Hidden in the Home*, 31). Domestic workers' advocates report that the Wage and Hour Division has never developed or implemented such an initiative to enforce labor laws in the domestic work sector (*Hidden in the Home*, 31; Poo, interview). Human Rights Watch reports that the Wage and Hour Division has historically initiated investigations into labor law violations in relation to domestic workers in only 0.006% of the known domestic work relationships (*Hidden in the Home*, 31).

Like other categories of workers covered by federal labor law, domestic workers may file individual lawsuits to enforce their rights. These individual claims are meant to function as incentives for employers to follow the law even when government enforcement is lacking. Unlike other workers, however, domestic workers are frequently unaware of the laws protecting them, and are especially vulnerable to reprisal by employers and other collateral consequences of pressing a claim. The immigration status of domestic workers with special visas depends on their continued employment by their sponsor, making them especially vulnerable if they complain. Undocumented workers may fear exposing their migration status should they pursue legal claims. While there are some protections against the forced disclosure of this information for migrants seeking labor remedies in the United States, they are not widely known and are often flouted.⁴⁷ Human Rights Watch reports the following in relation to domestic workers who the organization interviewed:

There were a variety of reasons mentioned by domestic workers for their failure to file complaints, including: lack of knowledge of the U.S. legal system, exacerbated by social and cultural isolation; fear that employers would report them to the [immigration authorities] and that they would subsequently be removed from the United States; and fear of retaliation by politically powerful employers against their families in their countries of origin (*Hidden in the Home*, 32).

Many of these fears have proven to be well-founded. Organizations report that some domestic workers pursuing lawsuits have had their families targeted in their home

⁴⁶ Ibid.

⁴⁷ See discussion, below, at note 131 and accompanying text.

countries, and have been deported during the pendency of their claims (*Hidden in the Home*, 33-35). The ILO explains that

a major incentive for exploitation of migrants and ultimately forced labor is the lack of application and enforcement of labor standards in countries of destination as well as origin. These include respect for minimum working conditions and consent to working conditions. Tolerance of restrictions on freedom of movement, long working hours, poor or non-existent health and safety protections, non-payment of wages, substandard housing, etc. all contribute to expanding a market for trafficked migrants who have no choice but to labor in conditions simply intolerable and unacceptable for legal employment. Worse still is the absence of worksite monitoring, particularly in such already marginal sectors as agriculture, domestic service, sex-work, which would contribute to identifying whether workers may be in situations of forced or compulsory labor (Taran & Geronimi, 11).

In addition to these problems, a special issue arises for those employed by diplomats and employees of international institutions: the problem of immunity from suit. Those entitled to full immunity from the criminal, civil, and administrative jurisdiction of the United States include diplomats and their families, as well as officials of the United Nations, the Organization of American States (OAS), and country missions and observer offices.⁴⁸ In addition, the technical and administrative staff of diplomatic missions and observer offices enjoy limited immunity in the form of absolute immunity from criminal sanction combined with immunity from civil and administrative proceedings for acts performed “in the course of their duties” (*Hidden in the Home*, 34). These immunities may be waived at the discretion of the official’s home government, and the U.S. Department of State is entitled to request such waivers. The Department’s policy is to request waivers in most criminal cases, and in some civil matters (*Hidden in the Home*, 34-35). In many cases, however, the Department of State affirmatively supports the immunity extended to diplomatic staff through letters submitted to courts or enforcement agencies (*Hidden in the Home*, 34-35). Even when immunities are waived and enforcement is possible, employers may escape penalties by leaving the United States or insulating their assets by holding them abroad.

⁴⁸ Under U.S. law, diplomats and their families, as well as officials of U.N. and O.A.S. missions and observer offices and their families, enjoy diplomatic immunity. The basic rule is that those with diplomatic immunity are not subject to the civil, criminal, or administrative jurisdiction of the United States, unless a specific exception applies, or unless immunity is waived by the sending state. Waivers must be express, and may be requested and obtained by the State Department from the sending state. The immunities enjoyed by diplomats are set out in the Vienna Convention on Diplomatic Relations in articles 31 (immunities of diplomats from criminal, civil, and administrative jurisdiction, subject to specific exceptions) and 37 (immunities of families of diplomats, administrative and technical staff). The specific immunities enjoyed by U.N. and O.A.S. officials are set out in the U.N. Headquarters Agreement, 11 U.N. Treaty Series 11, and Executive Order No. 11931, Aug. 3, 1976, 41 F.R. 32689, respectively.

III. USING HUMAN RIGHTS LAW TO EMPOWER MIGRANT DOMESTIC WORKERS

When used creatively, the norms and procedures encompassed by the Inter-American human rights system can be used by advocates as one method among many to respond to the myriad forms of abuse that migrant domestic workers experience in the United States. Before examining the ways in which the system could be used, it is important to examine two common concerns that women's rights advocates have often voiced about the human rights framework. First, some have argued that human rights discussions can be disempowering, since they present women as "victims" of human rights violations instead of empowered subjects, agents of their own lives. I will address this concern below. The second concern is that human rights law may not be a good instrument to reach conduct that happens in the "private" sphere – among non-state actors such as individual workers and her domestic employers. As I will explain below, human rights law has evolved significantly in the last several decades, and obligations in the "private" sphere have been sufficiently developed to make the framework a useful one for advocates fighting abuses that take place in private homes.

a. On Women's "Vulnerability"

Although necessary, rooting an analysis of human rights violations in women's lived experiences is fraught with danger. As Ratna Kapur has explained, this kind of focus can lead to "victimization rhetoric," in which women – usually from the global South – are presented as nothing other than the sum of their vulnerability, abuse, and victimhood.⁴⁹

I attempt to avoid this problem by rejecting the common narrow focus on migrants' experience of violence against women and trafficking. Many scholars have critiqued the seemingly exclusive focus on the "vulnerability" of women migrants – which often manifests itself through the emphasis on ending (usually sexual) violence against women migrants⁵⁰ and trafficking in women.⁵¹ I do not mean to dispute the

⁴⁹ Ratna Kapur, "The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics," *Harvard Human Rights Journal* 15 (2002): 5-6.

⁵⁰ See, for example, Donna Maeda, "Inter/National Migration of Labor: LatCrit Perspectives on Addressing Issues Arising With the Movement of Workers: Agencies of Filipina Migrants in Globalized Economies: Transforming International Human Rights Legal Discourse," *La Raza Law Journal* 12 (2002): 317, 326 (noting that "the focus on vulnerability centers the 'migrant' as a kind of status category for human rights analysis. Rather than addressing conditions that disable people from living well as human beings and focusing on changing these conditions, this human rights model places migrants into a status category with particular harms.")

⁵¹ See Lewis, 222 ("At this early stage in the recognition of the human rights implications of female migration, the attention of most mainstream human rights organizations remains fixed primarily on the physical and sexual abuses associated with slavery and trafficking. They document conditions involving literal enslavement or indentured servitude, such as the horrific cases reported in the United States involving foreign diplomats as employers. Are the stories of economic, social, and cultural violations that many other female migrant workers experience too 'ordinary' for us to see them as a matter of human rights urgency?").

existence, pervasiveness, or perniciousness of these violations. I simply mean to shift the focus to the human rights entitlements that women migrant workers should enjoy – civil and political, social and economic – in this article, most specifically, exploitative conditions of work. Finally, it is important to note that women’s “vulnerability” is not as a quality that inheres in them, but is instead the product of political, economic, and cultural forces acting along a variety of identity axes, including gender, race, and nationality, that disempower specific sets of women in particular ways. Focusing exclusively on women’s vulnerability effectively shifts the focus away from the forces of global inequality, the gendered divisions of labor, and the forms of racism and xenophobia that work together to ensure that women migrant workers remain marginalized. Emphasizing that women are rightsholders as workers and as migrants, on the other hand, may assist in efforts to empower domestic workers.

b. Reaching “Private” Conduct Through Human Rights Law

Women migrant workers face abuses at the hands of government officials, as well as private individuals, companies, and other non-state actors. This is true all along a migrant’s trajectory of movement, as well as in her chosen place of work. In fact, most of the abuses that migrant domestic workers face are committed by “private” actors in the sense that they are not carried out directly by government personnel, but are instead perpetrated by employers and recruitment agencies. For this reason, it is important to acknowledge the ways in which the human rights framework has evolved to respond to abuses that are carried out by agents other than the state. These advances have been especially well articulated in the Inter-American system.

Against a general backdrop in which human rights obligations were assumed to function as a check on state actions, a number of developments have emerged in the last several decades that can be said to have dramatically altered that orientation forever.⁵² First, as scholars of economic and social rights are quick to point out, human rights law was never really designed to halt only the abuses of the state: it was also written to include affirmative duties on states to ensure that those within their jurisdiction enjoyed a set of basic subsistence rights, such as the right to food, adequate housing, education, and health.⁵³ Through the development of the economic, social and cultural rights regime, it has become clear that the state is not necessarily required to *provide* the goods needed to fulfill rights.⁵⁴ Private individuals and groups – including families, communities, companies, or other groupings – may be the most well situated providers of food, water, shelter and work to people in various settings. The state, however, is recognized as obligated to ensure that (a) conditions are such that even the most marginalized and poor can access their subsistence rights in some way – whether through access to private schemes or through direct provision of goods by the state (Craven, 140-142), and (b)

⁵² For a discussion of some of these changes, see Dinah Shelton, “Globalization and the Erosion of Sovereignty: Protecting Human Rights in a Globalized World,” *Boston College International and Comparative Law Review* 25 (2002): 273-322.

⁵³ See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter “ICESCR”].

⁵⁴ See Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford: Clarendon Press, 1995), 120-124; hereafter cited in text.

when entrusting basic rights protections to the private sector, the state must regulate and monitor actions that could impinge on the rights of its people – through both action and inaction.⁵⁵

In truth, civil and political rights have always involved similar obligations on the state to protect human rights even when rights violations take place among non-state actors. The Inter-American Court of Human Rights famously described the duties inherent in the requirement that states “ensure” human rights to all within their jurisdiction in the *Velasquez-Rodriguez Case*, which concerned forced disappearances:

This obligation implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.⁵⁶

These obligations were amplified in a later case decided by the Inter-American Court. In the *Garrido and Baigorria Case*, the Court explained that the measures taken to ensure human rights can be considered effective only once “the community, in general, adapts its conduct to conform to the principles of the Convention” and when there are violations, “the penalties provided. . . are effectively applied.”⁵⁷

The second major development that clarified the affirmative duties of the state in the “private” sphere was the achievement, through the work of feminists in many parts of the world, of acceptance that abuses such as domestic violence, even when carried out in the most sacrosanct of spaces, constitute human rights violations.⁵⁸ This means that the state is required to take steps to prevent such abuses, to punish them when they occur, and to provide remedies to those who have been injured.⁵⁹ In the Inter-American system, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women sets out a very detailed set of obligations for states – from training and education to protective measures for victims seeking redress and punishments for abusers.⁶⁰ Having established that violence in the most intimate of spaces amounts to a human rights violation, this principle is now available for use with

⁵⁵ See, for example, United Nations Committee on Economic, Social, and Cultural Rights, *General Comment No. 15 on the Right to water* (2002), paras. 23-24; available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a5458d1d1bbd713fc1256cc400389e94?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a5458d1d1bbd713fc1256cc400389e94?Opendocument).

⁵⁶ *Velasquez-Rodriguez Case* (July 29, 1988; Honduras), *Series C, No. 4*, para. 166.

⁵⁷ *Garrido and Baigorria Case*, Reparations (Aug. 27, 1998), *Series C, No. 39*, para. 69.

⁵⁸ For a discussion of this shift, see United Nations Development Fund for Women, *Not a Minute More: Ending Violence Against Women* (New York: UNIFEM, 2003), 16-25.

⁵⁹ See, for example, United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 12 on Violence Against Women* (1989), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12>.

⁶⁰ *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*, June 7, 1999.

other forms of violation, including, for instance, discrimination that happens inside of companies, clubs, or recruitment agencies.

This broad set of positive and negative obligations for both private and public conduct has been abbreviated in the human rights field into the three-part requirement that states must respect, protect, and fulfill rights. States must *respect* rights by ensuring that the state and its instrumentalities do not violate rights; *protect* rights by preventing violations at the hands of non-state actors and investigating, punishing, and redressing violations when they do occur; and *fulfill* rights by creating enabling conditions for all individuals to enjoy their full rights.⁶¹ In sum, then, in relation to both civil and political rights and economic, social and cultural rights, the state must ensure that conditions are such that all people enjoy all of their rights. Though the state actions required in relation to each set of rights – and indeed each individual right – may differ, this common framework is a helpful way of conceptualizing state obligations. The focus of human rights law is on the obligations of states, 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.

IV. THE UNITED STATES IN THE AMERICAS: THE WORK OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM CONCERNING VIOLATIONS IN THE UNITED STATES

Having set out some of the more conceptual reasons why human rights law could be useful for migrant domestic workers, the next question that requires some answers is what use can human rights be when dealing with the United States? There are different answers to this question in different settings, and in relation to different human rights issues. This section will engage with the problem of American exceptionalism, and then look at how the U.S. has treated – and has been treated by – the Inter-American Court of Human Rights (“the Court” or “the Inter-American Court”) and the Inter-American Commission on Human Rights (“the Commission” or “the Inter-American Commission”) (collectively “the Inter-American human rights system”)

a. American Exceptionalism

American exceptionalism concerning international law – the view that the actions of the U.S. government should not be scrutinized under international law, and that adherence to that law is not in line with “American interests” –has been prominently

⁶¹ The “respect, protect, fulfill” framework has developed over time, and is expressed in a variety of ways. For an example of the application of this framework, see United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24 on Women and Health* (1999), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12>, and United Nations Committee on Economic, Social and Cultural Rights, *General Recommendation No. 15 on the Right to Water* (2002), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/a5458d1d1bbd713fc1256cc400389e94?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/a5458d1d1bbd713fc1256cc400389e94?Opendocument). For a discussion and a variation, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (New York: Oxford University Press, 2000), 180-184 (including the obligations to respect the rights of others, protect rights and prevent violations, create institutional machinery, provide goods and services to satisfy rights, and promote rights).

noted in the last few years in relation to the “war on terror.” This exceptionalism has historical antecedents that are all too familiar to human rights advocates. The U.S. has long been regarded as a strong promoter of human rights institutions, but has demonstrated itself to be an at-best reluctant participant in international human rights systems that might be used to redress abuses that take place under its jurisdiction. The U.S. has interposed reservations altering the substantive effect of the key human rights treaties that it has ratified (often pledging to uphold human rights law only insofar as it is in line with U.S. constitutional law) and has refused to ratify others, including such widely ratified treaties as the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention on the Rights of the Child, the latter of which has been ratified by all states in the world except Somalia and the United States.⁶²

The U.S. has also been unwilling to participate in human rights bodies with jurisdiction over individual complaints. Although it has ratified these treaties, the U.S. has refused to consent to the individual complaints procedures under the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or the Convention on the Elimination of All Forms of Racial Discrimination. This reluctance extends to – and is perhaps exemplified by – the nature of U.S. participation in the Inter-American human rights system. As Richard Wilson notes:

In the Inter-American system, while the United States has always been a strong political supporter of its human rights enforcement mechanisms, it has blanched at assuming treaty obligations or in complying with the decisions against it by those same mechanisms.⁶³

The United States has signed but not ratified the American Convention on Human Rights⁶⁴, and has not signed or ratified either of its protocols⁶⁵ or any of the other major Inter-American human rights conventions.⁶⁶

⁶² Convention on the Rights of the Child, G.A. Res. 44/25, 61st plen. mtg., U.N. Doc. A / RES / 44 / 25 (Nov. 20, 1989). For ratification information, see

<http://www.ohchr.org/english/countries/ratification/11.htm>.

⁶³ Richard J. Wilson, “The United States’ Position on the Death Penalty in the Inter-American Human Rights System,” *Santa Clara Law Review* 42 (2002): 1159, 1164.

⁶⁴ *American Convention on Human Rights*, Nov. 22, 1969, O.A.S.T.S. No. 36 (hereinafter “American Convention.”)

⁶⁵ There are two protocols to the *American Convention*: the *Additional Protocol to the American Convention on Human Rights in the Matter of Economic, Social and Cultural Rights*, Nov. 17, 1988, O.A.S.T.S. No. 69 (1988); and the *Protocol to the American Convention on Human Rights Relative to the Abolition of the Death Penalty*, June 8, 1990, O.A.S.T.S. No. 73 (1990).

⁶⁶ These conventions include the *Inter-American Convention to Prevent and Punish Torture*, Dec. 9, 1985, O.A.S.T.S. No. 67 (1987); the *Inter-American Convention on Forced Disappearance of Persons*, June 9, 1994; the *Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women*, June 9, 1994; and the *Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities*, June 7, 1999.

Despite this dismissive attitude, the United States cannot escape the scrutiny of the Inter-American human rights bodies. Unlike the committees that monitor United Nations conventions, the major investigatory human rights institution within the Inter-American system, the Inter-American Commission on Human Rights, has jurisdiction over individual complaints concerning the United States by virtue of U.S. membership in the Organization of American States. Further, unlike the U.N. bodies, which are limited to interpreting the provisions of the single treaty under their purview, the Inter-American Commission, following the lead of the Inter-American Court, has developed and used interpretive strategies (explored below) to incorporate and draw upon human rights norms from other systems, thus indirectly opening enforcement opportunities for norms that are binding on the U.S. but not opposable to it in other venues, such as the substantive norms encompassed in the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.

The Inter-American Court of Human Rights has also been willing to interpret human rights treaties that are binding on the United States in its advisory capacity, handing down key rulings on the rights of aliens that provide significant opportunities for migrants' rights advocates. The open-textured nature of the human rights corpus in the Inter-American system makes it an especially promising venue for complaints by migrant domestic workers seeking redress for multiple forms of discrimination and exploitation within the United States.

b. The United States before the Inter-American Commission and Court

The United States is a member of the Organization of American States, a regional organization whose members include all 35 states in the Americas.⁶⁷ As a member, the United States is subject to the investigatory and adjudicatory reach of the Inter-American Commission on Human Rights, as well as the advisory jurisdiction of the Inter-American Court of Human Rights, the two main human rights organs of the OAS. Briefly, the Commission began working in 1960 and is charged with a number of activities in relation to all member states of the OAS – regardless of whether they have ratified the Inter-American Convention on Human Rights or not.⁶⁸ These activities are: (a) considering individual petitions alleging human rights violations by specific member states; (b) human rights monitoring in OAS member states, including through site visits; and (c) promotional and educational activities concerning human rights law.⁶⁹

With respect to states that have not ratified the Convention, the Commission applies the American Declaration of the Rights and Duties of Man (“the Declaration” or “the American Declaration”), using it as a rule of decision in individual cases as an authoritative interpretation of the human rights obligations imposed on all member states

⁶⁷ For general information about the OAS, see <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/documents/eng/aboutoas.asp>.

⁶⁸ The powers and functions of the Inter-American Commission on Human Rights are set out in articles 18-20 of its Statute, in its Rules of Procedure, and in the Inter-American Declaration of Human Rights in articles 41-51.

⁶⁹ For information about the functions of the Inter-American Commission on Human Rights, see <http://www.cidh.oas.org/what.htm>.

by the OAS Charter.⁷⁰ This approach is based on the reasoning set out by the Inter-American Court in its advisory opinion on the *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*.⁷¹ In that case, the Court determined that the Declaration has indirect legal effect on members of the OAS as an embodiment of the states' legal obligations under the OAS Charter.⁷²

The Inter-American Court of Human Rights is an autonomous judicial institution charged with determining whether a state has violated an individual's human rights (in contentious cases⁷³), interpreting the Convention as well as any other treaties concerning human rights in the Americas (in advisory cases⁷⁴); and, at the request of a state party, determining the compatibility of that state's legislation with human rights norms.⁷⁵ Contentious cases may be referred to the Court by a State part or by the Inter-American Commission. In contentious cases, the Court's primary role is to determine the merits of complaints alleging that a state has violated the rights of an individual as set out in the American Convention.⁷⁶ States that have not ratified the Convention are not subject to the contentious jurisdiction of the Court. The Court's advisory jurisdiction empowers it to issue legal interpretations of the American Convention or any other treaty concerning human rights applicable to member states of the OAS; advisory opinions may be requested by the Commission, a member state of the OAS, or an OAS organ.⁷⁷ The phrase extending the Court's advisory jurisdiction to treaties other than the Convention – “other treaties concerning the protection of human rights in the American states” – has been liberally interpreted by the Inter-American Court to include, for example, treaties that may not have human rights as their primary subject matter, but which include individual rights protections nonetheless.⁷⁸ This strand of advisory jurisdiction has proven, in practice, to be a back door method of obtaining decisions from the Court on

⁷⁰ See Inter-American Commission on Human Rights, *Roach and Pinkerton cases*, Case 9647 (U.S., 1987 (“As a consequence of [provisions of] the Charter, the provisions of [the American Declaration] acquired binding force.”)).

⁷¹ Inter-American Court of Human Rights, *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989.

⁷² *Ibid.*, paras. 33-34, 47.

⁷³ The Court's contentious jurisdiction covers actual controversies between a state party and an individual who alleges concrete injuries as the result of an act or omission by that state, when the state has accepted the contentious jurisdiction of the Court. *American Convention*, arts. 61-63.

⁷⁴ The Court's advisory jurisdiction empowers it to issue legal interpretations of the American Convention or any other treaty concerning human rights applicable to member states of the OAS; advisory opinions may be requested by the Commission, a member state of the OAS, or an OAS organ. *American Convention*, art. 64. The phrase “other treaties concerning the protection of human rights in the American states” included in article 64 of the American Convention has been liberally interpreted by the Inter-American court to include, for example, the Vienna Convention on Consular Access, which sets out the right to information about consular assistance when foreign nationals are detained. See discussion, *infra*.

⁷⁵ *American Convention*, art. 64(2).

⁷⁶ *American Convention*, art. 62. States that have ratified the Convention may accept the Court's jurisdiction for any cases arising under the Convention, or they may subject their acceptance of jurisdiction to time limits, to reciprocity (in the case of State-to-State complaints), or to specific cases.

⁷⁷ *American Convention*, art. 64.

⁷⁸ See discussion, *infra*, of the Court's interpretation of the *Vienna Convention on Consular Access*.

the legal obligations of states that have not ratified the Convention, most prominently the United States.

Over the years, many complaints have been filed against the United States with the Inter-American Commission, most notably in the context of the death penalty, but also covering such issues as the rights of American Indians, the detention of foreign nationals at Guantánamo Bay, and injuries caused by the United States when it invaded Panama.⁷⁹ The U.S. government has defended itself vigorously before the Commission in recent years – a change from early non-engagement, even in contentious cases against the United States.⁸⁰ This engagement with the body does not, however, signal an acceptance of the authority of the Commission's decisions. As Richard Wilson explains:

It seems incongruous, at least, and arrogant, at worst, to respect the forum enough to accept its procedures and engage in debate about the appropriate application of its norms, but not to respect the outcome when it is not favorable to the government. When the Commission, or even the I[n]ternational C[ourt of] J[ustice], issues a decision, report or order, the U.S. government simply ignores, declines, or refuses to comply with it. In short, the U.S. legal position in international capital litigation can be summarized as follows: resist new obligations, vigorously contest everything and comply with nothing (Wilson, 1163).

Although a significant portion of the cases filed never proceed to their resolution [especially with respect to death penalty cases, where the individual complainants are often executed before their cases are dealt with on the merits (Wilson, 1174-76)], those that have resulted in decisions against the United States have not produced compliance by the U.S. government. Indeed, the United States rejects any findings of the Commission that are based on the premise that the American Declaration is binding on the United States through the OAS Charter (Wilson, 1159-60, 1172-3).⁸¹ In addition to this fundamental disregard for the authority of the Commission, the U.S. government has also argued forcefully against the unique interpretive practices of the Inter-American Commission. In one case against the United States, the Commission explained that:

In interpreting and applying the Declaration, it is necessary to consider its provisions in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of human rights law since the Declaration was first composed and with due regard to other

⁷⁹ Wilson, 1174-5, notes that the United States is one of the most frequently named defendant states before the Inter-American Commission.

⁸⁰ Wilson, 1184, explains that for many years, the U.S. government would send a student intern to monitor the hearings held before the Commission.

⁸¹ See also Inter-American Commission on Human Rights, *Cesar Fierro case*, Case 11.331 (U.S. 2003) (“With regard to the State’s assertion that the American Declaration constitutes no more than a recommendation to OAS member states, the Commission reiterates the well-established precept, articulated in the admissibility report in this matter, that the American Declaration is a source of international obligations for the United States and other OAS member states that are not parties to the American Convention on Human Rights.”).

relevant rule[s] of international law applicable to member states against which complaints of violations of the Declaration are properly lodged.⁸²

It is this kind of expansive interpretive practice that the United States especially dislikes.

c. Open-Textured Norms: The Interpretive Practice of the Inter-American Commission and Court of Human Rights

The Inter-American Commission has used two interpretive techniques that allow it to import progressive norms into individual cases alleging abuse under Inter-American standards. First, it has looked to its sibling commissions and courts in other regional contexts as persuasive authority in interpreting Inter-American norms. This technique is commonly used by human rights bodies around the world, and is unremarkable since it does not alter the standard approach to interpreting norms. The second methodology, however, is more unusual. Beyond looking for persuasive guidance in analogous legal norms and interpretations from other systems, the Commission will directly call upon provisions from treaties binding on the respondent state to determine whether that state has complied with its obligations under the American Declaration (or Convention, as appropriate). This second technique – the incorporation of a norm into an Inter-American provision – has been used in relation to cases brought to the Commission against the United States many times, and it may be a promising practice for migrants’ rights advocates.

The approach is exemplified in the 2002 *Villareal case*. There, an alien petitioner alleged that U.S. authorities breached his due process rights when he was detained for a criminal matter and not informed of his right to consular access, a right explicitly laid out for foreign nationals in article 36 of the Vienna Convention on Consular Relations (which the United States has ratified), but which was nowhere mentioned in the American Declaration on Human Rights. In discussing this allegation, the Commission recalled that its role, as affirmed by the Inter-American Court, was to determine the merits of claims concerning rights set out in one of the instruments within its Charter-based competence: the American Convention or Declaration. Accordingly, the Commission conceded that it could not directly interpret the Vienna Convention.⁸³ With this caveat, the Commission proceeded to determine that:

⁸² Inter-American Commission on Human Rights, *Garza v. United States case*, Case 12.243 (U.S., 2001), para. 88.

⁸³ Inter-American Commission on Human Rights, *Villareal v. United States case*, Case 11.753 (2002, U.S.), paras. 59-61 (“Before proceeding further with the analysis of this issue, the Commission wishes to clarify the jurisdictional basis upon which the Commission considers Mr. Martinez Villareal’s rights and the State’s obligations under the Vienna Convention on Consular Relations. Neither the Vienna Convention on Consular Relations nor any other international instrument explicitly endows the Commission with jurisdiction to determine violations of that Convention, on the part of the United States or other states parties to the agreement. Accordingly, based upon the current jurisprudence of the Inter-American Court, the Commission does not consider that it has competence to adjudicate upon the State’s responsibility for violations of the Vienna Convention on Consular Relations per se. . . At the same time, the Commission has previously noted that in interpreting and applying the American Declaration, it is necessary to consider its provisions in the context of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of

compliance with the rights of a foreign national under the Vienna Convention on Consular Relations is particularly relevant to determining whether a state has complied with the provisions of the American Declaration pertaining to the right to due process and to a fair trial as they apply to a foreign national who has been arrested, committed to prison or to custody pending trial, or is detained in any other manner by that state.⁸⁴

The Commission then found that the U.S. had violated the American Declaration's right to due process.

With this finding, the Commission functionally inserted the right of consular access embodied in article 36 of the Vienna Convention into the American Declaration by considering the substantive norm to be an element of the Declaration's provisions on due process. This kind of interpretive move is the only functional way for the Commission to preserve its jurisdiction over human rights issues that are not addressed directly by the Inter-American Declaration or Convention, since the Commission is limited by its statute to directly applying only these instruments.⁸⁵ This interpretive approach is significant in cases dealing with the United States, since it essentially provides a forum of complaint for individuals seeking to press claims against the U.S. using a variety of substantive norms articulated in treaties outside the jurisdiction of the Commission, so long as they can be successfully incorporated into a provision of the Declaration.⁸⁶ Because the Commission is one of very few international fora where

international law applicable to member states against which complaints of violations of the Declaration are properly lodged. . . . Developments in the corpus of international human rights law relevant in interpreting and applying the American Declaration may in turn be drawn from the provisions of other prevailing international and regional human rights instruments.”) (*citing* Inter-American Court of Human Rights, *Las Palmeras Case*, Judgment on Preliminary Objections of February 4, 2000, Annual Report 2000, p. 125 at 36).

⁸⁴ *Ibid.* at para. 61. *See also* Inter-American Commission on Human Rights, *Cesar Fierro case*, Case 11.331 (U.S. 2003), para. 77 (finding that “consider the extent to which a state party has given effect to the requirements of Article 36 of the Vienna Convention on Consular Relations for the purpose of evaluating that state’s compliance with a foreign national’s due process rights under Articles XVIII [right to a judicial remedy] and XXVI [due process in criminal matters] of the American Declaration.”).

⁸⁵ *Statute of the Inter-American Commission on Human Rights*, art. 1.

⁸⁶ The Commission has also applied international humanitarian law in cases against the United States. In 2002, the Commission adopted precautionary measures concerning those individuals detained by the United States on Guantánamo Bay, Cuba, finding that the U.S. was under an obligation to clarify the legal status of the detainees. The Commission declined to determine whether their status was governed by human rights law alone, or whether humanitarian law was applicable as *lex specialis*; it explained, instead, that at least one of the regimes applied, and that “no person under the authority and control of a state, regardless of his or her circumstances, is devoid of legal protection for his or her fundamental and non-derogable rights.” Inter-American Commission on Human Rights, *Detainees in Guantánamo bay, Cuba: Request for Precautionary Measures* (U.S. 2002), at p. 3. The Commission will therefore refer to international humanitarian law as *lex specialis*, and not as a freestanding source of law, following the approach set out by the International Court of Justice in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para. 25. In that opinion, the ICJ found that although human rights law continues to apply in situations of armed conflict, the determination of what counts as a deprivation of certain rights – most importantly, the right to life – will be determined by looking to the applicable *lex specialis*, here international humanitarian law. (“The Court observes that the protection of

individuals may press claims against the United States, this normative flexibility provides a potentially very valuable entry point for advocates seeking determinations on human rights claims.

This interpretive approach had been used by the Commission for some time, and was generally approved by the Inter-American Court in a 1982 advisory opinion concerning the scope of the Court's jurisdiction to interpret treaties concerning human rights. Examining the interpretive practice of the Commission, the Court held that:

The need of the regional system to be complemented by the universal finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the Commission. The Commission has properly invoked in some of its reports and resolutions "other treaties concerning the protection of human right in the American states," regardless of their bilateral or multilateral character, or whether they have been adopted within the framework or under the auspices of the Inter-American system.⁸⁷

Over the years since the 1982 "*Other Treaties*" Advisory Opinion, the Court had the opportunity to develop its own approach to interpreting and incorporating norms from outside the inter-American system. While the Commission is restricted by its statute to interpreting relevant norms by incorporating them into the American Declaration (or Convention, for states parties), the Court has the ability to directly interpret other treaties under its advisory jurisdiction (but not its contentious jurisdiction), so long as they "concern the protection of human rights."⁸⁸

The Court's distinct approach may be illustrated through an examination of an advisory opinion case from 1999 that preceded and concerned the same underlying issue as that decided by the Commission in the *Villareal* case: the alleged violation of the right to consular access of a number of Mexican nationals who were then under sentence of death in the United States. Mexico asked the Court for clarification of meaning and significance of the right to consular access that is accorded to individuals under the Vienna Convention on Consular Access, asking the Court to interpret the right's application (a) directly by examining article 36 of the Vienna Convention on Consular Relations; (b) indirectly, by determining whether the right to consular access in the

the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life, however, is not such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.").

⁸⁷ Inter-American Court of Human Rights, "*Other Treaties*" *Subject to the Consultative Jurisdiction of the Court* (Art. 64 American Convention on Human Rights, Advisory Opinion OC-1/82 of September 24, 1982, para. 43.

⁸⁸ *American Convention*, article 64.

Vienna Convention could be considered an element of or an antecedent to the due process guarantees set out in article 14 of the International Covenant on Civil and Political Rights; and (c) indirectly, by deciding whether the failure to inform detainees of their right to consular access would amount to an act of discrimination on the grounds of nationality under the American Declaration.⁸⁹

The Court held that the Vienna Convention did indeed “concern human rights” because it sets out specific rights whose benefit runs directly to the individuals themselves.⁹⁰ This finding could be useful for advocates seeking relief in other fora, since a finding that the provision concerns human rights could provide access to the remedies available for violations of human rights, instead of the remedies available for breaches of the rights of states. This distinction was clearly of the utmost importance for the individuals whose cases had prompted Mexico’s request for an advisory opinion, since they were facing death sentences and were obviously in need of individual – not state-centered – remedies.

Interpreting the ICCPR’s article 14 due process of law guarantees, the Court also determined that respect for the substantive right embodied in article 36(1)(b) of the Vienna Convention was a necessary antecedent to the full enjoyment of article 14 of the ICCPR: the Court held that consular access “makes it possible for the right to due process of law upheld in Article 14 of the International Covenant on Civil and Political Rights, to have practical effects in tangible cases.”⁹¹ Finally, the Court folded its discussion of the due process guarantees contained in the American Declaration into its discussion of the ICCPR, indicating – without explicitly finding – that the standards were identical for the purpose of understanding the right to consular access as an antecedent or element of the right to due process. This determination paved the way for the Commission’s 2002 *Villareal* holding incorporating the right to consular access into the Declaration’s due process provisions.

These interpretive techniques applicable in the Inter-American system may be fruitfully applied to norms relevant to the abuses that migrant domestic workers face in the United States. The next section of the article will examine current efforts to promote the rights of migrants and domestic workers through the Inter-American system, consider the significant obstacles to such efforts, and point to potential ways to overcome some of these obstacles and engage with the Inter-American system more directly to advance the rights of migrant domestic workers.

⁸⁹ Inter-American Court of Human Rights, *The Right of Information on Consular Assistance in the Framework of the Guarantees of the Due Process of the Law*, Advisory Opinion OC-16/99 of October 1, 1999, para. 4.

⁹⁰ *Ibid.*, paras. 68-87.

⁹¹ *Ibid.*, para. 124.

V. WOMEN AND MIGRANTS: THE WORK OF THE SPECIAL RAPPORTEURS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

a. The Special Rapporteurs of the Inter-American Commission on Human Rights

In addition to litigation, the Inter-American system also has mechanisms for investigation and promotion of human rights in the Americas. One of the most flexible mechanisms is that of rapporteurships – mandates filled by individuals who are designated to investigate and report on specific thematic human rights concerns. Rapporteurs have a significant amount of discretion to define their area of focus, to undertake investigations, and to report on their findings.

Special Rapporteurships may be created by the Inter-American Commission on Human Rights and staffed through appointments of the Commission. Currently, there are Special Rapporteurs on seven issues within the Commission: the rights of indigenous peoples; the rights of children; the rights of persons deprived of their liberty; the rights of Afro descendants and against racial discrimination; the rights of women; the rights of migrant workers and their families; and the right to freedom of expression. The quality and depth of the work of the rapporteurs varies over time and across mandates. Much depends on the individual rapporteur's creativity, commitment, and ability to leverage resources, since these positions are often severely constrained by lack of human and financial resources. This section summarizes the work of the two relevant rapporteurs and considers their potential for advancing the rights of migrant domestic workers in the United States.

b. Special Rapporteur on Women's Rights

In 1995, the Inter-American Commission appointed Claudio Grossman to serve as Special Rapporteur on Women's Rights, asking him:

to assist the member states of the OAS by identifying instances of discrimination which are inconsistent with inter-American human rights guarantees and issuing recommendations designed to remedy such inconsistencies and advance the ability of women to fully and equally enjoy their rights and freedoms.⁹²

The Special Rapporteur designed and carried out a study on the rights of women in the Americas, focusing especially on the issue of violence against women.⁹³ The Report, based in part on responses by member states to a questionnaire developed by the

⁹² Inter-American Commission on Human Rights, Annual Report 1996, Chapter VI. The Commission's 1997 report presents an overview of gender-related jurisprudence from the Commission and Court, noting that the Court had adopted the following definition of discrimination: "a distinction in treatment is discriminatory if it 'has no objective and reasonable justification'."

⁹³ Inter-American Commission on Human Rights, "Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas," in *Annual Report 1997*, Chapter VI.

Rapporteur, presents an analysis of the compliance of states with their obligations concerning the rights of women. In sum:

The information received showed an encouraging movement within states to place women's rights on the social agenda and to institute reforms aimed at advancing the legal, social, political, and economic status of women. This process reflects the strength of women's organizations and human rights groups, the strength and depth of the democratic movements of the region, and the conviction that democracy and its triumph in the region ultimately require full compliance with the rights to which women are entitled. Notwithstanding the advances taking place in the region, however, the Commission reported that serious problems remain. *De jure* discrimination continues to exist in a number of countries, especially with respect to family matters, administration of property, and the penal system. Even when no *de jure* discrimination is present, actual practices in many parts of the region reveal that the ability of women to freely and fully exercise their rights is often denied. Poverty and armed conflict have a disproportionate negative effect on women, and women belonging to indigenous groups and racial and ethnic minorities are the subject of further grave violations resulting from their specific situation.⁹⁴

Significantly, the Report recommended that states accept the definition of "discrimination against women" set out in the Convention on the Elimination of All Forms of Discrimination Against Women:

"discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women. . . of human rights and fundamental freedoms.⁹⁵

As discussed below, this definition supports the use of the substantive equality model within the Inter-American system. Among the other recommendations are several directly relevant to women migrant workers. The report notes that women suffer widespread discrimination in the workplace, and recommends that states: (a) take steps to ensure equal pay for equal work; (b) ensure equal employment opportunities; (c) ensure that women's reproductive functions are not used as a justification for discrimination by employers; and (d) "prevent, punish and eradicate sexual harassment in the workplace."⁹⁶

In 2000, the Commission appointed Marta Altoguirre as Special Rapporteur on the Rights of Women.⁹⁷ Much of the Special Rapporteur's work has since focused on women's access to justice, as well as violence against women, including the application of the standard of due diligence as the relevant test for evaluating the efforts of a state in preventing, punishing and eradicating violence against women. Although the

⁹⁴ Inter-American Commission on Human Rights, *Annual Report 1998*, Chapter VI(c).

⁹⁵ *Ibid.* (quoting and citing CEDAW, article 1).

⁹⁶ *Ibid.*

⁹⁷ Inter-American Commission on Human Rights, *Annual Report 2001*, Chapter VI(c).

discrimination and exploitation that migrant domestic workers face fit within her mandate, the Rapporteur has not focused directly on these concerns.

c. Special Rapporteur on Migrant Workers and their Families

In 1996, the Inter-American Commission created a Special Rapporteurship for Migrant Workers and Their Families and a supporting Working Group to Study the Situation of Migrant Workers and their Families in the Hemisphere.⁹⁸ Commissioner Alvaro Tirado Mejía was named Rapporteur. The Working Group was tasked with conducting a study, and began by examining the various definitions of “migrant worker,” as well as the migration patterns within the Americas. The Working Group focused its first several years of work on developing a questionnaire for states, consulting with experts, and conducting on-site visits. The Working Group made an on-site visit to the U.S. state of California in 1998, collecting information for its study; no evaluation of this information was published by the Rapporteur. A similar visit was made by the Special Rapporteur to the U.S. state of Texas in 1999.

The 1999 report of the Special Rapporteur provides a very helpful set of “principles applicable to migrant workers and their families developed on the basis of the case law of the Inter-American System.”⁹⁹ The principles are: the prohibition of the collective expulsion of aliens; the right to a fair trial and judicial protection; the right to nationality; and the right to protection of the family.¹⁰⁰ While the right to non-discrimination and equality is mentioned, no guidance is given concerning the application of this principle to migrants. The Special Rapporteur presents summary information drawn from the questionnaire sent to states by the Working Group; these summaries are not accompanied by any analysis.

While not terribly helpful from an evaluative point of view, the resulting summaries provide some very useful factual information concerning the treatment of migrant workers in the various countries in the Americas, and could be used by researchers. They also provide a snapshot of the unwillingness of some governments to engage seriously with the Commission on migrants’ rights issues.¹⁰¹ The U.S. answered all of the questions carefully, submitting useful information about the legal and administrative rules governing migrants in the United States, as well as factual information about instances of trafficking, worker exploitation, and benefits available to migrants. In an interesting misstatement, however, the U.S. reported that “those working

⁹⁸ Inter-American Commission on Human Rights, *Annual Report 1996*, Chapter VI.

⁹⁹ Inter-American Commission on Human Rights, *Annual Report 1999*, Chapter VI(c).

¹⁰⁰ *Ibid.*

¹⁰¹ For example, contrast the careful response of Canada to a question on xenophobia and racism aimed at migrants with that of Ecuador. Canada: “Xenophobia or racism exists in all countries. The Immigration Act and Regulations and all Canada’s policies, programs and practices with respect to immigration are subject to the Canadian Charter of Rights and Freedoms, which outlaws discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical ability. These equality provisions apply not only to Canadian citizens but also to permanent residents, asylum seekers and visitors (including temporary workers.” Ecuador: “Such aberrant behavior does not exist.” Inter-American Commission on Human Rights, *Annual Report 1999*, Chapter VI(c).

in irregular sectors, such as domestic service, may often fail to report, and pay taxes on, their earnings.”¹⁰² This inclusion of all “domestic service” work in the “irregular” category may be seen as a reflection of the U.S. government’s misapprehension of this sector in which many migrant women labor, a sector that is in fact subject to many of the general labor laws in place in the United States.

In 2000, Juan Méndez was appointed as Special Rapporteur. The Rapporteur’s annual report for that year focuses on migration and human rights. The report is commendable for placing migratory trends and policies into a human rights framework. It also examines the efforts of the international community to respond to human rights violations against migrants, pointing to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the U.N. Special Rapporteur on the Human Rights of Migrant Workers as important institutional responses to violations. The report then provides an overview of some of the most pressing human rights concerns for migrants in the Americas, finding that discrimination, xenophobia and racism are on the rise against migrants in the hemisphere; that due process guarantees need to be more carefully protected in relation to migrants in many countries in the region; and that “conditions faced by detained migrant workers in Central America, North America, and the Dominican Republic give rise to concern.”¹⁰³ Finally, the 2000 report includes a brief analysis of the country responses to the questionnaire sent by the Working Group, which concludes that:

the countries of the Americas coincide on the need to attack trafficking in migrant workers and the actions of unscrupulous employers. They also agree that the large and growing number of migrants, from the Americas and elsewhere, in transit poses a problem. The Office of the Special Rapporteur notes with grave concern that the legislation in place in most countries is not effective in extending real protection to migrant workers and members of their families, a group that faces structural vulnerability and needs government to contribute to preventing abuses against them. We are especially concerned by the fact that many governments do not recognize that violations of due process and alarming incidents of discrimination, racism and xenophobia against migrant workers and members of their family are occurring throughout the region.¹⁰⁴

Most relevant here, the report emphasizes that countries must work much harder to enforce labor laws, since widespread trends of exploitation of migrant workers were discovered in many countries in the Americas.

The 2001 report of the Special Rapporteur provides a very useful analysis of developments in case law concerning migrants’ right to a nationality, the right to a fair trial and to judicial protection, and the right to liberty and protection from arbitrary arrest. The 2002 report includes a section on the “labor market and conditions of discrimination

¹⁰² Ibid.

¹⁰³ Ibid. at para. 118.

¹⁰⁴ Ibid. at para. 128.

against migrant workers.”¹⁰⁵ This section of the report is a summarized version of a report submitted by the Special Rapporteur to the Inter-American Court of Human Rights in connection with a request filed by Mexico for an advisory opinion on the rights of migrant workers in 2002 (discussed below). In many ways, the report serves as a precursor to the Advisory Opinion issued in that case; much of the legal framework relied upon there is set out in the Special Rapporteur’s 2002 report.

In 2003, the Special Rapporteur reported on his on-site visit to Mexico. This report is remarkably in-depth, considering the reasons and purposes of migration to and from Mexico; the government’s actions in the field of migration; efforts by civil society to improve the lives of Mexican migrants; the legal framework governing migration; and the human rights obligations on the state to protect and ensure the rights of migrants. The report provides a careful analysis of Mexico’s shortcomings under human rights law, and includes reasoned recommendations.

In 2004, the Commission appointed Freddy Gutiérrez Trejos as Special Rapporteur for Migrant Workers and their Families. In the report summarizing his first year of work, a chapter is devoted to the human rights situation of migrant farmworkers in the Americas. This chapter discusses the systematic violations that farmworkers face, including widespread violations of labor rights; violations of economic and social rights (including the right to education); the right to be free from trafficking; and abuses of the right to due process, in both criminal and civil matters. Concerning labor rights, the report explains that farmworkers are often paid below the legal minimum wage; suffer illnesses relating to pesticides and heavy labor without adequate rest; may not have access to employment-related entitlements such as paid holidays, rest days, health insurance and disability schemes; and are often prevented from organizing to vindicate their rights. While the section of the report describing the situation facing migrant farmworkers is useful, it is rather cursory in comparison to the work of the Special Rapporteur in 2002 and 2003.

d. Special Rapporteurs and the Rights of Migrant Domestic Workers

The rights of migrant domestic workers fit squarely within the mandates of both the Special Rapporteur on Women’s Rights and the Special Rapporteur on Migrant Workers and their Families. Neither rapporteur has focused on this group, however. Given the resource constraints on the Inter-American Commission and its rapporteurs, advocates should consider approaching these individuals about work that could be feasibly achieved within their resource limits.

¹⁰⁵ Inter-American Commission on Human Rights, *Annual Report 2002*, Chapter VI, para. 61.

VI. USING THE INTER-AMERICAN SYSTEM TO PROMOTE THE RIGHTS OF MIGRANT DOMESTIC WORKERS IN THE UNITED STATES

a. The Rights of Migrants and Women Under International Human Rights Law

Migrant domestic workers suffer specific forms of abuse and deserve full protection from these abuses under human rights law. While the international human rights framework provides a wide range of standards and mechanisms that are relevant to this group, it has been a challenge to build an analytical approach to women migrant workers' rights that will encompass *all* aspects of their experience. Migrant domestic workers are situated at the crossroads of three major sets of norms: the human rights standards pertaining to women – mostly strong, protective standards; the human rights of workers – again, clearly articulated and robust; and the human rights rules concerning aliens or migrants – rules that remain in development, but which generally offer less protection than the rules relating to women and to workers. The situation within the Inter-American system is more promising, however. Indeed, the normative developments in the Inter-American system are almost the reverse of the state of affairs under international treaty law: clear rights protections have been articulated for migrants, while in many respects, women's rights jurisprudence is still under development.

The primary principles of non-discrimination, equality and equal protection of the law are essential to any human rights analysis, since they embody the general rule that human rights must be extended to all equally, and that avenues for redress should be made available to all on an equal footing. Over the years, these guarantees have been very strongly articulated at the international level with respect to certain groups that tend to face discrimination – including women. Unlike women, however, aliens and migrants, though they often face discrimination on the basis of their status as aliens or migrants, are not always protected *as a category*.¹⁰⁶ Indeed, in the state-centered world of international law, some exceptions to the standards of equal protection and non-discrimination have been carved out in relation to these groups, allowing states to impose certain limitations on the rights of aliens under international human rights law. This does not mean that states can violate the rights of aliens and migrants with impunity. Instead, it means that with respect to a small number of rights associated with citizenship, states may limit their application to nationals or to regular, documented migrants. This subset of rights *never* includes the most fundamental guarantees– so-called “non-derogable rights” such as the right to be free from torture – and even permissible restrictions may not be imposed discriminatorily as between men and women. Further, since they are only permissible in specific circumstances, distinctions between citizens and non-citizens, and between documented and undocumented aliens should be scrutinized very closely.

Despite these obstacles, in recent years, both the Inter-American Court and the Inter-American Commission for Human Rights have broken new ground in international

¹⁰⁶ The important and obvious counter-example is the Migrant Workers' Convention, which was created in part as a response to the gaps in existing conventions.

human rights law by clarifying that migrants must fully enjoy the right to non-discrimination, equality and equal protection in the host states where they live and work. This seemingly simple rule has enormously positive potential for migrant domestic workers. This section will focus on potential uses of the various Inter-American human rights institutions in the struggle to advance migrant domestic workers' rights.

b. The Inter-American Court of Human Rights

The Inter-American Court of Human Rights has already proven to be a very useful forum for advancing migrants' rights in the United States. This is true despite the unwillingness of the U.S. to subject itself to the contentious jurisdiction of the Court. In a groundbreaking advisory opinion concerning the rights of migrants, the Court determined that equality before the law, equal protection and non-discrimination constitute *jus cogens* norms. *Jus cogens* norms are norms "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."¹⁰⁷ The Court held that:

the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.¹⁰⁸

Significantly, the Court made this determination in a watershed case for the rights of migrants in the Americas, its 2003 opinion concerning the *Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03.¹⁰⁹ The request for this opinion was filed by Mexico, which was concerned about the impact of a recent U.S. Supreme Court ruling on its nationals working without documentation in the United States. In 2002, the United States Supreme Court determined that undocumented workers could not recover back pay when they were illegally fired in retaliation for organizing efforts. In *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), the Court determined that the usual remedy in labor rights violations cases was not available to undocumented workers, since those workers never had the right to work and earn wages in the first place. Concerned that this decision would lead to widespread abuse of Mexican nationals working without authorization in the United States, the Mexican government filed its

¹⁰⁷ Art. 53, Vienna Convention on the Law of Treaties, 23 May 1969, U.N.T.S., vol. 1155, p. 331.

¹⁰⁸ Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 (2003), para. 101.

¹⁰⁹ Inter-American Court of Human Rights, *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03 (2003).

request seeking an opinion from the Inter-American Court concerning the human rights protections available to undocumented workers.

The Inter-American Court's finding that principles of equality have achieved *jus cogens* status is significant for several reasons. First, such peremptory norms apply to all states as a matter of customary international law. So long as the Inter-American Court is correct in its holding, the United States is bound by those principles.¹¹⁰ Second, *jus cogens* norms trump other norms of customary or treaty law, meaning that state practices that violate the norm are invalid, regardless of the ratification status of the state in question, or even its attempts to object to the norm during its development. The importance of this finding becomes clear in relation to the Court's holding that all migrants – undocumented and documented alike – are covered by the principles of equality and equal protection.¹¹¹ The Court does not, of course, go so far as to say that any distinction on the basis of migration status is illegal; such a finding would have immediately rendered suspect all immigration and citizenship laws. Instead, the Court reminds states that they must adhere to the regular rules concerning non-discrimination when differentiating between migrants and non-migrants, or documented and undocumented individuals, by testing the use of the categories “documented/undocumented” or “migrant/national” against the principles of reasonableness, objectivity and proportionality:

the State may grant a distinct treatment to documented migrants with respect to undocumented migrants, or between migrants and nationals, provided that this differential treatment is reasonable, objective, proportionate and does not harm human rights. For example, distinctions may be made between migrants and nationals regarding ownership of some political rights. States may also establish mechanisms to control the entry into and departure from their territory of undocumented migrants, which must always be applied with strict regard for the guarantees of due process and respect for human dignity.¹¹²

In other words, the Court leaves undisturbed the sovereign right of states to limit certain political rights (such as voting) to nationals, and to fairly regulate the movement of individuals across its borders. The categories “migrant” and “undocumented” may not, however, be used to deprive individuals of their basic human rights. Among those basic rights is the right to equal protection of the law. This right translates into a requirement that migrants not be excluded from the protection of labor laws on the basis of their migration status. The Court explains that regardless of the source of the substantive rights of workers (such as the right to organize, to a minimum wage, or to back pay as a remedy for retaliatory firing), those rights inhere immediately upon hiring and may not be denied

¹¹⁰ The Court finds that its advisory opinion on migrants' rights applied to all “OAS Member States that have signed either the OAS Charter, the American Declaration, or the Universal Declaration [of Human Rights], or have ratified the International Covenant on Civil and Political Rights, regardless of whether or not they have ratified the American Convention or any of its optional protocols.” The United States fits in all of these categories. *Ibid.* at para. 60.

¹¹¹ *Ibid.*, para. 110, 118.

¹¹² *Ibid.*, para. 119.

on the basis of migration status, even if an individual was not authorized to work under the domestic law of the state in question:

Labor rights necessarily arise from the circumstance of being a worker, understood in the broadest sense. A person who is to be engaged, is engaged or has been engaged in a remunerated activity, immediately becomes a worker and, consequently, acquires the rights inherent in that condition. The right to work, whether regulated at the national or international level, is a protective system for workers; that is, it regulates the rights and obligations of the employee and the employer, regardless of any other consideration of an economic and social nature. A person who enters a State and assumes an employment relationship, acquires his labor human rights in the State of employment, irrespective of his migratory status, because respect and guarantee of the enjoyment and exercise of those rights must be made without any discrimination. . . In this way, the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.¹¹³

Armed with this robust principle, the Court next makes clear that labor rights must be upheld without discrimination not only as between individuals and the state (as with government employees), but must be protected by the state as between workers and private employers. Indeed, the Court explains that the state will accrue international responsibility for violations of the rights of migrant workers if it supports systems of discrimination against them, including through laws or rules that exclude undocumented workers from protections as workers.¹¹⁴

In the course of its discussion of the norm of non-discrimination under international law, the Inter-American Court makes clear that it is adopting a substantive approach to equality, moving beyond the formal equality model. The difference between the two models is of crucial importance for advocates considering the Inter-American norms and procedures as options for the redress of discrimination against migrant domestic workers. Briefly, formal equality is an approach to anti-discrimination doctrine that limits itself to an examination of the use by a state of impermissible distinctions or protected categories and their legitimacy. Without more, the Inter-American Court's test for the permissible use of categorization as set out above in relation to the categories "migrant" and "undocumented" would constitute formal equality, applicable only when a category describing a protected group is used by the state. Situations of indirect discrimination, in which no protected category is used, but in which the law or program has a disproportionate impact on groups covered by non-discrimination standards, would not be reachable by this formal approach to equality. The Inter-American Court goes

¹¹³ Ibid., paras. 133-134.

¹¹⁴ Ibid., paras. 145-160.

further, however, when describing the breadth of the obligations placed on the state by the principle of non-discrimination. There, the Court explains that states must:

abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de facto* or *de jure* discrimination. This translates, for example, into the prohibition to enact laws, in the broadest sense, formulate civil, administrative or any other measures, or encourage acts or practices of their officials, in implementation or interpretation of the law that discriminate against a specific group of persons because of their race, gender, color or other reasons. In addition, States are obliged to take affirmative action to reverse or change discriminatory situations that exist in their societies to the detriment of a specific group of persons. This implies the special obligation to protect that the State must exercise with regard to acts and practices of third parties who, with its tolerance or acquiescence, create, maintain or promote discriminatory situations.¹¹⁵

This understanding of discrimination – when paired with the guarantee of equality that accompanies it – should be interpreted as embodying the substantive equality model. This means that women’s rights are violated not only when, for example, laws formally treat them differently from men, but also when any law, policy, or action has the practical effect of disadvantaging them without adequate justification. The same would be true for migrants in the Inter-American system, since the Court has determined that migration status is a protected category.

This standard has important protective implications for migrant domestic workers, who often suffer harm from facially neutral laws that have a disproportionate impact on their rights to fair conditions of work, including laws concerning pay and safety standards. In effect, whenever a pattern can be found in which a certain law or policy has a disproportionately negative impact on the rights of women, the state will be required to prove that its policy has an objective and reasonable justification, and that the means employed are reasonably proportional to the ends being sought.¹¹⁶ In cases where the state cannot do so, discrimination will be present, and it will have an obligation to take active steps to ensure women their equal rights. A wide variety of laws and practices concerning migrant domestic workers, some of which are described in the next section, would fit into this pattern and should be open to challenge under the substantive equality model.

The Inter-American Court’s Advisory Opinion OC-18/03 is an incredibly powerful tool, and carries with it significant potential for advancing the rights of migrant domestic workers in the United States. Advocates need not focus their efforts on the Inter-American Court, but should instead look to other mechanisms within the Inter-American system to enforce the norms the Court has so eloquently set out.

¹¹⁵ Ibid., paras. 103-104.

¹¹⁶ For a discussion of the requirements of reasonable justification and proportionality, see Inter-American Court of Human Rights, *Proposed Amendments to the Naturalization Provisions to the Constitution of Costa Rica*, Advisory Opinion OC-4-84 of January 19, 1984.

c. The Inter-American Commission on Human Rights

As discussed above, the Inter-American Commission on Human Rights has had occasion to examine the rights of migrants through the work of its migrants' rights rapporteur, as well as through individual petitions, which have included cases concerning the rights of aliens to due process and consular access in the context of the death penalty in the United States. In a separate line of cases, the Commission has developed an extensive non-discrimination and equal protection jurisprudence that largely tracks the approach of the Inter-American Court. Also relevant for advocates of migrant domestic workers are suggestions by the Commission, in two cases concerning the United States, that it may be possible to make out a claim of indirect discrimination through the use of statistics. In the 1989 *Celestine case*, the petitioner introduced statistical evidence of racial bias in an attempt to demonstrate that he had suffered discrimination at the hands of the jury that had sentenced him to death.¹¹⁷ The Commission found that Celestine's statistical evidence was insufficient to prove the allegations of discrimination. Similarly, in the 2003 *Statehood Solidarity Committee case*, the Commission entertained, but found insufficient, statistical evidence introduced by the petitioners to demonstrate racial bias on the part of the U.S. Congress in failing to amend the voting arrangements applicable to residents of the District of Columbia.¹¹⁸ There, the Commission held that the U.S. government had violated equal protection on the basis of Washingtonians' place of residence, but not find discrimination on the basis of race. While the Commission rejected the claims made using statistics in both the *Celestine* and *Statehood* cases, it did—by characterizing these rejections as issues of insufficiency—indicate that statistical evidence, if strong enough, could play a significant role in making out a claim of indirect discrimination.

Given the existence of supportive norms, there are a number of specific strategies that could be used to promote the rights of migrant domestic workers before the Inter-American Commission on Human Rights: general interest hearings, petitions alleging human rights violations, and on-site visits. Domestic workers' advocates have already held one general interest hearing focusing on the issue of diplomatic immunity, and advocates for migrants have also held a general interest hearing examining the rights of agricultural and undocumented migrants. Some significant obstacles would present themselves were a petition lodged on behalf of migrant domestic workers, though that possibility is currently under discussion. On-site visits to meet with domestic workers' organizations may be an alternative way to follow up a general interest hearing; since the Commission has its headquarters in Washington, D.C., such visits may be possible even within the difficult financial constraints of the Commission.

¹¹⁷ Inter-American Commission on Human Rights, *Celestine v. United States case*, Case 10.031 (1989, U.S.).

¹¹⁸ Inter-American Commission on Human Rights, *Statehood Solidarity Committee v. United States case*, Case 11.204 (2003, U.S.).

i. General Interest Hearings

Groups and individuals who are “interested in presenting testimony or information to the Commission on the human rights situation in one or more States, or on matters of general interest” may request a hearing before the Commission.¹¹⁹ Such hearings can be especially useful in educating the Commission about a particular concern or set of rights, or when individual cases are not strategically wise or legally possible. They can also be productive in helping frame an issue as a human rights concern. Hearings on the rights of migrant workers have already been fruitful in several of these ways.

For example, in early 2005, a coalition of organizations requested a hearing on the status of undocumented workers in the United States, and another coalition requested a hearing on the rights of migrant farmworkers in the United States. These requests were jointly granted, and a hearing was held on March 3, 2005. Farmworkers, human rights advocates, and lawyers for undocumented workers presented evidence about human rights violations before the Commission and submitted written documentation concerning those abuses.

While the hearings did not directly produce results on the ground, farmworkers’ advocates point to several concrete outcomes. The Coalition of Immokalee Workers had been engaged in protracted negotiations with Taco Bell Corporation and its parent company, Yum! Brands over dire living and working conditions of farmworkers in the U.S. state of Florida. The organizations involved in the hearing credit the hearing as crucial in the struggle to frame the farmworkers’ concerns as human rights issues rather than a narrow dispute over wages – a struggle they won only days later, when Yum! Brands agreed to improve working conditions, increase wages, and fight slavery in its supply chain, affirming that “human rights are universal” in its press release concerning the agreement.¹²⁰

Advocates for undocumented workers – who came to the hearing armed with stories of such migrants’ lives and struggles – felt that a general hearing would be a safe way to raise human rights concerns facing undocumented workers without making them vulnerable to potential deportation or other repercussions.¹²¹ The message – that the United States is in contravention of the rule set out in the Inter-American Court of Human Rights’ Advisory Opinion OC-18 – was driven home through life stories. As one lawyer for undocumented workers explained, “talking about fundamental human rights puts a value on the individual in a way that talking about wages does not” (Paoletti, interview).

¹¹⁹ *Rules of Procedure of the Inter-American Commission on Human Rights*, art. 64.

¹²⁰ Amanda Shanor (Program Officer, RFK Memorial Center for Human Rights), interview by author, 5 May 2005.

¹²¹ Sarah Paoletti (Clinical Supervisor and Lecturer, University of Pennsylvania School of Law), interview by author, 6 May 2005.

In October 2005, human rights organization Global Rights paired with domestic workers' advocates from CASA de Maryland and the Center for Human Rights and Global Justice at NYU School of Law to present a general interest hearing on the issue of diplomatic immunity and its impact on the human rights of migrant domestic workers in the United States. The issue of diplomatic immunity was chosen because its effects were so dramatic (by barring women from obtaining even a day in court to assert their claims), and because the issue is one that advocates felt the Commissioners might relate to easily as beneficiaries of such immunities themselves. Testifying at the hearing were two domestic workers, a U.S.-based attorney who represents domestic workers in U.S. courts, and an international human rights expert.¹²² The workers testified that they had suffered violations at the hands of diplomatic staff, including breach of contract, underpayment of wages, overwork, and degrading treatment (Velasco, testimony). The legal arguments then focused on the barriers to justice for workers like these, who have valid claims under U.S. law but are barred from pressing those claims due to diplomatic immunity (Keyes, testimony). Reframing the issue as a human rights violation, the hearing called on the Inter-American Commission to take action to ensure that migrant domestic workers can enjoy the "right to a remedy" when their labor rights are violated (Satterthwaite, testimony). Specifically, Global Rights called on the Commission to monitor the situation of migrant domestic workers employed by O.A.S. Member States and O.A.S. staff, report on the situation of migrant domestic workers in the Americas region, and make recommendations to countries that are members of the O.A.S., emphasizing the practical steps they should take to ensure that domestic workers employed by diplomats are protected against human rights abuses (Global Rights, Hearing Recommendations). The Commissioners present at the hearing were engaged and expressed serious concern about the violations discussed. While no formal action has been taken by the Commission in response to the recommendations, the hearing was mentioned in the Commission's annual report (IACHR, 2006). Advocates are hopeful that the hearing has contributed to greater sensitivity on the part of the Commission that could augur well should an individual petition be brought challenging the issues discussed.

ii. Individual Petitions

As discussed earlier in this article, individuals and groups may lodge petitions alleging violations of their human rights by member states of the Organization of American States. Given the strong non-discrimination, equality, and equal protection standards explicated in recent jurisprudence of the Inter-American Court of Human Rights, it may seem that individual petitions on behalf of migrant domestic workers who have suffered human rights violations in the United States would be easy to craft. Normatively, this may well be true.

Migrant domestic workers may have a variety of strong claims using the interlocking norms of non-discrimination, equality and equal protection. These claims would be based on creative use of the substantive approach to equality, discussed above. This model of equality would make certain claims cognizable within the Inter-American

¹²² The author was the international expert who testified at the hearing.

system that would not be meritorious under U.S. law, which uses – for the most part – the formal equality model.

Expansive non-discrimination norms could be brought to bear through interpretations of the American Declaration, especially article 2's guarantee of equality before the law and article 18's right to a judicial remedy. The Inter-American Commission is likely to be open to this approach, which could explicitly call upon non-discrimination norms in treaties that the United States has ratified, including the ICCPR and the CERD. Both treaties have been authoritatively interpreted to use the substantive equality model. Drawing on these treaties in conjunction with the Inter-American Court's holding concerning discrimination against migrant workers would allow advocates to directly address the effects of intersecting forms of discrimination on migrant domestic workers.

The International Covenant on Civil and Political Rights (ICCPR) contains strong general non-discrimination and equal protection guarantees that extend to women, migrants, and ethnic minorities. Article 3 requires states parties to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Convention.” The Human Rights Committee, the body mandated to review state compliance with the ICCPR, has noted that the Covenant does not define discrimination. In the absence of an explicit definition, the Committee has determined that the definitions of discrimination set out in CERD and CEDAW should guide the interpretation of the ICCPR such that “the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground . . . and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹²³ This “purpose or effect” standard has been recognized as essential to international efforts to combat discrimination, since it looks beyond the intent of the legislation's drafters to the impact of the deployment of the category of distinction under examination. Article 26 holds that all people are entitled to equal protection of the law. “The law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground....” This article is crucial because it extends equal protection of the law to all persons subject to the state party's jurisdiction, including women and aliens. One of the most important ways to enforce nondiscrimination standards is to ensure that all individuals—here, women migrant workers – are able to vindicate their rights equally under the law. Violations of the right to equal protection are among the most critical violations that women migrant workers face, since such infringements compound the underlying violation for which a remedy is sought. Finally, the Human Rights Committee has explained that the treaty's provisions on gender equality include positive obligations on the state to “take all necessary steps to enable

¹²³ United Nations Human Rights Committee, *General Comment No. 18 on Non-discrimination* (1989), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument).

every person to enjoy” human rights equally.¹²⁴ This includes removing obstacles to equal enjoyment, as well as “positive measures in all areas so as to achieve the effective and equal empowerment of women.”¹²⁵

The CERD Committee, charged with interpreting the International Convention for the Elimination of All Forms of Racial Discrimination, has made a number of normative advances that could be relevant to the crafting of claims in the Inter-American system. The CERD Committee has interpreted the Convention to require that otherwise permissible distinctions between citizens and non-citizens may not be applied in a racially discriminatory manner.¹²⁶ Even more potentially far-reaching is the principle the CERD Committee set out in *Zaid Ben Ahmed Habassi v. Denmark*.¹²⁷ In that case, the Committee found that when circumstances suggest that alien status may be used as a proxy for racial discrimination, “a proper investigation into the real reasons” for the distinction are required by the state party. Failure to conduct such an investigation may amount to a violation of the convention. Under that rule, states may have an obligation to investigate distinctions on the basis of alien status – even by private actors – whenever such distinctions are suspected of being used as a proxy for impermissible discrimination. In a more straightforward manner, the discrimination that migrant domestic workers face often has little to do with their actual alien status, but is instead an overt function of racism, ethnic discrimination, and xenophobia; these forms of discrimination are clearly covered by the Convention.¹²⁸ Finally, although CERD is silent with respect to sex discrimination, it has been interpreted to include prohibitions on gender-specific and gender-differential forms of racial discrimination, making it a very useful tool for women migrant workers.¹²⁹

Armed with these robust standards against discrimination on the basis of gender, race, ethnicity, and nationality, advocates could then make out a number of potential claims concerning practices that have overlapping discriminatory impacts on migrant

¹²⁴ United Nations Human Rights Committee, *General Comment No. 28 on Equality of Rights between Men and Women* (2000), available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13b02776122d4838802568b900360e80?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13b02776122d4838802568b900360e80?Opendocument).

¹²⁵ Ibid.

¹²⁶ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30 on Discrimination Against Non-Citizens* (2004), available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e3980a673769e229c1256f8d0057cd3d?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e3980a673769e229c1256f8d0057cd3d?Opendocument).

¹²⁷ Committee on the Elimination of Racial Discrimination, *Communication 10/1997* (1999) (holding that an alien who was denied a bank loan on the basis that only citizens could be granted loans was denied his right to an effective remedy when the state failed to investigate the “real reasons” for the use of alien status for loan eligibility).

¹²⁸ As the Special Rapporteur on Migrant Workers explains: “People whose color, physical appearance, dress, accent or religion are different from those of the majority in the host country are often subjected to physical violence and other violations of their rights, independently of their legal status. The choice of victim and the nature of the abuse do not depend on whether the persons are refugees, legal immigrants, members of national minorities or undocumented migrants.” *Report of the Special Rapporteur, Ms. Gabriella Rodriguez Pizarro, submitted pursuant to Commission on Human Rights Resolution 1999/44* (U.N. Doc. E/CN.4/2000/82, at para. 32 (6 Jan. 2000).

¹²⁹ United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 25 on Gender-Related Dimensions of Racial Discrimination* (2000), available at

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/76a293e49a88bd23802568bd00538d83?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/76a293e49a88bd23802568bd00538d83?Opendocument).

domestic workers, and which would not be cognizable under U.S. law. For example, migrant domestic workers could challenge the explicit exclusion of domestic workers from certain U.S. terms of employment laws by demonstrating that those laws disproportionately impact women in general, and especially women of racial or ethnic minorities. Women workers of nationalities considered “unpopular” for nannies could allege that their right to equal protection and a remedy under the law is violated by their inability to bring anti-discrimination claims based on their race or nationality and gender under U.S. law. Undocumented domestic workers could challenge their ineligibility for back pay under the Supreme Court’s *Hoffman Plastics* decision, arguing that it constitutes an obstacle on their equal rights that impacts them especially harshly as women of protected racial and ethnic categories. Domestic workers present in the U.S. on special visas could challenge the absence of remedy for their contract claims by arguing that the Department of State’s failure to enforce such contracts is discriminatory. These potential claims are a small subset of the claims that advocates could craft concerning the interlocking forms of discrimination that migrant domestic workers face in the United States.

There are a number of significant obstacles facing such petitions, however. Issues of exhaustion of domestic remedies and the vulnerability of undocumented individuals may stand in the way of filings. To be considered by the Commission, a petitioner must show that she has “pursued and exhausted” all remedies for the violation being presented to the Commission that are available under the municipal law of the United States.¹³⁰ This means that domestic workers claiming violations that could be cognizable under U.S. law, such as non-payment of wages, breach of employment contract, and even debt bondage or trafficking will be required to demonstrate that they have used (or made diligent efforts to use) all possible avenues of redress, including the filing of lawsuits, seeking the assistance of government agencies with enforcement power, or asking for the help of police and investigative bodies. For undocumented workers, these avenues of redress often heighten vulnerability to deportation or retaliation. U.S. law does provide some protection from disclosure of documentation status for individuals pursuing their labor rights, but these protections are not widely known and may not be certain enough to assuage the fears of potential petitioners.¹³¹ For claims that are not cognizable under U.S. law – such as the claim for back pay or reinstatement that was rejected in the *Hoffman Plastics* case, the basis of which has been attacked by the Inter-American Court – domestic remedies are arguably “unavailable” for the purpose of satisfying the exhaustion requirement. Individuals lodging petitions on the basis of such claims, however, are by definition vulnerable to enforcement actions by U.S. immigration authorities and therefore may be hesitant to agree to the filing of a petition in their behalf with the Commission.

¹³⁰ *American Convention*, art. 46(a).

¹³¹ The law is not settled in this area yet: in some jurisdictions and in certain kinds of cases, a worker’s immigration status will be “discoverable” – i.e. subject to involuntary disclosure. See National Immigration Law Center & AFL-CIO, *Checklist for Attorneys Advising or Representing Immigrant Workers*. Available at http://www.nilc.org/immsemplymnt/TWR_Material/Attorney/Checklist.pdf.

In cases stemming from claims that are technically cognizable under U.S. law but practically unchallengeable because of fears about documentation status, individual petitions may be cognizable despite the failure to exhaust domestic remedies. Recognizing the intersecting forms of discrimination that migrant domestic workers face, advocates could recast their complaints as discrimination claims using other protected categories – especially gender, race, and ethnicity (Satterthwaite 2005). In other words, advocates could reconceptualize the human rights violation being challenged: instead of presenting a petition focusing on the underlying labor rights claim (to unpaid wages or the minimum wage), advocates would craft petitions focusing on claims about ethnic, race, and gender discrimination. For example, a claim could be constructed challenging the discriminatory failure to enforce labor laws in settings where either women or immigrants predominate. Such claims may be constructed by examining the enforcement practices, budgets, and plans of agencies charged with ensuring workers' rights are upheld. Since the relevant agencies have not designed any enforcement actions aimed primarily at reaching domestic workers (Poo, interview; *Hidden in the Home*, 31-33), such a claim would be colorable as having a discriminatory impact on migrants, on women, and on certain races and ethnicities.

Another set of claims may be admissible before the Commission without problems of exhaustion: the problem of immunities to criminal and civil enforcement enjoyed by members of the diplomatic corps and officials of some international institutions. These immunities have been used as defenses to claims filed under U.S. law by domestic workers seeking payment of wages, breach of contract damages, and other valid claims.¹³² A significant challenge will greet such petitions, however, since the United States would be likely to argue that it is required by international law to protect the immunity of foreign diplomats and officials. This obligation, based on the Vienna Convention on Diplomatic Relations, may in fact conflict with the rights of individual domestic workers to claim remedies.¹³³ A case has recently been filed by the American University School of Law Human Rights Clinic in federal court on behalf of Lucia Mabel Gonzalez Paredes seeking damages for violations she alleges she suffered while she was employed as a domestic worker by Argentine diplomats.¹³⁴ If the case is dismissed by the court on the basis of diplomatic immunity, the case could be taken to the Inter-American Commission as an individual petition.

iii. On-Site Visits

The Inter-American Commission is empowered to make on-site visits to “observe” human rights situations. Migrant domestic workers’ organizations could request such a visit and arrange for domestic workers to give testimony to Commission investigators. On-site observations are especially useful in situations where widespread or structural human rights violations are occurring, since the findings of visits are published

¹³² See American Civil Liberties Union & Global Rights, *Ending the Exploitation of Migrant Domestic Workers Employed by U.N. Diplomats and Staff*. Available at www.aclu.org/Files/getFile.cfm?id=17902.

¹³³ Rules of Procedure of the Inter-American Commission on Human Rights, art. 51.

¹³⁴ *Lucia Mabel Gonzales Paredes v. Jose Luis Vila and Monica Nielsen*, Civ. Action No. 1:06CV00089 (D.C. Dist. Court) (filed Jan. 18, 2006).

in free-standing reports where recommendations are presented to the government in question. The problem of non-enforcement of labor laws in the domestic worker industry, as well as the problematic issue of diplomatic immunity, could lend themselves to on-site investigations. Such visits would be cost effective as well, since interviews could be arranged in the immediate vicinity of the Commission in Washington, D.C.

d. Advocacy Using Inter-American Norms

Potentially more effective than direct engagement with the Inter-American human rights system are efforts that enlist human rights norms through organizing, consumer pressure, direct action, and the filing of “friend of the court” legal briefs. A wide variety of such activities supporting the rights of migrant domestic workers are already underway in the United States, and many more are possible with creative strategizing and organizing. The use of the human rights framework and the norms of the Inter-American system could be strengthened through cooperative efforts uniting human rights organizations and domestic workers’ organizations.

Consumer pressure was essential in the successes achieved by the Coalition of Immokalee Workers, who were able to negotiate a higher wage for farmworkers after long-term organizing, public campaigning, hunger striking, and media work. As mentioned above, the opportunity to frame the CIW message as a *human rights* message by testifying before the Inter-American Commission was credited as essential to the final breakthrough with Yum! Brand officials. Similar efforts at framing migrant workers’ struggles as a fight for human rights have been undertaken without initiating litigation before human rights bodies. In addition to the general interest hearing in October 2005, other efforts are underway in relation to domestic workers. For example, as part of a large coalition of organizations contributing “shadow” reports critiquing U.S. performance under the ICCPR, Global Rights paired with the University of North Carolina Human Rights Policy Clinic to produce a report examining domestic workers’ rights in the United States (Global Rights, 2006). This 18-page document identifies abuses against domestic workers in the United States as violations of the rights guaranteed under the convention, and sets out specific changes in law and practice that the U.N. Human Rights Committee could recommend to the U.S. government.

As Jennifer Gordon has documented, organizing campaigns are sometimes more challenging with respect to domestic workers than with (even immigrant) workers in other industries, since women are dispersed in private households and don’t always benefit from days off.¹³⁵ Women who are undocumented may be especially reluctant to join with other workers for fear of becoming even more vulnerable through their efforts. Some groups of documented workers, such as those working on special visas that tie their documentation status to a specific employer, may also fear repercussions should they become involved in demanding their rights.

¹³⁵ Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005).

Despite these obstacles, a number of very successful organizing campaigns have been launched by domestic workers' organizations. In New York City, Domestic Workers United (DWU), with the support of the NYU School of Law's Immigrants' Rights Clinic, has brought together community-based organizations and domestic workers to campaign for city-wide and now state-wide legislation protecting the rights of domestic workers. Building on groundbreaking work done on Long Island years earlier by the Workplace Project, organizers created a "Bill of Rights" for domestic workers, using the language of human rights to back demands for a living wage, health insurance, paid vacation days and holidays, notice of termination and severance pay, and protection from discrimination.¹³⁶ DWU was founded in 2000 by CAAAV Organizing Asian Communities and Andolan Organizing South Asian Workers, and also includes Damayan and Haitian Women for Haitian Refugees. The coalition has been extremely successful: in June 2003, the organization convinced the New York City Council to pass legislation requiring employment agencies to inform workers about their labor rights.¹³⁷ DWU is now working to pass similar legislation at the state level, which would circumvent the exclusions of domestic workers written into labor laws by requiring the payment of a living wage, the provision of family leave, paid holidays, and severance pay, among other basic protections. The bill is making its way through the legislative process now, and has garnered endorsements by a number of prominent lawmakers and organizations (Poo, interview & personal communication). In addition to lobbying for legislative change, some of DWU's constitutive organizations, notably Andolan, have spearheaded a campaign to end the use of diplomatic immunity for employers of exploited domestic workers in New York. This work parallels efforts by CASA de Maryland, Global Rights, and the Break the Chain Campaign in the Washington, D.C. area, which have also focused advocacy efforts on the problem of diplomatic immunity.

The language and framework of human rights has been a common reference point for organizers, and could be amplified even more with the additional efforts of human rights organizations. Several human rights organizations have used their traditional "name and shame" methodology to call attention to abuses against domestic workers in the U.S. Human Rights Watch has contributed a great deal through its groundbreaking report, *Hidden in the Home: Abuses of Domestic Workers with Special Visas in the United States*, published in 2001. This report, based on interviews with domestic workers, carefully documents and analyzes the human rights violations domestic workers experience under both U.S. and international law. More recently, Washington D.C.-based Free the Slaves paired with the Human Rights Center of the University of California at Berkeley to investigate and report on forced labor in the United States. Entitled *Hidden Slaves: Forced Labor in the United States*, the report found that domestic service accounted for 27% of the cases the researchers documented (Free the Slaves, 48). The report highlights several case studies of domestic workers who were victims of trafficking and forced labor. The work of Global Rights, already mentioned above, has been exemplary, combining organizing, advocacy before human rights bodies, and public awareness activities. In October 2005, Global Rights joined with Domestic Workers

¹³⁶ Ibid. Domestic Workers United, "Bill of Rights for Domestic Workers," N.D. (on file with author).

¹³⁷ For information about DWU, visit their website at: <http://www.domesticworkersunited.org/>, as well as the CAAAV website: <http://www.caaav.org/coalitions/dwu.php>.

United to hold a “Domestic Workers Human Rights Tribunal” in New York City. The purpose of the tribunal was to “hold the U.S. and New York State governments accountable for the systematic exploitation of over 200,000 domestic workers in the greater New York metropolitan area,” by “bring[ing] the voices and experiences of domestic workers forward, in a call for justice” (Global Rights & DWU, 1). During the half-day event, women spoke about their own experience and efforts to find redress; a panel of “judges”—heads of human rights, workers’ rights, and migrants’ rights organizations—listened and then provided closing comments that functioned as a call to renewed action.

Finally, groups already engaged in domestic litigation on behalf of domestic workers could seek out the help of human rights organizations willing to file *amicus curiae* briefs. Such efforts would fit well with the strategies adopted by some litigators, who in addition to making claims for breach of contract and violations of wage and hour laws are also bringing international law claims in extreme cases, alleging slavery, servitude, forced labor, and trafficking.¹³⁸ “Friend of the court” briefs would set out the human rights obligations binding on the United States that support the claims of the worker. U.S. courts have proven more open to international law arguments of late; this openness could be used by advocates to introduce more wide-ranging and expansive protections relevant to domestic workers.

VII. CONCLUSION

It is too soon to say whether the next “nannygate” will provide an opportunity for advocates to reframe the debate to emphasize the human rights of domestic workers. Domestic workers are organizing in many cities in the United States: coalitions exist in New York City, on Long Island, in Los Angeles, in Washington, D.C, and in other cities. Despite the enormous obstacles they face, the groups have had remarkable successes and are beginning to organize at the regional and national levels. Some groups are now turning to international human rights law and human rights organizations like Global Rights to support their local and national efforts. As demonstrated in this article, there are many ways to enlist human rights norms and institutions in the fight against exploitation and discrimination. Of course, as with any legal strategy, these institutions should be used only as part of a broader organizing strategy lest they lead to backlash or increased vulnerability of domestic workers. Now that advocates have determined that it makes

¹³⁸ Two pending cases may be cited here as examples. In 2004, the American Civil Liberties Union joined forces with the Seton Hall University School of Law Center for Social Justice to represent Beletashachew Ayenachew Chere, an Ethiopian woman who was a domestic worker for a staff member of the United Nations Development Fund. The lawsuit alleges that Chere suffered enslavement, forced labor, involuntary servitude, and trafficking at the hands of the defendants. The other case was brought in June 2006 by the City University School of Law International Women’s Human Rights Clinic on behalf of Vishranthamma Swarna, an Indian woman who was a domestic worker for a Kuwaiti diplomat. This lawsuit alleges that the employers trafficked Swarna into the United States, and subjected her to slavery and slavery-like practices. *See Vishranthamma Swarna v. Badar al-Awadi et al.*, U.S. District Court, S.D.N.Y. (23 June 2006); *and Beletashachew Ayenachew Chere v. Fesseha Taye et al.*, U.S. District Court, D.N.J. (20 Dec. 2004).

sense to “internationalize” the struggle,¹³⁹ the Inter-American system is the ideal place to start.

¹³⁹ In 1964, African-American leader Malcolm X counseled civil rights activists in the United States to “internationalize” their struggle in order to allow for broader solidarity, collective action, and United Nations action concerning racial discrimination in the United States.

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