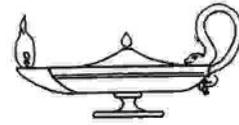


Proceeding



**2013**

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"ASIAN IDEAS OF INTERNATIONAL LAW"**

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**4-7 JUNE 2013**

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UNIVERSITAS AIRLANGGA,  
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**Responsibility of State on the Protection of Migrant Workers in  
Informal Sectors:  
A Case of Indonesia  
By. Koesrianti<sup>1</sup>**

## **1. Introduction**

The movement of person around the world would be increasing due to globalization that has brought about the rising of volume of the movement of goods, services, and labors across the globe. Due to structural changes and rapid economic growth in 70s and 80s caused labor demand in domestic labor supply and even some countries have become importers of unskilled labors, such as, Hong Kong, Singapore, Taiwan, Japan, and Malaysia. In some countries, people may immigrate to other countries because of the high level of unemployment and poverty in their own home countries.

It can be said that the migrant workers have less protection compare to the local workers. Migrant workers perform 3D jobs, i.e, Dirty, Dangerous, and Difficult that people in their host country do not wish to do.<sup>2</sup> Although some destination countries have employment law that provides rights and obligations of migrant workers, lack of effective enforcement and the dependence of migrant workers to their employers and recruit agents mean that they have few or no safeguard against abuse. Although in some extend the existence of migrant workers can contribute to receiving states

economic development, they are considered as the vulnerable group of workers, in particular, informal and women migrant workers. Many migrant workers face violence and abusive treatment within their entire spectrum of migration. Who are responsible to provide protection to the migrant workers: the sending country, the receiving country, or the companies that employ them?

Indonesia for the last three decades has sent migrant workers to countries such as Malaysia, Singapore, Hong Kong, Middle East, Korea, Taiwan, Japan, and some other countries. Majority Indonesian migrant workers are informal female workers who worked in domestic sectors. The number of migrant workers is increasing throughout the decades especially female workers due to the demand for migrant women to fill low-wage service work in many cities throughout the world. However the reports of violations and abuse of migrant workers' rights are also escalating significantly. These violations include inhuman treatment, unsafe working conditions, non-payment of wages and multiple deduction, unreasonable working hours and conditions, physical and verbal abuse, accidents and illness, as well as unfair treatment in legal proceedings.<sup>3</sup> Relate to these violations, domestic workers even have less recourse when their rights are violated since they are systematically excluded from most labor law protection. As a consequence, they received less protection than other type of labors even no protection at all.

This article attempts to identify of the root problem of vulnerably informal Indonesian migrant workers and evaluate their

protection from the concept of the state responsibility. It discusses the responsibility of Indonesia over the migrant workers, especially Indonesian female domestic migrant workers. After a brief overview of fact figure of Indonesian migrant workers and characteristic of female domestic migrant workers, this article analyzes the concept of state responsibility over informal migrant labors that should provide protection in entire process of employment, comprise of pre-departure, employment, and return home stage. It simultaneously reviews Indonesian government policies, the regulations as well as the institutions that deal with migrant worker protection. Lastly, it will draw conclusions and suggestions.

### **2.a. The Fact Figure of Indonesian migrant workers**

Approximately 400,000 Indonesians are registered to have legally migrated to other countries each year since 1998. The actual figure is estimated to be much higher because many migrate illegally.<sup>4</sup> Some migrant workers are considered as documented or in a regular situation, while others are considered as undocumented or in an irregular situation based on their administrative status under national immigration laws. The latter also can be called as illegal migrant workers and treated differently by the destination states.

The official number of Indonesian migrant workers in foreign countries approximately is 2.536.429, of this number, 67 % are women.<sup>5</sup> More than 90% of female migrant workers work in the

informal sector as domestic workers while the rest works in the agricultural and industrial sectors as daily labors, as caregivers to the elderly, shop assistants, and as waitresses. In fact, Indonesia has sent more informal workers than the formal one. The government intends to increase gradually the number of formal workers every year. Based on the database of Ministry of Manpower and Transmigration 2011, formal migrant workers accounted as 264.756 (45,56%) while the number of informal migrant workers is 316.325 (54,44%). This figure has changed with lower number of informal workers in 2012, namely, 258.411 people as formal migrant workers, and some of 236.198 as informal migrant workers as housemaids.<sup>6</sup> The sector of the informal migrant workers is domestic worker accounted 70%, with majority of them is woman.

The real number may be twice or three times partly due to the high incidence of undeclared domestic work and the fact that national statistics often do not count domestic workers as a distinct category. According to the regulation and migration policies, the Indonesian agencies are obliged to report data of migrant workers to the Indonesian embassy at destination countries, but the agencies often ignore this obligation.

The destination countries of Indonesian migrant are Africa 4.439 (1%), Europe 59.735 (2%), the United States of America 130.851 (4%), Pacific Countries 55.591 (2%), Southeast Asia 249.100 (7%), Malaysia 1.410.787 (42%), East Asia 359.844 (11%), South Asia 2.760 (1%), Middle East 379.963 (11%), Saudi Arabia 641.039 (19%).<sup>7</sup> In Saudi Arabia, Indonesian migrant workers

mainly stay in Riyadh and Jeddah, 225,453 (35%) and 415,586 (65%) respectively. Meanwhile in Malaysia, most migrant workers are staying in Kuala Lumpur 620,817 (44%), in Penang 298,318 (21%), in Johor Bahru 202,352 (14%), in Kuching 254,111 (18 %) and in Kinabalu City 35,189 (3%).<sup>8</sup> Thus, Malaysia and Saudi Arabia are two biggest receiving countries for Indonesian migrant workers and therefore the problems of Indonesian migrant workers have happened a lot in these two destination countries.

### **2.b. The problems of Indonesian migrant workers**

The majority Indonesian migrant labors work as housemaid or domestic workers, accounted nearly half of the total number. Due to the typical of the housemaid work and vulnerability of migrant domestic workers, Indonesian migrant workers' problems are relatively high. The Indonesian migrant workers, especially housemaid workers have faced work related problems including unpaid work, physical abuses, sexual harassment, overloaded and over-hour job, unhappy, disagreement with employer, sick, and facing death penalty. Of these problems, the death penalty is the most serious one as this escalating the tension in Indonesian society due to the massive mass media reports.

In some cases, as soon as the person go abroad, the attitude of the authorities seems to change, as they consider that the entire legal responsibility is transferred to the foreign employers and the destination countries wherein work is being carried out. In fact, like the destination countries, their home countries should also

responsible to the migrant workers especially when they are get injured in host country. Migrant workers deserve protection as the labor companies get benefit from the fruits of migrant labor as much as the governments of the receiving as well as their home countries.

Majority cases are experienced by Indonesian unskilled domestic migrant workers. The number of the closed cases that reported to the National Agency for Placement and Protection of Indonesian Migrant Workers accounted 2.714 cases in 2012. This comprise of unpaid wage (590), no communication (640), jobs not compatible the employment contract (216), die in the destination countries (164), unhappy migrant workers (153), abuse treatment of employers (141), sick (112), unsuccessful placement job (81), unfair fired (59), sexual harrasment (45), deduction of wage (45), accident in workplace (33).<sup>9</sup> Up to September 2012, of total 5.934 cases of Indonesian domestic migrant workers abroad, 3.484 cases have closed and the rest in the processes of finalization.<sup>10</sup> Many said that the source of all of these problems rooted in internal condition of Indonesia itself, namely, the pre-departure processes of labor migration.

The problems of Indonesian migrant workers are very complex and involving many element of Indonesian bureaucratic government policies as well as national immigration regulations of destination states. Majority of cases of Indonesian migrant workers has happened in the countries that its national labor law gives weak protection to migrant worker so that lead to arbitrary of employer and agency toward the workers. In other words, a part of the

protection of Indonesian migrant workers relies on the national labor regulations of receiving states. To give more protection to migrant workers abroad, Indonesian government have some bilateral agreements or Memorandum of Understanding (MOU) with some receiving states. Indonesia has MOUs with nine countries, namely, United of Arab, Kuwait, Korea, Lebanon, Malaysia, Qatar, Jordan, and Timor Leste.<sup>11</sup>

Even though, Indonesia has MOUs on migrant worker with destination states, these MOUs cannot directly give protection to migrant workers individually as MOU cannot replace the national labor law of destination states. For example, the provision of minimum wage in the MOU cannot materialize if the national labor law silent about minimum wage. Indeed, most MOUs concern with and are designed to provide standard of regulations and the administrative works of placement and acceptance of migrant workers in receiving states and excluded the protection of migrant workers. For instance, if Indonesia intended to insert the protection element to the MOU, this kind of protection is merely an indirect protection in the form of cooperative works between Indonesia and destination states. However, the application of the MOU still limited especially when it against the labor law of destination states.

The entire processes of migrant labor comprise of recruitment, preparation for migration, departure, employment, and return to Indonesia. Of these processes, the main problem of the protection of Indonesian migrant workers starts from the recruitment

processes in Indonesia. At least three reasons involved in this process:

1. Poverty and education factors are the first major reasons so that migrant workers who are sent to receiving states majority are unskilled and poor migrant workers.
2. Migrant works became commercial object of recruit agents, as the more workers they get the more profit they gain. Therefore, many Indonesian migrant workers who are recruited as the result of tricky promise of dishonest brokers and middlemen. The candidates often do not fully understand the scope of work and the destination countries that they are approaching.
3. Migrant works is a very profit business for some people and institutions, including 'person' from government institutions and agencies that lead to 'conflict of interests' between them, and then this cause to weak and poor recruitment and job - placement processes. At last, all of these would decrease bargaining position of Indonesian government in receiving states in giving protection.

### **3. The Characteristic of the Women Domestic Migrant Works**

The International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families (ICRMW),<sup>12</sup> defines the term "migrant worker" as any person who "is to be engaged, is engaged or has been engaged in a remunerated

activity in a State of which he or she is not a national".<sup>13</sup> The ICRMW is an instrument of international law meant to protect migrant workers whether in regular or irregular situation.<sup>14</sup> The ICRMW is an attempt to ensure that a broad range of human rights (civil and political, and economic, social and cultural) is accessible to the migrant worker. It should be noted that group of people that are vulnerable against unfair treatment including legal immigrants, asylum seekers, and refugee. One group that is called as undocumented immigrants are asylum seekers who deny a permanent residence permit, or people who overstay, that is, staying in the destination countries longer than their visa allowed, and called as 'overstayer'.<sup>15</sup> Overstayers constitute as illegal migrants.

Most of the provisions of ICRMW offers a more precise interpretation of human rights in the case of migrant workers, and does establish a few new rights specific to the condition of migrants, such as the right to transfer remittances or to have access to information on the migration process.<sup>16</sup> In short, the ICRMW is a major step forward of the protection of migrant workers rights, means, that 'everyone' in every human rights instruments 'really means every human beings, that non-citizens are covered and protected by most of the provisions of human rights instruments, and that these instruments also apply to immigration law...this may appear self-evident today. It surely was not ... in the early seventies'.<sup>17</sup>

Based on the qualification of jobs in destination countries, migrant workers divide into formal and informal migrant workers.<sup>18</sup>

Domestic migrant workers are one of informal workers similar with gardeners, plantation workers, construction employees, transportation and services workers. The Convention of Migrant Worker excludes from its scope of application a number of categories of workers<sup>19</sup> and is even silent about domestic migrant workers.

It can be said that domestic work is an important occupation for millions of individuals, accounting for up to 10 per cent of total employment in some countries.<sup>20</sup> The trend over the past decades has been a growing prevalence of migrants amongst domestic workers. Women make up the overwhelming majority of these workers. However, for a long time there is the omission of express references to either domestic work or domestic workers in a broad range of national and international frameworks of law. In other words, there is no proper protection for domestic workers. This even depraved when they work as housemaid in foreign countries. Being women, is even worse as they subject of additional exploitation and abuse.

Compare to domestic labors who work in their own countries, domestic migrant workers have several human rights issues. Generally, migrant domestic workers are at heightened risk of certain forms of exploitation and abuse. Staying in foreign countries became the hardest experience for uneducated Indonesian female domestic migrant workers as they become 'nobody' once they arrive in destination countries. At the center of their

vulnerability is isolation and dependence, which put in the following details:

1. The isolation of life in a foreign land and language, far away from home and family;
2. Lack of basic support systems and unfamiliarity with the culture and national labour and migration laws;
3. Dependence on the job and employer because of migration-related debt and legal status;
4. The practices of employment that restrict them to leave the job;<sup>21</sup>
5. The simple fact that the migrants' workplace may also be their only shelter; and
6. The reliance of family members back home on remittances sent back from the migrant workers.

The majority of those who employed as domestic workers are women. It can be said that there are some additional risks for women migrant domestic workers, namely gender-based violence, from sexual harassment to rape. Their risks and vulnerabilities are further worsening for migrant domestic workers who are non-documented or in an irregular situation, not least because they often risk deportation if they contact State authorities to seek protection from an abusive employer. Thus, women domestic migrant workers have multiple risks of certain forms of exploitation and abuse because of the nature of domestic works as well as individual human resources since usually those who want to do this type of jobs are

less educated than other type of workers where require little schooling and no formal qualification.

The destiny of domestic workers would be changed as in June 2011 the domestic work is recognized as a decent work equal to other types of formal works as the International Labour Organization (ILO) adopted the historic Decent Work for Domestic Workers Convention, 2011(No.189) and accompanying Recommendation No.201.<sup>22</sup> The Convention 189 defines domestic work as 'work performed in or for a household or households'. The work may include tasks such as, cleaning the house, cooking, washing and ironing clothes, taking care of children or elderly or sick members of family, gardening, guarding the house, driving for family and even taking care of household pets.

#### **4. The state responsibility concept related to the protection of migrant workers**

In today's globalized world, millions of people work outside their own state borders, including Indonesian migrant workers. Indonesia has sent formal and informal workers abroad at least for four decades. Across the entire spectrum of migration -- from recruitment to employment to return -- the workers sometimes face exploitation and abuse. Therefore, the protection to migrant workers is not only when the migrants are actually working, but during the entire migration process of migrant workers which comprises preparation for migration, departure, transit and the entire period of

stay and remunerated activity in the destination state as well as return to the State of origin or the State of habitual residence.

Basically, the sending state is responsible for the entire process of migration that comprise of three stages: pre-departure, on-site job/employment, and return home stage. Of these stages, the protection of migrant workers in the employment stage when the migrants are actually working is the most difficult task due to the fact that the workers are staying abroad or outside the jurisdiction of the sending states. However, this does not mean that the other two stages are less important than the employment stage as in these stages the capability and capacity of workers are enhanced thoroughly. It can be said that the success of the migrant workers abroad fully depends on the pre-departure stage. The problems of migrant workers would decrease significantly if the sending state sent qualified workers abroad. Notably, of total of the problems of Indonesian migrant workers abroad, around 80% of them came from the pre-departure stage. In short, the weak protection of migrant workers abroad is started from the pre-departure phase, that consist of recruitment, training, documents' handling and related issues. It should bear in mind that female domestic migrant workers are the biggest group as well as the most exploited group due to the scope of the work and the looseness administrative recruitment, as it has requirement of little schooling and no formal qualification. The sending state responsibility over the three stages of migration processes can be described as follows.

#### **4.a. The sending state's responsibility in pre-departure phase**

In the process of recruitment consist of elements, such as, job information, training, and documents' handling including employment contracts, and information of destination countries. In this stage, some vulnerable and unemployed female villagers are recruited by dishonest and unregulated agencies. In many cases, the job info as well as the recruitment mostly has done by 'sponsor' or labor broker. For many villagers in Indonesia<sup>23</sup> a job abroad is seen as a ticket out of poverty. Some of them often sell everything they or their families own and borrow heavily to pay unscrupulous labor brokers and recruitment agencies. The fee for brokers or sponsor is around nine billion per person for arranging travel and the placement of job abroad.<sup>24</sup> As consequence, many of Indonesian migrant workers are trapped for months in debt bondage because of excessive fees and bribes. Most of them work as low-wages domestic workers abroad. They have to pay their debt when they are working abroad. They cannot have their wage for at least the first six or eight months of employment because they have to pay off their debt.

Currently, government has launched Microfinance Credit (Kredit Usaha Rakyat/KUR) for Migrant Workers that have its purpose to help migrants financing costs incurred during their transition.<sup>25</sup> The credit scheme is designed based on the destination countries of the migrants. Accordingly, this scheme can ease the burden of migrant workers, but this purpose seems cannot achieve

because the amount of the credit still relatively high for migrant workers. Thus, the migrant workers remain pay off the debt bondage with six until eight months of their wage. Furthermore, in order to get more candidates, often the brokers manipulate identity documents.<sup>26</sup> As consequence, the most candidate are younger than official requirement. They may constitute as child labors. This is however difficult to eradicate due to dishonesty of labor brokers and indirect consequence of workers' recruitment system which has done by the agencies or private labor companies. Even many villagers are trapped into human trafficking. Indonesian government should cut this migration chain by optimized the role of province governments into the processes.

Another important issue is the handling of the employment contracts. Majority of workers do not understand the substance of their contract because the contract documents in many cases are prepared by the agencies and given to the workers just before they take off to go to destination countries. Therefore there is no opportunity at all to them to read carefully the employment contract. Moreover, they cannot understand the substance of the contract because the contracts are usually in English. In this stage, it needs state intervention in mediating employment contract abroad as a form of state responsibility to migrant workers.

Another process is training program. Before going abroad for the job, the candidates have to attend training program, namely language and skill training program. In many cases the training programs are held as a formality of to fulfill the requirements of the

migration policy as the agent' obligation rather than to develop the candidates' skill in order to improve the quality of candidates. Not just language skill is important, the information of culture and law of the destination states are also important parts of this training. Notably, Saudi Arabia has different culture as well as law to Indonesia. Thus, all of those things are the survival kits for Indonesian migrant workers abroad.

**4.b. The sending state responsibility on the employment stage**

State responsibility of the sending state is important when migrant workers abroad are facing work related problems or serious criminal offences. In some receiving countries, many of them cannot enjoy their freedom of movement since their employers or brokers withhold their passports and wages, for example Malaysia employers often withhold the passport of their Indonesian housemaid female migrant workers for 'security'. Many of them work and live in sub-standard conditions when they work in destination countries. For many migrant workers the hope of building a better life for their families soon fade when they realize that they must plough the majority of their wages into loan repayment.

It can be said that migrant workers basically are protected under the international law of human rights. However, they are not allowed to form or join trade union, so they cannot organize themselves to bargain collectively for better pay and condition. They sometimes are physically abused or sexually exploited and can end up being trafficked into various forms of modern-day slavery.

Access to justice for those who face such abuses is rarely available or affordable. Therefore, the intervention of the sending state to provide protection for migrant workers in receiving countries is indispensable.

***Diplomatic Protection of Sending States***

In relation with the protection of migrant workers, sending states can intervene based on diplomatic protection, as an injury to a national of a state is an injury to the state itself.<sup>27</sup> Diplomatic protection is the right of a state to espouse a claim on behalf of nationals injured by the wrongful conduct of another state.<sup>28</sup> The sending states based on the law on the international responsibility of States for injuries to aliens can make a claim to the defendant state. Although the receiving states 'are not obliged to admit aliens to their territory, but if they permit aliens to come, they must treat them in a civilized manner.'<sup>29</sup> Furthermore, Malanczuk technically described it that "failure to comply with minimum international standard 'engages the international responsibility' of the defendant state, and the national state of the injured alien may 'exercise its right of diplomatic protection', that is, may make a claim, through diplomatic channels, against the other state, in order to obtain compensation or some other form of redress."<sup>30</sup>

The sending states should have a genuine link with injured alien through nationality. The bond of nationality gives the sending state a legal standing to exercise diplomatic protection on behalf of an injured national. Thus, nationality is the basis of legal interest in indirect claim of the sending state.<sup>31</sup> In relation with this issue, the

International Court of Justice in the *Nottebohm* Case (1955) stated that:<sup>32</sup>

*According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis-à-vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State, which has made him its national.*

However, it should be noted that 'one a state has taken up a case on behalf of one of its subject...the state is the sole claimant.'<sup>33</sup> This is because the basic proposition of international law remains that in a State-oriented world system. Thus, it is only through the medium of the State that individual may obtain the full range of benefits available under international law, and nationality is the key.<sup>34</sup>

Beside diplomatic protection, the international law of human rights as known and recognized as modern or contemporary international law can be use as another mean for giving protection to migrant worker in host countries. The International human rights law protects individual regardless of their nationalities; indeed, it protects human being as such. Accordingly, Indonesian female domestic migrant workers are protected by Convention on the

Elimination of All Forms of Discrimination against Women (CEDAW).

Referring to their objects of protection, international human rights is different from the responsibility of state, as reflected in the opinion of Buergenthal and Maier as follow:<sup>35</sup>

*The law of state responsibility protects individuals against violations of their rights only when their nationality is not that of the offending state; international human rights law protects individuals regardless of their nationality. The concept of nationality is irrelevant in human rights law because the individual is deemed to be the subject of these rights. Nationality is of vital importance however, under the law of State Responsibility because here the injury to a national is deemed to be an injury to the State of his/her nationality.*

As human being, domestic migrant workers should be protected by international human right law just like other worker groups. Domestic work however still undervalued. The people who work in this sector have low status in the community and being marginalized. Indonesia has sent around 650 thousand domestic migrant workers abroad every year.<sup>36</sup> Therefore the protection over them became crucial for the government. The government intent to decreased this number of domestic migrant workers over years, indeed, for the last three years this number is decreased gradually.<sup>37</sup>

***The protection for migrant workers in employment stage: Indonesian case***

Indonesian government has adopted regulation and policies on the placement and protection of migrant workers, and established institutions to protect the rights of migrant workers. The main legal instrument for the protection of migrant workers is Law 39/2004<sup>38</sup>

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concerning the Placement and Protection of Indonesian Migrant Workers Abroad (hereinafter Law 39), President Instruction 6/2006 concerning the Government Policies on Reformation the System of Placement and Protection Indonesian Migrant Workers, and a National Agency for the Placement and Protection of Migrant Workers (BNP2TKI) was established by Government Regulation 81/2006. This Agency accordingly has main responsibility 'for implementing policies in the field of placement and protection of Indonesian workers in foreign countries in a coordinate and integrated manner' as stated in article 95 of Law 39. Its purpose to coordinate various stakeholders that involve in the migration chain processes, namely, private labor Indonesian companies (PPTKIS), Agency abroad, and Non Governmental Organization, Indonesian Embassies abroad, as well as the host countries themselves. Its tasks cover inter alia, recruitment, health check, training, departure, and in-country protection. It also should have good cooperation with Ministry of Manpower and Transmigration<sup>39</sup>, Ministry of Internal Affairs,<sup>40</sup> Ministry of Health,<sup>41</sup> Directorate General of Immigration (with Ministry of Law and Human Rights),<sup>42</sup> and Ministry of Foreign Affairs.<sup>43</sup> Based on these coordination and cooperation, the National Agency will issue the Migrant Worker Card, which is given to the migrant workers just before they take off for destination countries (Kartu Tenaga Kerja Luar Negeri/KTLN).

Indonesian government tries to utilize diplomacy channels to protect migrant workers through bilateral and multilateral agreements with the destination states. Indonesia has Mandatory

Consular Notification (MNC) agreements with seven destination countries. The existence of this agreement to assurance that the destination country will notify Indonesian Embassy promptly when Indonesian nationals injured. Indonesia also has some government to government (G-G agreements), for example, Indonesia – Japan agreement concerning the placement nurse to Japan, Indonesia – Timor Leste agreement for sending caregiver and midwives, and Indonesia - South Korea agreement concerning industries, manufacture, agriculture, fisheries, and services. In multilateral level, Indonesia is a party for the ASEAN Declaration on Migrant Worker 2007. This Declaration is the commitment of ASEAN member countries both sending and receiving states in fulfilling their obligations to provide protection to migrant workers from ASEAN member countries.

There are many Indonesian who were in jailed in destination countries have committed various crimes such as fraud, adultery and sorcery. Indonesian migrant workers facing death sentences stood at 420, in five countries, with Malaysia accounting for the highest number at 351, Saudi Arabia 45, China 22, Singapore and the Philippines with one each, 99 of them had already been sentenced to death.<sup>44</sup>

In order to minimize the number of the migrant workers who sentenced to death, the government established a task force, i.e., Task Force for migrant workers facing death sentences, which has responsibility to provide accurate data of problems migrant workers as well as suggestions to the governments. Based on these data and

suggestions, government has arranged a high level diplomacy under direct command from President and legal aid for migrant workers. Between 2010-2012: the Saudi government has pardoned more than 500 jailed Indonesian migrant workers.<sup>45</sup> In early 2011 following several reported cases of maltreatment and violent abuses, after an Indonesian worker was beheaded after being converted of murdering her Saudi employer, Indonesia stopped sending maids to Saudi Arabia. The Kingdom, is the Middle East's largest market for Asian domestic helpers before Malaysia. The recent data in the Ministry of Foreign Affairs recorded that in 2012 the number of Indonesian nationals who sentenced to death stood at 121 cases, 74 are freed, and 219 still on the processes. While up to March 2013, there are 19 cases, 6 are freed, and 232 still on the processes.<sup>46</sup>

#### **4.c. The sending state responsibility upon return home of migrant workers**

Migrant domestic workers are still facing maltreatment upon return home. They may encounter difficulties in reintegrating into the labor market of their home country, as often the type of works does not match with the availability of employment. Also, the migrant workers should adapt with the society due to the prolonged absence in their home country. Migrant workers also have difficulties relate to the probability of their pension in their elderly period and social security benefits. It is important that the money saved and remitted by migrant workers is put to productive use, and contributed in creating jobs in sending countries. While returned

filipino migrant workers have access to number of credit loan, their Indonesian counterpart have not been offered the same thing.

Many migrants are unable to seek remedies for violations of their rights by employers because their period of employment has been terminated and they are not entitled to stay longer. In many cases, migrant workers return to their home country with less pay than they are due and with no possibility of seeking compensation and remedies. This is the responsibility of the government to seek a solution for returned migrant workers to sustain their financial security and benefit. The financial literacy training and soft loan can be used to overcome this problem as many migrant workers and their families are underserved by formal financial services and possess limited levels of financial literacy.

#### **5. The Decent Work for Domestic Workers Convention and Recommendation as a Direct Protection of Migrant Workers**

The regulation of domestic workers will change dramatically due to the adoption of the ILO Convention on domestic workers. At the hundredth session of the ILO Conference in June 2011, ILO adopted the historic Decent Work for Domestic Workers Convention 189, 2011 and accompanying Recommendation No 201.<sup>47</sup> The adoption of the Convention represents a key milestone on the path to the realization of decent work for domestic workers. Based on ILO research there are more than 53 million domestic workers in the world with ages between 15 years old and above.<sup>48</sup>

Article 21 para.2 of the Convention provides that it shall come into force twelve months after the date on which the ratifications of two Members have been registered with the Director-General. It has received the two requisite ratifications (from Uruguay on June 4, 2012, and the Philippines on September 5, 2012) that will be enable it to enter into force a year from the date that the second ratification was registered with the ILO's Director General.<sup>49</sup> Therefore the Convention will enter into force on 5 September 2013.

Domestic work is defined broadly in Article 1 of Convention No.189 as 'work performed in or for a household or households.' The scope of domestic work includes a broad range of responsibilities, functions, and tasks, often invisible and undervalued, undertaken in and for a household.<sup>50</sup> Meanwhile, the domestic worker is defined as 'any person engaged domestic work within an employment relationship.' It clearly states that a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

The Convention provides the fundamental principles and rights at work in relation to domestic workers, as the following:<sup>51</sup>

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

Furthermore, the Convention No.189 formulates that the domestic workers enjoy effective protection against all forms of abuse, harassment and violence. (Art 5). Also, the Convention stated that domestic workers similar to workers generally enjoy fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy (Art.6).

The working time of the domestic work has been regulated in such way so that domestic workers have normal hours of work. They also can have overtime compensation, period of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristic of domestic workers. (Art.10). This will change the customary expectation across jurisdiction that 'servants' will constantly be available to their 'masters' to perform all required duties 'within the reasonable limits of their physical strength and moral welfare'.<sup>52</sup> Thus, domestic workers just like other worker generally will have normal hours of work, overtime compensation, right to a daily and weekly rest, and paid annual leave. This will give better protection for the rights and condition of domestic workers.

Unlike the common practice of domestic workers employment, the Convention No.189 stated that the Member State shall ensure that domestic workers are informed of their terms and conditions of employment in written contracts in accordance with national laws with details of terms. In relation to migrant domestic worker, the Convention in its Article 8 stated as follows:

'National laws and regulations shall require that migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies'.

Moreover, the Convention No 189 stated that: 'Members shall take measures to cooperate with each other to ensure the effective application of the provisions of this Convention to migrant domestic workers'. This means the administrative works for migrant worker should be completed in the sending state prior depart to other countries. The provisions of the Convention will empower the domestic workers all over the world. However, this is subject to the ratification of the Convention. Indonesia as a sending state

## **6. Conclusion**

The Protection of Indonesian migrant domestic workers should be handled thoroughly and involving the commitments of all stakeholders that concerned with the migration administrative processes. Majority workers that Indonesian government has sent to foreign countries are domestic migrant workers. This is became the root problems of the protection of the Indonesian migrant workers. Domestic work is accounted undervalue, isolated, and unimportant, so that migrant domestic workers are at heightened risk of certain forms of exploitation and abuse. In addition, there is the omission of express references to either domestic work or domestic workers in a broad range of national and international frameworks of law. On the

other hand, domestic migrant workers have financial contribution to sending states as they send remittance back home. Therefore, the protection of domestic migrant workers is indispensable. In order to protect migrant domestic workers abroad Indonesian government issued some regulations and established institutions. It seems that the cooperation and coordination between these institutions are not strong in order to overcome the problems. Indeed, there is an overlap obligation among them.

Accordingly, the sending state is responsible for entire processes of migration of domestic workers, from recruitment to employment to return when they subject exploitation and abuse. However, the protection of migrant workers in the employment stage is the most difficult because out of jurisdiction of sending states. In this case, theoretically Indonesia as a sending state can intervene based on the state responsibility concept as well as diplomatic protection as basically migrant workers are protected under international law of human rights. The adoption of the Convention No.189 in 2011 would change the treatment and condition of domestic worker all over the world. Indonesia should ratify this Convention, as it will support Indonesian government effort to give protection to the domestic migrant workers.

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<sup>2</sup> The 3D jobs often define as Dirty, Dangerous and Demeaning/Demanding. This terminology came from Japanese as 3K, kitanai, kiken, kitsui, see J Cornell, Kitanai, Kitsui, and Kiken: the Rise of Labor Migration to Japan, Economic & Regional Restructuring Research Unit, University of Sydney, 1993. The job is described as high risk and low status.

<sup>3</sup> Badan Pengkajian dan Pengembangan Kebijakan Kementerian Luar Negeri bekerjasama dengan Unit Kajian Hukum Perlindungan Universitas Airlangga, Upaya Peningkatan Kualitas Perlindungan dan Pelayanan WNI di Luar Negeri, Buku Petunjuk Teknis, 2011

<sup>4</sup> The World Bank, Fact sheet: Migration, Remittance, Female Migrant Workers

<sup>5</sup> Director of Protection Indonesian Citizens and Legal Entities (Direktur PWNI dan BHI), Ministry of Foreign Affairs, Lokakarya Peningkatan Kapasitas Aparatur Pemerintah Daerah Dalam Pelaksanaan Diplomasi dan Kerjasama Teknis, Manado, 21 Maret 2013

<sup>6</sup> *Antara News*, 12 May 2013, BNP2TKI Tingkatkan Penempatan TKI Formal. The figure of 2010 is 124.683 people work in formal sector, while some of 415.121 people work in informal sector.

<sup>7</sup> Tatang Budi U Razak, Direktorat Perlindungan WNI dan BHI Kemenlu, Pengelolaan Masalah TKI dalam Perspektif Perlindungan WNI di Luar Negeri, Focus Group Discussion Upaya Peningkatan Perlindungan dan Pelayanan WNI dan BHI di Luar Negeri, Surabaya, 27 September 2012

<sup>8</sup> *Ibid*

<sup>9</sup> See at, <http://bnp2tki.go.id/berita-mainmenu-231/6890-dalam-setahun-crisis-center-bnp2tki-selesaikan-2714-kasus-tki.html>, *Dalam Setahun Crisis Center BNP2TKI Selesaikan 2.714 Kasus TKI*, Rabu 27 juni 2012, (visited 20 May 2013)

<sup>10</sup> *Ibid*

<sup>11</sup> *Ibid*

<sup>12</sup> The International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families (ICRMW), adopted in 1990 by the United Nations (UN) General Assembly. UNGA Res45/158 of 18 Dec 1990. It is the most comprehensive international treaty in the field of migration and human rights. It has been ratified by forty one countries, most of these are described as 'sending countries' such as Mali, the Philippines and Sri Lanka. Indonesia has ratified ICRMW on 12 April 2012 by Law 6/2012

<sup>13</sup> See The International Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families, (the Migrant Worker Convention), art. 2. For refugees and stateless persons are only included under the Convention if such application is provided in national legislation (art. 3(d)).

<sup>14</sup> Regular situation means documented migrant workers while irregular situation means undocumented migrant workers.

<sup>15</sup> Walter Deville, *The Right to Health Care for Vulnerable Population Groups in the Netherlands and in Europe*, in *Human Rights and Biomedicine*, A den Exter (ed.) Antwerpen: Maklu, 2010, at. 89

<sup>16</sup> Paul de Guchteneire and Antoine Pecaud, Introduction: the UN Convention on Migrant Workers' Right, in *Migration and Human Rights: the UN Convention on Migrant Workers' Rights*, Paul de Guchteneire, Antoine Pecoud, and Ryszard Cholewinski (eds.), Cambridge, 2009, at 8

<sup>17</sup> Groenendijk, Introduction, in Bogusz et al, *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives*, Leiden, Netherlands, Martinus Nijhoff, 2004, p xix, as cited in Paul de Guchteneire and Antoine Pecaud, *ibid*.

<sup>18</sup> While formal workers are people who work in proper workplace with permanent official contract arrangements, informal workers are people who work based on less formal contract arrangement. They can be freelancers or temporary labor, and their activities and income partially or fully outside government regulation, taxation, and observation

<sup>19</sup> They are international organizations employees, employee of co-operation programs, investors, refugees and stateless persons, students and trainees, and seafarers and workers on an offshore installation, see art.3 the Convention of Migrant Workers

<sup>20</sup> There is no accurate data on the number of domestic workers throughout the world, partly due to the high incidence of undeclared domestic work and the fact that national statistics often do not count domestic workers as a distinct category. However, such data as are available show that domestic work accounts for between 4 and 10 per cent of total employment in developing countries and between 1 and 2.5 per cent in industrialized countries. See International Labour Organization (ILO) (2009), "Decent Work for Domestic Workers", Report IV(1), International Conference, 99th session, 2010.

<sup>21</sup> For the Indonesian migrant workers, the employment contract period usually lasting for two years. The domestic migrant workers cannot leave their workplace before this two-year contract ends. However this contract can be renewed, after the migrant workers back home to Indonesia.

<sup>22</sup> The ILO Convention concerning Decent Work for Domestic Workers, June 16, 2011 [hereinafter Convention No 189 and Recommendation No.201]; The Recommendation provides practical guidance concerning possible legal and other measures to implement the rights and principles stated in Convention, no need ratification from states.

<sup>23</sup> Many provinces in Indonesia are categorized as 'kantong TKI' (the pockets for migrant workers) in Indonesia, namely, NTT, NTB, West Java, East Java, Bali, Lombok, and Lampung

<sup>24</sup> Rusjdi Basalamah, S.IP, Strategi Peningkatan Kualitas Sistem Perekrutan dan Pelatihan TKI, Lokakarya Nasional Perlindungan TKI di Luar Negeri, Surabaya, 24-25 Maret 2010

<sup>25</sup> For example, the Scheme adopted on 24 January 2012, Regulation of the Head of BNP2TKI stated that the credit scheme for Singapore is IDR 10.933.000, with interest and administrative fee, new migrant workers should pay IDR 14.336.000 and calculated equal to 8 months wage; while for former migrant workers IDR 5.448.000, with interest and administrative fee in total IDR 7.168.000.

<sup>26</sup> Documents that should be provided by the candidates are ID Card (KTP), Family Identification Card (Kartu Keluarga), birth certificate, and a letter from parents or husband stated their permission for the candidate,; All of these documents are needed for the legality of the processes that done by the Agency (PPTKIS).

<sup>27</sup> Emmerlich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and Sovereigns*, Vol. III, at. 136 (1758), "whoever ill-treats a citizen indirectly injures the State, which must protect the citizen", (James Brown Scott ed. Charles Fenwick trans., Carnegie Institution of Washington 1916), cited in Alberto Alvarez-Jimenez, *Foreign Investors, Diplomatic Protection and the International Court of Justice's Decision on Preliminary Objections in the Diallo Case*, 33 *North Carolina Journal of International Law & Commercial Regulation* 437, 2008, at 438

<sup>28</sup> the UN International Law Commission (ILC), First Report on Diplomatic Protection, UN.Doc.A/CN.4/506 (Mar.7,2000), article 1 (1) of the draft articles on diplomatic protection stated, 'diplomatic protection means action taken by a State against another State in respect of an injury to the person or property of a national caused by an internationally wrongful act or omission attributable to the latter State.'

<sup>29</sup> Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh Revised Ed, Routledge, 2002, at. 256; see also, *Barcelona Traction. Light and Power Company, Limited (Belgium v. Spain)*(New Application: 1962) <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1a&case=50&code=bt2&p3=1>

<sup>30</sup> Ibid.

<sup>31</sup> Phoebe Okowa, Issues of Admissibility and the Law on International Responsibility, in Malcolm D. Evans. (Ed.), *International Law*, Oxford, 2003, at 477

<sup>32</sup> Nottebohm Case (Second Phase), Judgement of 6 August 1955, see <http://www.icj-cij.org/docket/files/18/2674.pdf>

<sup>33</sup> The *Mavrommantis Palestine Concessions case (Jurisdiction)* (1924), a claim on the international level is considered to be that of the state whose citizen has been mistreated by the defendant state.

<sup>34</sup> Malcolm N. Shaw, *International Law*, Cambridge Univ.Press, 2008, at 809

<sup>35</sup> Thomas Buergenthal and Harold G Maier, *Public International Law in a Nutshell*, West Publishing Co, St. Paul-Minn, at 115

<sup>36</sup> <http://www.indonesia.go.id/in/kementerian/kementerian/kementerian-tenaga-kerja-dan-transmigrasi/497-ketenagakerjaan/10279-kemnakertrans-targetkan-hentikan-penempatan-iki-domestik-worker-tahun-2017.html> (visited on 10 May 2013)

<sup>37</sup> See note 6, *supra*

<sup>38</sup> Due to its shortage of provisions on the protection migrant workers, it is now at the schedule of amendment in the Parliament. It only has seven articles out of 109 articles that say about protection compare to 66 articles on placement.

<sup>39</sup> Ministry of Manpower and Transmigration is the leading government agency for the regulation of Indonesian migrant workers. Recruitment and placement are conducted by private agencies, which are licensed by this Ministry. This Ministry also monitor pre-departure training, a compulsory pre-departure briefing, and provide limited number of labor attaché at Indonesian Embassies abroad.

<sup>40</sup> For issuing the ID Card of the candidates

<sup>41</sup> For medical check up for the candidates

<sup>42</sup> For the service of the issuing the passport

<sup>43</sup> For the legality status of job orders, i.e., the Indonesian Embassies in the destination states

<sup>44</sup> *Jakarta Globe*, Indonesia's Migrant Workers still Lacking Government Protection, December 19, 2012.

<sup>45</sup> *Jakarta Globe*, Saudi Arabia Pardon 141 Jailed Migrant Workers from Indonesia, 19 April 2013

<sup>46</sup> Direktur PWNI dan BHI Kemlu, Kondisi Umum dan Upaya Pelayanan serta Perlindungan WNI di Luar Negeri. Lokakarya: 'Peran Negara dalam Perlindungan WNI di Luar Negeri' Peningkatan Kapasitas Aparatur Pemerintah Daerah Dalam Pelaksanaan Diplomasi dan Kerjasama Teknis, Manado, 21 Maret 2013,

<sup>47</sup> It adopts in June 16, 2011, see n.20 *supra*, see [http://www.ilo.org/global/about-theilo/newsroom/news/WCMS\\_189191/lang-en/index.htm](http://www.ilo.org/global/about-theilo/newsroom/news/WCMS_189191/lang-en/index.htm) (Visited on 10 May 2013)

<sup>48</sup> <http://www.guardian.co.uk/global-development/2013/jan/09/ilo-better-pay-domestic-workers>, Mark Tran, ILO urges better pay and condition for 53 million domestic workers, *the Guardian*, 9 January 2013 (visited on 15 May 2013)

<sup>49</sup> Up to June 2013, there are seven countries have ratified the Convention, namely, Bolivia, Italy, Mauritius, Nicaragua, Paraguay, the Philippines, and Uruguay. Indonesia has not ratified the Convention No.189 yet.

<sup>50</sup> Adelle Blackett, The Decent Work for Domestic Workers Convention and Recommendation, 2011, 106 *American Journal of International Law*, 778, at 779

<sup>51</sup> Article 3 para.2 of the Convention No 189

<sup>52</sup> Erna Magnus, *The Social, Economic, and Legal Conditions of Domestic Servants: I*, 30 *Int'l Lab. Rev.* 190, 206 (1934), as cited in Blackett, n. 48, *supra*



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### SURAT TUGAS

Nomor : 2759/UN.1.3/KP/2013

Sehubungan dengan diadakannya kegiatan 2013 The Development of International Law in Asia (DILA) International Conference "ASIAN IDEAS OF INTERNATIONAL LAW", dengan ini Dekan Fakultas Hukum Universitas Airlangga memberi tugas kepada :

1. Nama : Nurul Barizah, S.H., LL.M., Ph.D.  
Judul Materi : Revisiting State Obligation on Virus Sample Sharing
2. Nama : Koesrianti, S.H., LL.M., Ph.D.  
Judul Materi : Responsibility of State on the Protection of Migrant Workers in Informal Sectors: A Case of Indonesia

sebagai Pembicara pada Seminar Internasional tersebut yang diselenggarakan pada tanggal 4 s.d. 7 Juni 2013 di Fakultas Hukum Universitas Airlangga, atas kerjasama dengan the Fondation of DILA, Haesung Institute, Inha Law School dan Korea Maritime Institute.

Demikian Surat Tugas ini diterbitkan agar dilaksanakan dengan sebaik-baiknya



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