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## Human Trafficking and Labor Migration: The Dichotomous Law and Complex Realities of Filipina Entertainers in South Korea and Suggestions for Integrated and Contextualized Legal Responses

Yoon J. Shin

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# Human Trafficking and Labor Migration: The Dichotomous Law and Complex Realities of Filipina Entertainers in South Korea and Suggestions for Integrated and Contextualized Legal Responses

Yoon Jin Shin\*

## ABSTRACT

*This Article examines the complex legal situation of Filipina “entertainers” in U.S. military camp towns in South Korea: the individuals located at the intersection of human trafficking and labor migration. The Article investigates how the dichotomous law fails to recognize these entertainers as either trafficking victims or as migrant workers. The law therefore denies proper legal rights and remedies for the serious rights violations they suffer in the destination state. This research demonstrates that these migrants have diverse needs, aspirations, and transnational experiences that embrace both victimhood and agency. It illuminates the fundamental problems of the current global anti-trafficking regime, particularly the criminal justice and immigration control agendas of destination states that adopt flattened and paternalistic perception and treatment of trafficking victims. It makes concrete recommendations on how to overcome the law’s dichotomy and a crime-and-immigration-control-centered framework; empower victimized migrants in the human, civil, and labor rights contexts; and address the diverse needs of migrant individuals with comprehensive, integrated, and contextualized responses. Crucially, it proposes the right to stay and work in destination states as an effective remedy in itself, criticizing the current repatriation policy that does more harm than good to the individuals.*

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\* J.S.D., Yale Law School; Attorney at Law, Former Judge, South Korea. The author owes a debt of gratitude to W. Michael Reisman, Mattias Kumm, James J. Silk, James Tierney, Noah Messing, Maria Dino, Jiewuh Song, Kwon-Yong Jin, Grace Kim, Soo-Ryun Kwon, and My Sister’s Home, for their thoughtful comments and kind support.

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## I. INTRODUCTION

This Article examines the complex legal situation of migrant “entertainers” working in U.S. military camp towns in South Korea: the individuals located at the intersection of human trafficking and labor migration. The dynamics of law and reality for these migrant entertainers bears a profound connection with global phenomena and legal regimes of human trafficking and labor migration. The laws for trafficking and labor migration have developed in largely disconnected

ways. Although scholarship on human trafficking has flourished in the last fifteen years, studies have tilted toward either demonstrating realities without a profound legal analysis or criticizing current law and policy without providing sufficient empirical research. While the current scholarship has produced abundant criticism of the current legal regime on human trafficking, it has been considerably weaker in suggesting detailed alternative responses. Prescriptions have also been lacking regarding the ways to address the diversity among victimized migrants. Based on the author's several years of field experience as a lawyer and researcher, this study seeks to accomplish a comprehensive analysis of the law and the reality of the issue. This Article investigates how a dichotomous law deprives marginalized migrants of proper legal status, rights, and protections and fails to recognize them either as trafficking victims or as migrant workers. The findings and suggestions made by this Article head toward the reform of the international legal regime and national law and policy on human trafficking in most destination states, including the United States. The United States has been the global leader of anti-trafficking regime-building in the last fifteen years.

Part II investigates the realities of migration processes of Filipina entertainers through the entertainer visa system in Korea, their life and work under abusive conditions in the "foreign-only" clubs that exist in U.S. military camp towns, and the reasons why the majority of the entertainers are enduring their current situations. Part III examines the complex situations of these entertainers through the lenses of human trafficking and labor migration. It sets out five different groups of Filipina entertainers for comprehensive and contextualized analysis based on their prior expectations about their jobs and current desires after migration. Part III exposes diversity among these migrants and their multi-layered experiences and argues for a legal framework that responds to their vulnerabilities and agency in integrated and contextualized ways. Part IV begins with examining state obligations regarding human trafficking and the location of human rights of migrants in trafficking situations under the current international law. It also summarizes global trends of the anti-trafficking frameworks at the national level. This Part then investigates the current legal responses of the Korean government. It analyzes the way in which the legal system and practice effectively denies migrant entertainers' legal status and rights *either* as trafficking victims or as migrant workers, and how the law successfully marginalizes them as "unlawful foreign hostesses."<sup>1</sup> Findings in Part IV suggest why the current anti-trafficking regimes around the globe are inadequate. This study also critically analyzes actual decisions by Korean courts and prosecutors in criminal cases brought by migrant

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1. For the meaning of "hostess" as used in this Article, see *infra* text accompanying note 19.

entertainers against their employers. Part IV evaluates the responses of Korea in terms of its human rights obligations and responsibilities. It further argues that the current global anti-trafficking regime *empowers destination states* and *disempowers the individuals* it claims to protect. Finally, Part V suggests alternative legal responses to each category identified in Part III. It first sets out principles of comprehensiveness, integration, and contextualization to reform the current anti-trafficking regime, and then makes concrete recommendations in the case of Filipina entertainers, with the aim of empowering them with enhanced legal status and rights in the destination state. Current anti-trafficking legal frameworks, occupied by “criminal justice and immigration control agendas,” have yet to develop concrete and effective remedies for migrants victimized by trafficking and related human rights violations. This Article argues for ensuring the entertainers’ status in destination states as rights holders in the human, civil, and labor rights contexts, overcoming their current passive positions as victim-witnesses captured in a criminal context. It suggests new positive forms of remedies and legal responses, which will hopefully inspire scholars and practitioners in the field of international law and human rights who seek ways to make the law of human trafficking do actual good for the people.

## II. MIGRATION AND WORK OF FILIPINA ENTERTAINERS IN U.S. CAMP TOWNS IN SOUTH KOREA

### A. *Overview of the Migration Process*

#### 1. Figures

Every year, more than four thousand foreigners enter South Korea with “art and entertainer” (E-6) visas.<sup>2</sup> E-6 visas are issued with three subcategories: artists, or entertainers who will appear in the media (E-6-1); entertainers who will perform in tourist establishments, including tourist hotels, tourist restaurants, and “foreigner-only entertainment establishments” (E-6-2);<sup>3</sup> and sportspersons (E-6-3). Since 2004, women from the Philippines have dominated the E-6-2 category. As of June 2014, 5,086 foreigners reside in Korea with E-6

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2. See *Statistical Yearbook*, KOREA IMMIGRATION SERVICE, [http://www.moj.go.kr/HP/COM/bbs\\_003/BoardList.do?strNbodCd=noti0096&strOrgGbnCd=104000&strFilePath=imm/&strRtnURL=IMM\\_6050&strNbodCdGbn=&strType=&strAllOrgYn=N](http://www.moj.go.kr/HP/COM/bbs_003/BoardList.do?strNbodCd=noti0096&strOrgGbnCd=104000&strFilePath=imm/&strRtnURL=IMM_6050&strNbodCdGbn=&strType=&strAllOrgYn=N) (last visited Mar. 9, 2015) [<http://perma.cc/3UAK-3YSE>] (archived Mar. 9, 2015) (providing data on the number of entrants with E-6 Visas).

3. In this article, “entertainers” means those who hold E-6-2 visas.

visas.<sup>4</sup> Among them, 82.7 percent (4,207) are staying with E-6-2 visas.<sup>5</sup> Of these foreigners, 85.6 percent (3,602) are women.<sup>6</sup> Among those women holding E-6-2 visas, 85.7 percent are from the Philippines (3,089).<sup>7</sup> Under Korean immigration law, every E-6-1 and E-6-2 visa applicant must receive a “recommendation of performance” from the Korea Media Rating Board before applying for a visa.<sup>8</sup> In 2013, the Board issued 1,850 recommendations for E-6-2 categories, among which 75.1 percent were for performing in “foreigner-only entertainment establishments” (hereinafter *foreigner-only clubs*).<sup>9</sup>

A foreigner-only club is a form of adult entertainment bar business that needs the permission of the government to operate, defined as “[a] business operating facilities suitable for foreigners, with a license for an entertainment drinking house business . . . to serve customers alcoholic beverages or other foods and *provide them with music and dance* or facilities for dancing.”<sup>10</sup> As of 2010, 348 foreigner-only clubs were operating in Korea, concentrated in U.S. military camp towns, while a much smaller number are located in shipbuilding areas where a number of high-income foreign engineers reside.<sup>11</sup> The dominant majority of migrant entertainers working in foreigner-only clubs are

4. KOREA IMMIGRATION SERVICE, MONTHLY STATISTICS OF JUNE 2014 [hereinafter KOREA IMMIGRATION SERVICE], available at [http://www.moj.go.kr/HP/COM/bbs\\_003/ListShowData.do?strNbodCd=noti0097&strWrtNo=141&strAnsNo=A&strOrgGbnCd=104000&strRtnURL=IMM\\_6070&strAllOrgYn=N&strThisPage=1&strFilePath=imm/](http://www.moj.go.kr/HP/COM/bbs_003/ListShowData.do?strNbodCd=noti0097&strWrtNo=141&strAnsNo=A&strOrgGbnCd=104000&strRtnURL=IMM_6070&strAllOrgYn=N&strThisPage=1&strFilePath=imm/) [<http://perma.cc/47PK-A7UQ>] (archived Feb. 10, 2015).

5. *Id.*

6. *Id.*

7. *Id.*

8. The Korea Media Rating Board is a semi-governmental entity commissioned by the Ministry of Culture, Sports and Tourism. The Enforcement Rules of the Immigration Control Act requires E-6-1 and E-6-2 visa applicants to attain the Board’s “performance recommendations” as a prerequisite for visa applications. See Choolipkuk Gwanlibup Shihaenggyuchik [Enforcement Rules of the Immigration Control Act], Ministry of Justice Decree No. 835, May 15, 2015 (S. Kor.).

9. KOREA MEDIA RATING BOARD, 2014 ANNUAL REPORT 360 (2014), <http://www.kmr.or.kr/data/educationPrDataView.do?idx=22> [<http://perma.cc/T29G-9W6G>] (archived May 21, 2015).

10. Gwangwang Jinheungbup Shihaengryung [Enforcement Decree of the Tourism Promotion Act], Presidential Decree No. 23790, May 14, 2012, art. 2(1)(6)(c) (S. Kor.) (emphasis added). English translation in this Article adopts the one offered by the Korea Legislation Research Institute, see Statutes of the Republic of Korea, [http://elaw.klri.re.kr/eng\\_service/main.do](http://elaw.klri.re.kr/eng_service/main.do) (last visited Mar. 9, 2015) [<http://perma.cc/9G3E-B6EC>] (archived Mar. 9, 2015), with necessary adjustment by this author when the Institute’s translation is awkward or obviously inaccurate.

11. MINISTRY OF CULTURE, SPORTS AND TOURISM, THE CENSUS ON BASIC CHARACTERISTICS OF TOURISM ESTABLISHMENT 2009, at 44 (2011).

women from the Philippines.<sup>12</sup> Almost all of these Filipina entertainers entered Korea with singer visas.<sup>13</sup>

## 2. Migration Through the Entertainer Visa System into the Sex Industry

The recruitment, migration, and employment process of Filipina entertainers to work in foreigner-only clubs in Korea is standardized through the entertainer visa system. The process is conducted with close coordination between local recruitment agencies in the Philippines, “worker dispatching agencies” in Korea,<sup>14</sup> owners of foreigner-only clubs, and the Korean government. In the majority of cases from My Sister’s Home, the only NGO in Korea specializing in supporting migrant entertainers in U.S. military camp towns, local recruiters in the Philippines had approached young women, often single mothers or breadwinners, in their villages. The recruiters promised these women jobs as singers in U.S. military camp towns in Korea and a decent salary. Other women contacted recruitment agencies themselves after seeing the agencies’ advertisements on the street or on the Internet.

An aspiring female entertainer first needs to pass a “singing audition” at a recruitment agency in the Philippines. A Korean employer, a so-called *promoter* who runs a “worker dispatching agency” (hereinafter a *dispatching agency*), flies from Korea to choose Filipinas to work for him. If the applicant is selected, the local agency makes and sends a video recording of her singing performance to the Korean agency, which then submits it to the Korean Media Rating Board to obtain its performance recommendation. While living in a dormitory, many applicants receive a certain period of training from the local agencies before the video recording. To apply for the Board’s

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12. In 2011, 1,983 foreign entertainers (E-6-2) were recommended to perform in Korea by the Korea Media Rating Board. Among them, 90.5 percent (1,794) were from the Philippines. KOREA MEDIA RATING BOARD, 2011 ANNUAL REPORT 305, 309 (2012), <http://www.kmr.or.kr/data/educationPrDataView.do?idx=17> [<http://perma.cc/R392-QSY2>] (archived May 21, 2015). In 2010, 2,570 foreign entertainers (E-6-2) were recommended, among whom 92.8 percent (2,340) were from the Philippines. KOREA MEDIA RATING BOARD, 2010 ANNUAL REPORT 328, 330 (2011), <http://www.kmr.or.kr/data/educationPrDataView.do?idx=41> [<http://perma.cc/S8UM-VJBD>] (archived May 21, 2015). While the Korea Media Rating Board does not produce gender specific data, the gender ratio can be inferred from immigration statistics. For example, as of June 2014, migrants from the Philippines residing with E-6-2 visas were 3,411, among whom women were 90.5 percent (3,089). KOREA IMMIGRATION SERVICE, *supra* note 4. Most clients of My Sister’s Home stated there were no migrant entertainers from countries other than the Philippines in their clubs; nor were there any male entertainers.

13. Hereinafter, the term “Filipina entertainers” refers to women from the Philippines with E-6-2 visas working at foreigner-only clubs in Korea.

14. A worker dispatching agency is a licensed business in Korea, dispatching workers who belong to the agency to employers who want to hire them. Under Korean labor law, a dispatching agency is the primary employer of dispatched workers.



recommendation, an applicant must also sign a “performance contract” prepared by the Korean dispatching agency. Most of these contracts are identical to the “Standard Performance Contract” drafted by the Board as a sample. This standard contract stipulates that an entertainer performs for one year<sup>15</sup> at the place designated by the Korean dispatching agency, is paid a monthly salary of the legal minimum wage or more,<sup>16</sup> works no more than 8 hours a day, takes one full day off a week, and receives free round trip flight tickets home, meals, and housing.<sup>17</sup>

With the aspiring entertainer’s performance video and a signed contract, only a dispatching agency, not the entertainer, can apply for a recommendation from the Board. Once the Board grants a recommendation, the Ministry of Justice issues a “Certificate of Eligibility of Visa Issuance (CEVI)” to the applicant. A local agent then takes the applicant to the Korean Embassy in the Philippines for a visa interview. At the interview, a Korean consul checks the applicant’s name and asks her to sing again in front of him without further questioning on her designated workplace or her knowledge about the terms of her contract. With rare exception, the consul issues an E-6-2 visa, usually on the same day as the interview.<sup>18</sup> With the visa finally in hand, the aspiring entertainer gets on a plane to Korea. At the Incheon (Seoul) Airport, she is met by personnel either from her dispatching agency or a foreigner-only club, who take her directly to the club in a U.S. military camp town. On the first night after her arrival, she discovers that she will not be working as a singer, but as a *hostess*, a so-called “juicy girl.”<sup>19</sup>

### B. A Brief History of the U.S. Camp Town Sex Industry in South Korea

South Korea has an ongoing history of governmental regulation and patronage of the sex industry around U.S. military bases in Korea, particularly since the 1970s, when the U.S. government decided to

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15. This contract is renewable for another year, as the maximum term of an E-6-2 visa is two years.

16. The legal minimum wage in Korea in 2014 set by the Ministry of Labor is about \$5.10 per hour and about \$1,020 per month (in case of eight working hours a day for twenty-five days a month).

17. For further analysis of this standard contract, see *infra* notes 173–76 and accompanying text.

18. At the interview this author had with a Consul at the Korean Embassy in Manila in June 2010, the Consul answered that he did not have much discretion in issuing E-6 visas since applicants already received a CEVI from the Ministry of Justice, and the denial rate by his hand was less than 3 percent.

19. In Korea, the term “hostess” is slang for a woman working in adult clubs who serves male customers and whose work is assumed to involve sexual services.

reduce its troops in Asian regions.<sup>20</sup> While criminalizing prostitution in general, the Korean government made a special exception for U.S. military camp towns, “kijichon,” in Korean. The government has shielded from law enforcement those involved in prostitution in kijichon and even encouraged Korean women to relocate to and work in this industry, praising it as “patriotic.”<sup>21</sup> The Korean government has also systematically regulated the women’s sex-related medical conditions.<sup>22</sup> When the number of Korean women working in kijichon sharply decreased in the 1990s, the members of the Special Tourist Business Association, the association of club owners in kijichon areas, requested that the government allow them to “import” foreign hostesses to sustain their businesses. In 1996, the government granted them a legal entitlement to hire foreign entertainers at kijichon clubs through the E-6 visa system.<sup>23</sup> In 1999, the Korean government even loosened legal regulations on hiring foreign entertainers by replacing the requirement for permission by the Minister of Culture and Sports with the requirement of a much more lenient recommendation by the Korea Media Rating Board.<sup>24</sup> Since then, the number of migrant women entering Korea with E-6-2 visas has dramatically increased,<sup>25</sup> and so has the number of foreigner-only clubs and dispatching agencies. Filipinas holding singer visas are predominantly hired in kijichon foreigner-only clubs to serve American GI customers because of their ability to speak English. After these migration flows began, widespread exploitation and abuses of female migrant entertainers drew international criticism. In response, the Korean government decided to stop issuing E-6-2 dancer visas in June 2003 while

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20. For scholarly work in English on the history of the sex industry of U.S. military camp towns in Korea and the relevant roles of and the politics between the two governments, see generally KATHARINE H.S. MOON, *SEX AMONG ALLIES: MILITARY PROSTITUTION IN U.S.-KOREA RELATIONS* (1997) (examining the development of prostitution as a feature of U.S. military bases in South Korea); SEALING CHENG, *ON THE MOVE FOR LOVE: MIGRANT ENTERTAINERS AND THE U.S. MILITARY IN SOUTH KOREA* 15–20, 59–65 (2011) (examining “the global forces that brought . . . together” Filipina entertainers and U.S. military base clientele).

21. See, e.g., Ju-Min Park, *Former Korean ‘Comfort Women’ for U.S. Troops Sue Own Government*, REUTERS (July 11, 2014), <http://uk.reuters.com/article/2014/07/11/uk-southkorea-usa-military-idUKKBN0FG0WK20140711> [<http://perma.cc/Q9TT-5NMY>] (archived Feb. 10, 2015) (“The women claim the South Korean government trained them and worked with pimps to run a sex trade through the 1960s and 1970s for U.S. troops, encouraged women to work as prostitutes and violated their human rights.”).

22. See MOON, *supra* note 20, at 78–83, 127–48 (discussing the joint “Clean-Up Campaign” targeting venereal diseases).

23. See MINISTRY OF CULTURE AND TOURISM, WOEKUKIN YEONYEIN DOYIB SILTAEJOSA MIT JEONGCHAEKBIKYO YEONGU [RESEARCH ON SITUATIONS OF EMPLOYMENT OF FOREIGN ENTERTAINERS AND COMPARATIVE POLICY STUDY] 41–42 (2006) [hereinafter MINISTRY OF CULTURE AND TOURISM].

24. See *id.* at 63–66.

25. See *Statistical Yearbook*, *supra* note 2.

continuing to issue E-6-2 singer visas, of which the dominant recipients were Filipinas.<sup>26</sup>

Korean law, in fact, legalizes hiring hostesses (in legal terms, “workers engaged in entertainment”) in the bar entertainment business. The Enforcement Decree of the Korean Food Sanitation Act defines “workers engaged in entertainment” as “women who provide amusement to customers by drinking alcoholic beverages with customers, singing or dancing.”<sup>27</sup> A foreigner-only club is a kind of bar entertainment business exclusively open to foreign customers where these workers engaged in entertainment, the migrant entertainers, are hired to amuse them by singing or other services. In other words, the E-6-2 singer visa system for foreigner-only clubs exists in order to bring foreign women to work as hostesses. Hiring Filipina entertainers as “juicy girls” in these clubs is thus not an abuse or misuse of the visa system by individual perpetrators but the system’s original intent.

The survey by the then Ministry of Culture and Tourism in 2006 contains interviews with promoters and club owners in kijichon, which confirm that operating the E-6-2 visa system for foreigner-only clubs is a coordinated project by those businessmen and the Korean government:

In 1996, we asked the government to allow us to import entertainers. Our business was under threat of closing down due to the size reduction of the US Force in Korea and economic crisis. . . . But the government could not [bluntly] issue “hostess” visas. Anyway, the government felt responsibility for our difficulties, so after deliberation, they created an entertainer visa for us to bring in hostesses under the name of entertainers. . . . Our business is not unlawful, it’s that the original purpose of the [entertainment] visa is to “host.”<sup>28</sup>

Kijichon clubs needed women who would do waitressing and entertain customers at the same time. As there was no other way to import them, dancer visas and singer visas were used.<sup>29</sup>

### C. Working and Living Conditions of Filipina Entertainers

Filipina entertainers in foreigner-only clubs are directed to perform the work of hostesses. The “juicy girl” double entendre reflects the fact that one of the main duties of the hostesses is to sell customers as many glasses of juice or drink as possible in order to meet their monthly “juice quota” assigned by club owners. Each entertainer is usually assigned a juice quota ranging from three-hundred to four-hundred points to meet each month. Selling one ten-dollar glass of juice

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26. For the sharp decrease of Russian female entertainers with dancer visas in 2004 and dominance by Filipina entertainers since then, see *id.*

27. Shikpum Weesaengbup Shihaengryeong [Enforcement Decree of the Food Sanitation Act], Presidential Decree No. 26180, Mar. 30, 2015, art. 22, para. 1 (S. Kor.).

28. MINISTRY OF CULTURE AND TOURISM, *supra* note 23, at 40–41.

29. *Id.* at 41.

counts one point.<sup>30</sup> Each ten-dollar glass of juice gives customers twenty minutes to sit and flirt with Filipina entertainers. If an entertainer does not meet her assigned juice quota, various penalties are imposed: no day off or free time in the following month, no bonuses, transfer to other clubs with worse conditions, and threats of being sent back to the Philippines. Verbal threats and intimidation are routine, and physical violence occurs frequently.<sup>31</sup> It is, in fact, impossible to meet these monthly quotas when the entertainers sell only juice or drinks. No clients of My Sister's Home, for example, had met their monthly quotas: many reported they could make only forty to fifty points a month by selling juice. For most entertainers, the only way to achieve their monthly quotas is "going out for a bar fine,"<sup>32</sup> which is slang for prostitution. According to the rules of most clubs, one bar fine counts as thirty points, equivalent to selling thirty glasses of juice. In this case, a customer pays a bar fine of \$300 directly to the club owner, not to the entertainer, before he takes her outside, often without asking her consent.

No client of My Sister's Home had a chance to sing in her club. Instead, requiring entertainers to perform provocative dances on stage wearing bikini-like garments is a widespread practice. In the hall, entertainers have to sit with customers, badgering them to buy drinks, offering lap dances, and sometimes "hand jobs" or oral sex, which are equivalent to selling five to ten glasses of juice. They also have to perform extra labor, such as cleaning up the clubs and washing dishes every day after work.<sup>33</sup>

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30. In 2011, the Ministry of Gender Equality and Family in Korea conducted a survey on ninety-eight migrant women, including fifty-one Filipina entertainers, who were working or have worked in entertainment establishments that were assumed to engage in prostitution. According to this survey, 70 percent of Filipina entertainers answered that their clubs had a juice quota system. MINISTRY OF GENDER EQUALITY AND FAMILY, SURVEY FOR THE MIGRANT WOMEN EMPLOYED IN THE ENTERTAINMENT BUSINESS IN KOREA 90 (2011) [hereinafter 2011 SURVEY], available at [http://www.prism.go.kr/homepage/researchCommon/retrieveResearchDetailPopup.do?research\\_id=1382000-201100019](http://www.prism.go.kr/homepage/researchCommon/retrieveResearchDetailPopup.do?research_id=1382000-201100019) [<http://perma.cc/8KN2-42VF>] (archived Mar. 9, 2015). Due to the limited number of respondents in this survey and constraint situations of currently working entertainers that make them hesitate to provide more candid answers, it would be hard to consider the result of the Survey as an accurate presentation of the reality of migrant entertainers. Nevertheless, this Article cites this survey as a reference considering its importance as a recent direct survey on migrant entertainers, conducted as a government project to understand their situations in various aspects.

31. According to the 2011 Survey, 29.3 percent of Filipina entertainers answered they have experienced physical or psychological abuse in workplace. Among the respondents who were staying in a shelter, 48 percent answered they had experienced such abuses. *Id.* at 114–15.

32. Customers who want to have sexual intercourse with an entertainer usually need to pay a club owner \$300. This money is considered as a "fine" for a customer to pay the owner in order to take the entertainer outside the club during her work hours.

33. In the 2011 Survey, current Filipina entertainers answered they were working 8.84 hours a day while former entertainers staying in a shelter answered they worked thirteen hours a day. See 2011 SURVEY, *supra* note 30, at 92.

The entertainers experience various constraints on their freedom. In many cases, either promoters or club owners confiscate their passports. Most clients of My Sister's Home did not possess their passports when they came to the shelter. Entertainers usually live in a dormitory located inside or next to their club buildings, where they spend most of their off-work hours. Even during off-work hours, "real" free time spent outside is minimal: in many cases, one hour a day or less.<sup>34</sup> During the "real" free time, many clubs let their entertainers go outside only when accompanied by a Korean employee or a senior Filipina entertainer.<sup>35</sup> In some clubs where an entertainer can go out by herself during free time, the owner or manager repeatedly calls to monitor her location.<sup>36</sup> Clubs often impose heavy fines for returning even a few minutes late from free time.<sup>37</sup> Closed-circuit television (CCTV) surveillance over dormitories is also common.<sup>38</sup> Most clients of My Sister's Home had only one or two days off a month, if any.<sup>39</sup> If an entertainer wants to take an additional day off, she must pay a heavy fine to "buy herself a day."<sup>40</sup> Promoters and club owners constantly warn their entertainers that if they run away or contact the police or NGOs, they will be immediately caught by the Immigration Service and be deported for doing work beyond the scope of their visas. If an entertainer quits her job in the middle of her contract term, she must pay an extravagant penalty for breach of contract.<sup>41</sup> Club owners often assert that this fine will be imposed upon the entertainer's family in the Philippines.<sup>42</sup> The lack of knowledge about Korea, including

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34. In the 2011 Survey, 29.2 percent of Filipina entertainers answered they could not freely go outside of their club during their free time. *Id.* at 94.

35. *See id.* at 93–94, 122.

36. *Id.*

37. Fining rules vary by clubs. In the 2011 Survey, one Filipina entertainer answered she had to pay \$20 for being fifteen minutes late, while another entertainer answered she had to pay \$300 for being five minutes late. *Id.* at 112.

38. In the 2011 Survey, 50 percent of Filipina entertainers answered there were CCTVs installed in their clubs and dormitories. *Id.* at 123.

39. According to the 2011 Survey, Filipina entertainers had 3.47 days off a month on average. Former entertainers answered they had 2.41 days off a month on average. Some Filipina entertainers answered they had no days off at all. *Id.* at 92.

40. In the 2011 Survey, one Filipina entertainer stated that she had to pay \$100 to \$150 to her club owner to take a day off and that on a day without any customers in the club, entertainers were forced to pay the same amount for having no customers. *Id.* at 113.

41. The 2011 Survey shows that 40 percent of Filipina entertainers answered that they must pay a penalty to their employers if they quit their job in the middle. The average amount of the penalty was \$1,887.50. *Id.* at 53; *see also* CHENG, *supra* note 20, at 85 (quoting Filipina entertainer's statement that she would have to pay \$5,000 as penalty for breaking her contract).

42. The 2011 Survey shows that 40 percent of Filipina entertainers answered they must pay penalty to their employers if they quit their job in the middle. The average amount of the penalty was \$1,887.50. *Id.* at 53; *see also* CHENG, *supra* note 20, at 85 (quoting Filipina entertainer's statement that she would have to pay \$5,000 as penalty for breaking her contract).

geography, language and legal system, and the absence of a social network outside their clubs contribute to the constrained lives of Filipina entertainers.<sup>43</sup>

These Filipina entertainers also work under poor medical and health conditions. Club owners do not easily let them go to the hospital except for HIV and STD examinations.<sup>44</sup> Many entertainers do not have medical insurance and have to pay their own medical expenses, including costs associated with STDs.<sup>45</sup> Upon becoming pregnant, entertainers face losing their jobs unless they have an abortion at their own cost.<sup>46</sup> Many clients of My Sister's Home stated that club owners forced them to take pills every day, which, they were told, were to keep them "slim, sober and stimulated."<sup>47</sup> While their contracts stipulate free meals, club owners usually give each entertainer only \$10 a week for food expenses, which allows them only extremely poor options.<sup>48</sup>

The legal status of Filipina entertainers is subordinated to their dispatching agencies and club owners. However abusive and poor their working and living conditions are, Filipina entertainers must work in a place designated by their dispatching agencies.<sup>49</sup> As mentioned earlier, only dispatching agencies are entitled to apply for E-6-2 visas on behalf of entertainers and only to work in assigned clubs. Migrant entertainers do not have the right to change their employers or workplaces and must pay heavy, arbitrarily calculated penalties if they want to quit their jobs. On the other hand, they must return home immediately if fired by their employers for any reason. As discussed in Part II.E, when entertainers leave their clubs without notice, club owners and dispatching agencies report to the Immigration Service, making their immigration status unlawful.

#### D. Mechanisms of Exploitation

Under the Korean law, a dispatching agency, which is the primary employer of dispatched workers, is responsible for paying Filipina

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43. In the 2011 Survey, 96.1 percent of Filipina entertainers answered they spoke no or little Korean. 2011 SURVEY, *supra* note 30, at 136–37.

44. See CHENG, *supra* note 20, at 61.

45. In the 2011 Survey, 54.1 percent of Filipina entertainers answered they did not have health insurance. 2011 SURVEY, *supra* note 30, at 124.

46. In the 2011 Survey, 44.4 percent of Filipina entertainers answered they did not use contraception and 8.2 percent of Filipina entertainers had experienced pregnancy while working in Korea. Many Filipina entertainers stated their club owners coerced abortion, asking them to choose between having a surgery and going back to the Philippines after paying back all the costs they owed to their employers. One respondent answered she escaped from the club to keep her baby. A reported 57.1 percent of the respondents who got pregnant had an abortion. In 75 percent of such cases, either the entertainers or their boyfriends paid the cost of a procedure. *Id.* at 128–30.

47. Similar statements are found in the 2011 Survey. See *id.* at 125.

48. See *id.* at 135.

49. This problem is further discussed *infra* Part IV.C.

entertainers salaries as written in their contract. The written salaries are more than \$900 a month to comply with minimum wage regulations. Most clients of My Sister's Home actually received about \$350-\$400 a month from their agencies (except those who received no wages at all).<sup>50</sup> Entertainers usually do not receive any wages for the first two to four months of their employment because the promoters arbitrarily deduct "fees" for facilitating their immigration process.<sup>51</sup>

According to a common business contract between a dispatching agency and a club owner, a club owner must pay a dispatching agency about \$1,200, every month, for each entertainer that the agency brings to the club.<sup>52</sup> This fee structure is the main reason that club owners try to extort as much profit as possible from each entertainer. The club owner must extract more money from each entertainer than he pays the dispatching agency. Under this system, coercive labor practices and exploitation of Filipina entertainers naturally follow. This business practice also implies that foreigner-only clubs that hire Filipina entertainers make high profits.

The combination of bar fine and juice quota systems is a unique mechanism of exploitation in foreigner-only clubs in Korea. While Korean criminal law penalizes prostitution, the Supreme Court of Korea has decided that as a civil matter, the entire earnings from prostitution belong to a woman in prostitution, and when her pimp takes a part of the earnings, it constitutes a crime of embezzlement.<sup>53</sup> Kijichon clubs operate in open violation of this rule. As noted, while customers pay about \$300 directly to club owners, entertainers only get "points" toward their juice quota. In many clubs, the entertainers receive 20 percent or 30 percent of the total bar fine sales they made at the end of each month as "bonuses" only when they meet their quota that month. In some clubs, owners give entertainers 20 percent of their sales when they do not meet the quota and 30 percent when they do meet the quota.<sup>54</sup> Therefore, in most clubs, a club owner unlawfully takes between 70 percent and 100 percent of what legally belongs to entertainers. Moreover, club owners often deduct large amounts of money from the paltry salaries and monthly bonuses of the

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50. In the 2011 Survey, the average basic monthly salary (excluding juice quota bonus and bar fine income) that Filipina entertainers received from their dispatching was \$384, while the average monthly salary written in their contracts was \$848. 2011 SURVEY, *supra* note 30, at 52, 95. The respondent Filipina entertainers answered that they were making extra money from bonuses for selling juice (41 percent of their total income) and bar fines (27.7 percent of their total income). In this survey, an average total monthly income of Filipina entertainers was \$1,269, while that of Russian and Thai entertainers was \$2,623 and that of Chinese entertainers was \$1,947. *Id.* at 52, 95.

51. *See id.* at 96-97.

52. *Id.* at 91.

53. Supreme Court [S. Ct.], 98Do2036, Sept. 17, 1999 (S. Kor.).

54. *See* 2011 SURVEY, *supra* note 30, at 74-77.

entertainers with various pretexts of fines and penalties,<sup>55</sup> which is a clearly prohibited practice under the Korean labor law.<sup>56</sup> Several My Sister's Home clients received little or no wages during the period of their work due to such practices. In many cases, club owners also keep entertainers' bankbooks and return them only when the entertainers need to send money to their families in the Philippines. The above-described mechanism of embezzlement and arbitrary wage deduction, combined with coercive juice quota and bar fine systems, clearly violates civil, criminal, and labor law in Korea and amounts to exploitation.

#### *E. Endure or Escape: Absence of Remedies and Undesired Return*

Some Filipina entertainers manage to leave their clubs and seek help from My Sister's Home. However, the lack of available legal options means their hardships continue. When a Filipina entertainer leaves her club, the promoter reports to the Immigration Service her "arbitrary leaving from the workplace,"<sup>57</sup> which immediately invalidates her visa, making her presence in Korea unlawful. Fines for unauthorized stays in Korea start accumulating on the entertainer's immigration record. The only way the entertainer can regain lawful immigration status is to file a legal (usually criminal) accusation against her employers. She may then apply for a G-1 "miscellaneous" visa.

A G-1 visa is a temporary visa, usually issued for three months, for reasons that do not fit into regular categories.<sup>58</sup> However, in order to receive a visa, applicants for G-1 visas are required to pay all their accumulated fines.<sup>59</sup> This is a significant and unfair burden for the Filipina entertainers who have escaped abusive workplaces and become undocumented as a result. Furthermore, even if an entertainer successfully gains G-1 status, her legal status remains unstable, since renewal of G-1 visas is at the discretion of the Immigration Service.<sup>60</sup>

55. The pretexts of fines include penalties for not meeting juice quotas, for being late for work, for coming in late after free time or bar fine, for gaining weight, or for not having any customers in a club. *See id.* at 111–13. In the 2011 Survey, one Filipina stated she received only \$145 a month even when she met her juice quota because of such penalty system. *Id.* at 114.

56. *See infra* note 164.

57. Every employer of migrant workers has a legal obligation to report to an office of the Immigration Service in cases of "runaway" or missing workers. *See* Choolipkuk Gwanlibup [Immigration Control Act], Act. No. 12782, Oct. 15, 2014, art. 19(1)(2) (providing that if "the whereabouts of the employed foreigner become unknown," the foreigner's employer "shall . . . report it to the head of the office or branch office within fifteen days after learning of such occurrences").

58. The Korean immigration system does not provide a precise visa category for victims of human trafficking or other serious crimes.

59. Immigration Control Act, *supra* note 57, art. 94, para. 17.

60. *Id.* art. 25.



An applicant must appear at the Immigration Service office every three months to show proof of her pending case and the need for further stay.<sup>61</sup> Moreover, G-1 visa holders are prohibited from working.<sup>62</sup> After several months without work, many entertainers feel frustrated since they cannot send remittances to their families for extended periods of time. They often tell their families they are sick or their workplace is temporarily closed. Unfortunately but understandably, not a few of them begin to regret their decision to escape and seek help.

The entertainers' cases are almost always discontinued by prosecutors, and they must leave the country. As discussed in detail in Part IV.B, no E-6-2 visa case has been prosecuted in Korea for either human trafficking or coercion of prostitution. As a consequence, Filipina entertainers who have filed claims end up being treated as "unlawful foreign hostesses" who have turned themselves in. Even if an entertainer was recognized as a victim, the result would be the same: she must leave Korea, regardless of the result of her case, when her G-1 visa expires.<sup>63</sup> Most clients of My Sister's Home have left Korea against their will, being labeled as unlawful migrants under both criminal and immigration law.<sup>64</sup>

My Sister's Home speculates that only a small number of Filipina entertainers among those who have escaped from their clubs contact the organization for assistance. The rest are assumed to be seeking out workplaces where they might find work as undocumented migrants. Filipina entertainers worry about their unfulfilled promises to their families and try to find any possible opportunities left for them. Some clients of My Sister's Home fail to show up on their promised departure date to the Philippines: they decide to be undocumented rather than return with empty hands. The majority of Filipina entertainers are enduring their current situations without attempting to escape.

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61. Choolipkuk Gwanlibup Shihaengryung [Enforcement Decree of the Immigration Control Act], President Decree No. 25669, Oct. 28, 2014, art. 31, para. 1; Enforcement Rules of the Immigration Control Act, *supra* note 8.

62. As an exception to this rule and as a response to constant criticism from civil societies, the Ministry of Justice made an internal guideline in 2008 allowing a possibility for victims of "human rights violation crimes" holding G-1 visas to apply for a work permit. However, this rule had never been applied and was hardly known to local immigration offices until March 2012, when this author found the guideline and suggested My Sister's Home should file work permit applications for their clients; the organization succeeded in attaining work permits for three clients. However, this guideline has no binding force and is still seldom applied in practice.

63. Enforcement Decree of the Immigration Control Act, *supra* note 61, art. 33.

64. In departing Korea, the Immigration Service requires them to sign a document admitting their unlawful stay and breach of relevant laws in Korea.

### III. COMPLEX REALITIES ACROSS HUMAN TRAFFICKING AND LABOR MIGRATION

While law prefers a black or white classification and treatment of things, realities mostly appear in gradations of grey. A number of authors, especially in anthropology and feminist studies, have shed light on ambiguous and complex realities and identities of individuals in sex work and trafficking. They have indicated how the current legal system on human trafficking is inadequately built on a fictional dichotomy between “victims” and “criminals,” with a flattened victim stereotype that effectively erases agency.<sup>65</sup> This Part analyzes the

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65. See, e.g., *TRAFFICKING AND PROSTITUTION RECONSIDERED: NEW PERSPECTIVES ON MIGRATION, SEX WORK, AND HUMAN RIGHTS* viii (Kamala Kempadoo, Jyoti Sanghera & Bandana Pattanaik eds., 2012) [hereinafter *TRAFFICKING AND PROSTITUTION RECONSIDERED*] (exploring “trafficking not as the enslavement of women, but as *the trade of labor under conditions of coercion and force*, analyzed from the lives, agency, and rights of women and men who are involved”); RHACEL SALAZAR PARREÑAS, *ILLICIT FLIRTATIONS: LABOR, MIGRATION, AND SEX TRAFFICKING IN TOKYO* 4–5, 273 (2011) (critiquing “the identification of migrant Filipina hostesses as sex-trafficked persons” and arguing that “[w]e should . . . not celebrate the forced return migration of hostesses to the Philippines but instead lament the setback it has posed to the empowerment of migrant women”); JO DOEZEMA, *SEX SLAVES AND DISCOURSE MASTERS* 17 (2010) (arguing that “the focus of our concern” should be changed “from the *vulnerable* subject (capable of being hurt) needing protection, to the *desiring* subject whose primary requirement is not passively confirmed ‘rights’ but a political arena conducive to the practice of freedom”); RUTVICA ANDRIJASEVIC, *MIGRATION, AGENCY AND CITIZENSHIP IN SEX TRAFFICKING* 142 (2010) (arguing that sex trafficking “in practice has been and still is predominantly used by states to legitimise repressive measures against migrants and sex workers rather than to protect them from abuse and secure their rights”); LAURA MARÍA AGUSTÍN, *SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY* 194 (2007) (critiquing the migration discourse and decrying the widely held “assumption of Knowing Best and having a duty to find proper solutions”); Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 *IND. L.J.* 1409, 1416–44 (2011) (describing and critiquing abolitionist and liberal feminist legal theories on sex work); Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 1, 19 (2009) [hereinafter Haynes, *Exploitation Nation*] (“[P]ost-modernist critics of human rights advocacy have already come full circle and called upon human rights advocates and activists to avoid re-victimizing persons who have been trafficked by focusing solely on the ‘victim’ aspect of the story.”); Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 *GEO. IMMIGR. L.J.* 337, 338–41, 345–46 (2007) [hereinafter Haynes, *(Not) Found Chained*] (criticizing the U.S. Trafficking Victims Protection Act for treating trafficking victims like criminals); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 *B.U.L. REV.* 157, 187–207 (2007) (“In the real world . . . victims are not perfectly innocent and perpetrators are not perfectly evil.”); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theories*, 95 *COLUM. L. REV.* 304, 306–07 (1995) (inquiring as to “how we might formulate feminist theories that highlight both women’s oppression and the possibilities of women’s agency under oppression” (footnote omitted)); see also Diana Tietjens Meyers, *Two Victim Paradigms and the Problem of “Impure” Victims*, 2(2) *HUMAN.* 255, 255–64 (2011) (analyzing the two victim paradigms—pathetic and the heroic—and “argu[ing] that the popular hegemony of the two paradigms

realities of Filipina entertainers from the perspectives of both human trafficking and labor migration.

### A. Examining Through the Lens of Human Trafficking

#### 1. Definitions Under International and National Law

Although South Korea signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the UN Trafficking Protocol)<sup>66</sup> in December 2000, it has yet to ratify it.<sup>67</sup> The UN Trafficking Protocol, the first and only international treaty that provides a comprehensive definition of human trafficking, defines human trafficking of adult persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>68</sup>

Before 2013, South Korea had no criminal law to prosecute trafficking crimes in general. The only statute mentioning “human trafficking” was the Act on the Punishment of Acts of Arranging Sexual Traffic (hereinafter the Prostitution Punishment Act) with brief provisions regarding only sex trafficking. It defines “human trafficking aimed at sexual traffic” as “transferring targeted persons to a third person while holding them under control and management by a deceptive scheme, by force or by other means equivalent thereto for the purposes of making them sell sex.”<sup>69</sup>

In March 2013, under international pressure mainly from the U.S. government, the Korean National Assembly adopted an amendment to

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produces social and legal blind spots that perpetuate unjust treatment of trafficked women”).

66. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter UN Trafficking Protocol].

67. See UNITED NATIONS TREATY COLLECTION: CHAPTER XVIII 12.a., [https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg\\_no=xviii-12-a&chapter=18&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en) (last visited Mar. 9, 2015) [<https://perma.cc/WS7C-S27F?type=image>] (archived Mar. 9, 2015).

68. UN Trafficking Protocol, *supra* note 66, art. 3(a) (emphasis added).

69. Sungmaemae Alsun Deung Haengweeui Chuhbuleh Gwanhan Bupryul [Act on the Punishment of Acts of Arranging Sexual Traffic], Act. No. 10697, May 23, 2011, art. 2(1)(3) (S. Kor.).

the Criminal Act to criminalize trafficking acts more generally. The two most relevant provisions stipulate:

A person who *obtains and maintains another under the control* of his/hers or a third person by means of the threat, use of force or other forms of *coercion*, or by means of *fraud, deception or enticement* for the purpose of *labor exploitation, prostitution, sexual exploitation*, or the acquisition of organs, shall be punished by imprisonment for at least two years up to fifteen years.<sup>70</sup>

A person who *buys or sells* another for the purpose of labor exploitation, prostitution, sexual exploitation, or the acquisition of organs shall be punished by imprisonment for at least two years up to fifteen years.<sup>71</sup>

The following sections examine whether the situations of Filipina entertainers satisfy the above definitions of human trafficking under the UN Trafficking Protocol and the Korean criminal law.

## 2. Five Categories for Analysis: Appreciating the Diversity of Victimized Migrants

Working with Filipina entertainers at My Sister's Home as a legal counselor and examining the organization's advocacy records for the last five years, presented one clear observation: that the diversity found among Filipina entertainers needs to be appreciated and properly responded to. The entertainers show different levels of prior expectations about their work and life in Korea, diverse reactions to their actual migration and work experiences, and various hopes and expectations about their futures. Incorporating this diversity, this Article presents multiple categories of Filipina entertainers for further analysis. This categorical analysis aims to overcome the victim versus criminal dichotomy adopted by the current anti-trafficking regime and to develop more contextualized remedies for each individual, responding to one's vulnerability and agency in integrated ways. The first three groups are based on cases identified by My Sister's Home. The last two categories are hypothetical ones, but were included for the purpose of a more comprehensive analysis. The five categories are as follows:

- (1) Entertainers who believed that they would be working only as singers in Korea as informed by recruitment agencies and indicated on their visas and performance contracts;
- (2) Entertainers who were informed or expected they would be doing works other than singing, such as waitressing or sitting and talking with customers, but no more than that;

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70. Hyungbup [Criminal Act], Act. No. 11731, Apr. 5, 2013, art. 288(2) (S. Kor.) (emphasis added).

71. *Id.* art. 289(3) (emphasis added).

- (3) Entertainers who knew or expected that they would be working as “juicy girls,” not as singers, and that they might be engaging in sexual services, including prostitution, but only when they were willing to and with the understanding that they would be keeping all proceeds. They were not informed of the actual working and living conditions in foreigner-only clubs in Korea.
- (4) Entertainers who were aware of the actual working and living conditions in foreigner-only clubs, including juice quotas, bar fines, actual salaries, and various restrictions of personal freedom, but who, after starting to work, find the situations intolerable and want to leave the clubs and work in a different place; and
- (5) Entertainers who were aware of all the actual working and living conditions in foreigner-only clubs and are willing to stay working in their clubs as long as they can.

### 3. Examining the Applicability of Human Trafficking in Each Case

#### a. The First Category: Agreeing to Singer’s Job Only

The experience of the first group would satisfy the definition of human trafficking with the least controversy. Filipina entertainers in this category were deceived both about the type and the conditions of their jobs. The above-discussed *modus operandi* of foreigner-only clubs and dispatching agencies—abusive work conditions, restriction of freedom, coercion of prostitution through juice quotas and bar fines, heavy penalties on quitting the jobs which could amount to debt bondage, and arbitrary and significantly unfair profit distribution and wage deduction practices—would sufficiently constitute exploitation under the UN Trafficking Protocol.<sup>72</sup> The promoters and club owners would be punishable under the Korean criminal law provisions as well. They have “control over” their Filipina entertainers, with both legal and actual power to manipulate the entire migration process of the entertainers as well as their immigration status, working conditions, and income distribution. They used deception to obtain control over the entertainers and coercion to maintain their control.

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72. The UN Trafficking Protocol does not provide a definition of exploitation: it only lists examples. See UN Trafficking Protocol, *supra* note 66, art. 3(a). However, the Model Law against Trafficking in Persons, provided by the United Nations Office on Drugs and Crime (UNODC) defines “[e]xploitation of prostitution of others” as “the unlawful obtaining of financial or other material benefit from the prostitution of another person.” UNITED NATIONS OFFICE ON DRUGS AND CRIME, MODEL LAW AGAINST TRAFFICKING IN PERSONS art. 5(1)(h) (2009) [hereinafter UNODC MODEL LAW], [http://www.unodc.org/documents/legal-tools/Model\\_Law\\_TiP.pdf](http://www.unodc.org/documents/legal-tools/Model_Law_TiP.pdf) [http://perma.cc/9GGF-THZH] (archived Mar. 10, 2015).

b. The Second Category: Agreeing to Waitressing but not Sexual Service

In the second group, even if Filipina entertainers expected and “agreed” to do certain work other than performing as singers, deception still occurred. They were not accurately informed about the nature of their work, including various forms of sexual services, nor about actual working conditions. As in the first category, they were deceived both about the type and the conditions of their work and would be recognized as victims of human trafficking under both international and Korean law.

However, entertainers in this category face the possibility of being charged with violating Korean immigration law. The Immigration Control Act provides that any person who stays in Korea outside the scope of her visa shall be sentenced to imprisonment up to three years, or fined up to around \$20,000,<sup>73</sup> and subject to forced removal.<sup>74</sup>

By agreeing to work beyond the scope of their professional singer visas, entertainers put themselves at risk when they report employers’ abuses to the police. However, the extent of their immigration law violation is relatively minor. Sitting and talking with customers is not a crime and not a serious deviation from the scope of their visas. The activities beyond that level were coerced by their employers. A minor violation of immigration law by entertainers should not disqualify them from being recognized as trafficking victims. As further discussed in later sections, this proposition requires understanding that the coexisting *victimhood* and *agency* of an individual should not overrule each other. Minor violations of immigration law by the entertainers cannot exempt the employers from criminal charges.

c. The Third Category: Agreeing to Voluntary Sexual Service Only

The third group requires more deliberation than the first two. Entertainers in this group knew that they would be working as hostesses with possibilities of engaging in prostitution. As discussed in Part IV, law enforcement authorities in Korea would most likely deny their status as victims either of trafficking or of coerced prostitution. A closer look suggests a different conclusion may be in order. While it is true that the entertainers expected to engage in sex work,<sup>75</sup> they assumed that they would do so only when they chose to and for their own profits. They were not informed about the exploitative operating system. This operating system coerces prostitution against their will, unlawful distribution of proceeds, and other abusive and constraining working and living conditions. Therefore, although these entertainers

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73. Immigration Control Act, *supra* note 57, arts. 17(1), 94.

74. *Id.* art. 46(1), (7).

75. This Article uses the terms “prostitution” and “sex work” interchangeably.

were aware of the type of work they would be doing, they did not know or agree to the important conditions of their work: in short, they may have agreed to engage in sexual work, but did not agree to be exploited or abused. As they were deceived about important information concerning working and living conditions critical to their migration decisions and its consequences, the entertainers in this group can be recognized as victims of trafficking under both international and Korean law.<sup>76</sup>

These entertainers would find themselves in a more complicated situation than those in the second category. They not only are in violation of immigration law but also could face charges under criminal law for “voluntary” engagement in prostitution. Parts IV and V will discuss related problems in greater detail.

d. The Fourth Category: Fully Informed but Hoping to Leave

The fourth category is a hypothetical one. One could imagine an entertainer who agrees to work in a club although she is fully aware of its working conditions. The UN Trafficking Protocol specifically deals with this issue, providing, “[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.”<sup>77</sup> This provision was adopted to invalidate traffickers’ allegations that a victim has consented to perform the labor at issue.<sup>78</sup>

However, another issue is raised here. To constitute human trafficking under the UN Trafficking Protocol, one of the means stipulated in the definition clause must have been used.<sup>79</sup> If a migrant

76. The Model Law against Trafficking in Persons by UNODC is clear on this point. See UNODC MODEL LAW, *supra* note 72. Official commentary to this Article explains:

Deception or fraud can refer to the nature of the work or services that the trafficked person will engage in . . . as well as to the condition under which the persons will be forced to perform this work or services (for instance the person in promised the possibility of a legal work and residence permit, proper payment and regular working conditions, but ends up not being paid, is forced to work extremely long hours, is deprived of his or her travel or identity documents, has no freedom of movement and/or is threatened with reprisals if he or she tries to escape), or both.

*Id.* at 12.

77. UN Trafficking Protocol, *supra* note 66, art. 3(b).

78. See Anne Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT’L L. 789, 811 (2009) [hereinafter Gallagher, *Quagmire or Firm Ground?*].

79. “It is logically and legally impossible to ‘consent’ when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.” UNODC, MODEL LAW, *supra* note 72, at 34. It should be reminded that in order to constitute human trafficking,

already knew all the important information about her work, it is difficult to make the case that traffickers used a deception in the course of migration. This leaves the other means of trafficking in the clause, such as “the abuse of power or of a position of vulnerability.”<sup>80</sup> This is the vaguest term in the definition clause, which raises questions on whether, how, and why to draw a line between victims of human trafficking and migrant workers constrained by their vulnerable social and economic situations.<sup>81</sup> For the Filipina entertainers in the fourth category, the applicability of this element will be the key question in deciding their victim status under the UN Trafficking Protocol. Under the Prostitution Punishment Act in Korea, it would be even harder to recognize them as victims, since the provision does not stipulate the abuse of vulnerability as a means of trafficking. However, the amended Criminal Act could produce a different result since it provides “maintaining someone under control” by coercion as a punishable act.

Even if the entertainers in this group would not fit neatly into the definition of trafficking victims under the current law, this does not mean that they do not deserve legal remedies for their suffering. These migrants indeed experienced various rights violations in the context of international human rights law and the domestic law of the destination state, so they are in need of, and entitled to, remedies. The relations between “being recognized as a trafficking victim” and “experiencing victimization and rights violations” are further discussed in Part III.C and Part V.

e. The Fifth Category: Fully Informed and Hoping to Stay

The fifth category is also hypothetical: what if a migrant entertainer, fully informed of the situation of foreigner-only clubs before coming to Korea, is relatively “satisfied” with her work and wants to continue working in her club as long as she can? Would the UN Trafficking Protocol still recognize her as a victim—provided a

the stipulated means under the Protocol should be used for the *act* of trafficking (movement or receipt of persons), not the purpose of it (exploitation). See UN Trafficking Protocol, *supra* note 66, art. 3(a).

80. UN Trafficking Protocol, *supra* note 66, art. 3(a).

81. The Explanatory Report on the Council of Europe Convention on Action Against Trafficking in Human Beings provides the meaning of “abuse of a position of vulnerability” as “abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social, or economic. The situation might, for example, involve insecurity or illegality of the victim’s administrative status, economic dependence or fragile health.” Council of Europe, Explanatory Report on the Council of Europe Convention on Action Against Trafficking in Human Beings ¶ 83, May 16, 2005, 197 C.E.T.S. 38 [hereinafter Council of Europe Explanatory Report], available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm> [<http://perma.cc/8QM6-F6BA>] (archived Mar. 10, 2015). For a discussion of the difficulty in discerning between trafficking victims and migrant workers under exploitation, see Haynes, *Exploitation Nation*, *supra* note 65, at 48–50.



stipulated means exists—because she is under exploitation anyway, so her consent does not matter? If yes, should she be rescued and safely repatriated to her home country because she has been trafficked? Or should she be punished and deported because she voluntarily engaged in unlawful sex work and violated immigration law?

Related questions can be asked concerning the first three categories as well: some of the entertainers in each category may nevertheless want to stay and work in their clubs in order to send at least a little remittance to their families rather than to report their cases to the police and be sent home. Should they still be rescued from their workplaces and sent home because they are victims of trafficking? Or are there alternative ways to address their victimization while recognizing their needs and entitlement to stay and work in Korea under lawful conditions?

### *B. Re-examining Through the Lens of Labor Migration*

This author's continuing interactions with the Filipina entertainer clients and the service providers of My Sister's Home yielded a series of firsthand stories of victimized migrants, as summarized below. These findings expose the limitations and risks of approaching the situations of Filipina entertainers solely in the context of human trafficking, since the current anti-trafficking regime tends to oversimplify the experience of individuals into a narrow frame of "victims" and impose paternalistic and monolithic treatment of them in the name of protection.<sup>82</sup> It is essential to have fact-grounded, prejudice-free observations of each individual's stories of migration, work, needs, and hopes in order to develop legal responses and remedies for them that are actually helpful and effective. Such an observation would require approaching the matter in the context of global labor migration<sup>83</sup> and understanding the perspectives of individual migrants who take transnational journeys.

The following parts state six key observations about the experiences of Filipina entertainers in Korea.

#### *1) Most Filipina Entertainers Agreed and Wanted to Migrate to and Work in Korea.*

This basic fact often seems overlooked in the current anti-trafficking regime, which is framed with the rhetoric of "modern-day

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82. See *infra* Parts IV.A.2, IV.D.2 (discussing "Dominant Trends at the National Level" and the "Inadequacy of the Current Anti-Trafficking Framework").

83. In this Article, "labor migration" means "migration to work," regardless the characteristics of work, sexual or nonsexual, as opposed to migration for non-work purposes such as migration for marriage, family unification, or as refugees.

slavery.”<sup>84</sup> While the traditional slavery system was based on forced migration and forced work, the majority of victims in contemporary transborder human trafficking cases in fact desired to migrate to work abroad.<sup>85</sup> The Filipina entertainers pursued new lives and careers in Korea either as singers or hostesses in order to support their families at home and also to fulfill their own migration aspirations.<sup>86</sup> Appreciating the basic fact that “migration to work” itself is not against the victim-migrant’s will,<sup>87</sup> but, in fact, strongly desired by her, makes an important ground for accessing the current regime’s victim treatment and for developing alternative approaches.

2) *In Every Case, “Deception” Was Used as a Means of Recruiting Filipina Entertainers. Physical Force or Threat Was Not Used in Any Case.*

Unlike the slave trade in the past and the stereotypical images of trafficking reproduced by multimedia, cases in which abduction, kidnapping, or physical forces are used as a means of trafficking are rare.<sup>88</sup> However, neither the UN Trafficking Protocol nor anti-

84. I argue this rhetorical catchphrase is largely inaccurate and often misleading as it contributes to consolidate the stereotype of trafficking victims and falsely assimilates their complex experiences into a concept of “slavery.” See Anne Gallagher, *Using International Human Rights Law to Better Protect Victims of Trafficking: The Prohibitions on Slavery, Servitude, Forced Labor, and Debt Bondage*, in THE THEORY AND PRACTICE OF INTERNATIONAL CRIMINAL LAW: ESSAYS IN HONOR OF M. CHERIF BASSIOUNI 397, 423 (Leila Nadya Sadat & Michael P. Scharf eds., 2008) [hereinafter Gallagher, *Using*] (“[T]he simple recognition of trafficking as a ‘contemporary form of slavery’ . . . while perhaps important in rhetorical terms, is without particular legal significance.”).

85. See Haynes, *Exploitation Nation*, *supra* note 65, at 50 (“[A]ll trafficking is a byproduct of labor and migration. Victims of human trafficking are people who determined to improve their lives but had that desire exploited. Only the very rare few have been literally snatched or kidnapped by traffickers.”).

86. In her ethnographic work on Filipina entertainers in Korean kijichon, Cheng describes the entertainers’ agency and desires as “laboring and erotic subjects in migration,” stating, “[M]igrant Filipina entertainers are global actors who pursue desires and dreams shaped by the globalization of modernity and struggle for redistribution and recognition along their own paths, simultaneously reconstituting meanings and flows in the transnational field.” CHENG, *supra* note 20, at 9–10.

87. A few studies on international migration, however, categorize human trafficking as a form of forced migration. See, e.g., Ryszard Piotrowicz, *Trafficking of Human Beings and Their Human Rights in the Migration Context*, in INTERNATIONAL MIGRATION LAW: DEVELOPING PARADIGMS AND KEY CHALLENGES 275, 275 (Ryszard I. Cholewinski, Richard Perruchoud & Euan MacDonald eds., 2007); Vitit Muntarhorn, *Combating Migrant Smuggling and Trafficking in Persons, Especially Women: The Normative Framework Re-Appraised*, in MIGRATION AND INTERNATIONAL LEGAL NORMS 151, 151 (Thomas Alexander Aleinikoff & Vincent Chetail eds., 2003).

88. Empirical studies indicate this fact. See, e.g., Ilse van Liempt, *Trafficking in Human Beings: Conceptual Dilemmas*, in TRAFFICKING AND WOMEN’S RIGHTS 27, 32–33 (Christien van den Anker & Jeroen Doomernik eds., 2006) (noting that “[f]rom previous research we know that most prostitutes willingly leave their country and enter sex work because they have no alternative,” and citing two additional studies); Natasha Ahmad,

trafficking frameworks in individual states distinguish critical differences between trafficking by force and trafficking by deception.<sup>89</sup> Like many other potential trafficking victims, Filipina entertainers desired to migrate to and work in Korea, so using physical force was unnecessary to facilitate their migration. The use of deception instead of physical force not only suggests that entertainers have a vulnerability and are in lack of resources, but, also, importantly signals that the entertainers do have agency and volition in their aspirations for better lives and work opportunities. Remedies and assistance measures for these victimized migrants thus should be designed differently from those targeting forced migration and forced work.

- 3) *After Escaping, Most Clients of My Sister's Home Want to Stay and Work in Korea As Long As Their Immigration Status Permits. Some Want to Work as Singers in More Decent Places, Whereas Others Want to Work as Regular Migrant Workers in a Factory or a Restaurant.*

Going home empty-handed is the last thing a Filipina entertainer would want to face after escaping. Most clients of My Sister's Home wanted to stay and work in Korea, for at least their original E-6-2 visa period.<sup>90</sup> As discussed earlier, most former clients were returned to the

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*Trafficked Persons or Economic Migrants? Bangladeshis in India*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED*, *supra* note 65 at 211–12; see also Ratna Kapur, *Post-Colonial Economies of Desire: Legal Representations of the Sexual Subaltern*, 78 *DENV. U. L. REV.* 855, 876 (2000) (discussing the results of “a research project based on questionnaires circulated to groups working directly with ‘victims’ of trafficking,” and finding that “[t]heir research reveals that a large majority of the trafficking cases involve women who are in or know that they will be going into the sex industry, but are not accurately informed about the conditions of work or the amount of money they will receive”).

89. For example, the UN Trafficking Protocol simply lists force, coercion, abduction, fraud, and deception in the definition clause as means of trafficking and does not distinguish trafficking by force and trafficking by deception in its provisions regarding victim treatment. UN Trafficking Protocol, *supra* note 66, arts. 3(a), 6–8. This indiscriminate approach is taken by national anti-trafficking frameworks in most states. See, e.g., Trafficking Victims Protection Act of 2000, 22 U.S.C. §§ 7101–7110 (2000).

90. In the 2011 Survey, 90 percent of Filipina entertainers (including both current and former entertainers) answered they wanted to stay in Korea for one to five years or more. Fifty percent of Filipina entertainers answered they wanted to stay in Korea for one to three years, 40 percent answered five years or more, and only 10 percent said they wanted to leave Korea right away. Among currently working entertainers, 34.5 percent answered they wanted to stay in Korea for two years and 31 percent said more than five years, while no one answered they wanted to leave Korea immediately. 2011 SURVEY, *supra* note 30, at 139. Among former entertainers staying in a shelter, 33.3 percent answered five years or more, 33.3 percent answered one to three years, and 20.8 percent answered they wanted to leave right away. For the reason they want to stay longer in Korea, 55.8 percent answered, “I did not earn enough money.” 16.3 percent answered “I can earn more money in Korea than in [the Philippines], and another 16.3 percent said “living conditions in Korea is better than in [the Philippines].” *Id.* at 139. For the question on the kinds of help they currently need, 31 percent of Filipina

Philippines against their will. Some other clients instead chose to become undocumented, in which case My Sister's Home often lost contact with them and could not offer further assistance. While some clients want to work as professional singers in safer and more decent places, such as upscale hotels or tourist restaurants, more clients want to work as regular migrant workers outside the entertainment business. These findings squarely question the appropriateness and effectiveness of the main "protection measure" under the current anti-trafficking regime: safe and voluntary repatriation.<sup>91</sup>

4) *More Filipina Entertainers Are Still Working in the Clubs Rather Than Trying to Escape.*

Considering the total number of Filipina entertainers working in foreigner-only clubs, the number of those who escape and contact My Sister's Home is significantly small. The director of My Sister's Home, based on her outreach experiences, estimates that roughly half of Filipina entertainers currently working in foreigner-only clubs *cannot* escape, while the other half *do not* escape (although the line between the two is difficult to draw). Various circumstantial factors discussed in Part II: confiscation of passports, the threat of incurring debts and penalties for breach of contract, unstable and subordinated immigration status, lack of legal options other than returning home, and an absence of social networks, would deter many Filipina entertainers from seeking alternatives, if any, to address their situations. On the other hand, some entertainers who achieve their monthly juice quota and receive higher bonuses may be relatively satisfied with their work. These entertainers can make more money in Korea than they did in the Philippines.

The 2011 Survey yielded counterintuitive results in this regard: 89.8 percent of Filipina entertainers responded "satisfactory" other than "unsatisfactory" or "neither" in answering the question about their lives in Korea, although they showed variations in the extent of satisfaction.<sup>92</sup> The authors of the survey report assess this result as follows: "the reason for this high level of satisfaction could be found in their achievement to secure jobs abroad, while reasons for

entertainers answered "counseling for escape from prostitution," 20.7 percent, "improvement of working conditions," and 17.2 percent, "counseling for immigration status," while only 10.3 percent answered "counseling about going home." *Id.* at 142.

91. See *infra* Parts IV.A.2, IV.D.2 (discussing "Dominant Trends at the National Level" and the "Inadequacy of the Current Anti-Trafficking Framework").

92. 36.7 percent of Filipina entertainers (including both current and former workers) chose "very satisfactory," 20.4 percent, "overall satisfactory," 32.7 percent, "somewhat satisfactory." Only 2 percent chose "very unsatisfactory" and another 2 percent, "overall unsatisfactory." 6.1 percent chose "neither," and no one chose "somewhat unsatisfactory." Among current entertainers, the overall degree of satisfaction was 74.75 out of 100 while that of former entertainers in a shelter was 67.31. 2011 SURVEY, *supra* note 30, at 138.

dissatisfaction would be difficulties in life in Korea. These differences in self-evaluation reflect different experiences in their lives according to their current situations.”<sup>93</sup>

Many Filipina entertainers thus choose to continue to work in their clubs despite various predicaments and constraints they experience. They are pursuing their transnational aspirations, knowing that resources and options available to them are limited. With stories of Filipina entertainers who were fully aware of the fact that they have been put into trafficking situations, but at the same time “did not feel the need to be rescued” and did not regret their decision to come to Korea, scholar Sealing Cheng illuminates the entertainers’ multi-layered identity and reality.<sup>94</sup> These findings indicate that a single and uniform response for migrant entertainers is not able to properly address their situations.

5) *The Primary Concern of Filipina Entertainers Staying in the Shelter Is That They Can No Longer Work and Send Remittances to Their Families.*

As mentioned earlier, Filipina entertainers staying in My Sister’s Home’s shelter are in desperate need of jobs. Some clients choose not to stay in a shelter on a full-time basis and, instead, seek employment despite the risk of being caught and deported by the Immigration Service. For many Filipina entertainers, bringing their employers to justice is of much less concern than receiving overdue and embezzled wages from them and finding new jobs. In fact, enduring prolonged criminal procedures while out of employment would lead to feelings of insecurity and helplessness. One client left the shelter in the middle of an investigation period and returned to her club to work again.

6) *In Escaping, the Majority of Filipina Entertainers Received Help from Their Military Customers/Boyfriends.*

U.S. military customers frequently aid Filipina entertainers in leaving their clubs and contacting the NGO for assistance. Military customers who become close to particular entertainers sometimes help the entertainers with transportation, money to escape, and a place to stay. However, such close relationships often reinforce prejudice held by law enforcement authorities against Filipina entertainers: that they came to Korea to meet U.S. military personnel in a club and get married to one of them.<sup>95</sup> As discussed in Part IV, this offers a justification for law enforcement authorities to deny them victimhood. In fact, having GI “boyfriends” is an important event for many Filipina

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93. *Id.*

94. CHENG, *supra* note 20, at 93–94.

95. For actual judicial practice based on such prejudice, see *infra* Part IV.B.1.b.

entertainers, both for their daily earnings and for hoping for a better life in the future.<sup>96</sup> A hope and an attempt by entertainers to secure a living with limited means available to them should not be grounds for subjecting them to abuse and exploitation and to deny remedies.

### C. Need for Integrated Understanding

The above examination of the situations of Filipina entertainers from the two different angles—human trafficking and labor migration—suggests a need for integrated approaches. These multiple aspects of reality coexist, not only among thousands of Filipina entertainers but also within a single entertainer's migration-work experience. While the deception and exploitation that most entertainers experienced locate them within the definitions of trafficking victims, their aspirations and endeavors throughout their migration projects illuminate their subjectivity and agency as migrant workers. These entertainers cannot be fully described by the single term “trafficking victims” or “foreign hostesses.”

It would be fairer to refer to them as individuals in transnational labor migration whose rights have been seriously violated in various ways, who bear both victimhood and agency, whether or not they are recognized as trafficking victims under the criminal definitions.<sup>97</sup> With responses from the overwhelming majority of Filipina entertainers that they would want to stay and work in Korea for several more years, the 2011 Survey concluded that “most migrant women [entertainers] try to find hope in Korea despite their hard and weary lives.”<sup>98</sup> Scholar Rhacel Parreñas conceptualized the experiences of “Filipina hostesses” in Tokyo, as “indentured mobility”:

96. Cheng explores socioeconomic meanings of GI “boyfriends” to Filipina entertainers: “To perform the role of a poor, virginal, and exploited oriental woman in need of protection is just one way to elicit financial and emotional support as well as the ‘love’ of their American GI customers. . . . [I]t allows migrant women, aware of their marginalization and stigmatization, to assert individual respectability and self-worth through genuine affection.” CHENG, *supra* note 20, at 34. She also notes, “In fact, marriage to a GI is a dominant theme in the lives of Filipina entertainers in *gijichon*.” *Id.* at 91.

97. See CHENG, *supra* note 20, at 34 (mentioning “the coexistence of victimhood and agency” of the migrant entertainers); Meyers, *supra* note 65, at 262–64 (noting many trafficked sex workers affirm their agency and do not fit into the “pathetic victim” model); Srikantiah, *supra* note 65, at 197–98 (“The iconic victim concept also does not contemplate victims of sex work who are not completely passive, but instead exercise agency in a variety of ways even while enslaved. . . . A simple mythology that assumes naïve victimhood fails to grapple with the reality of the trafficking victim’s complex identity and psychological state – one in which the survivor may be both victim and individual actor.”); Julia O’Connell Davidson, *Will the Real Sex Slave Please Stand Up?*, 83 FEMINIST REV. 4, 9 (2006) (“[T]he abuses that come under the umbrella of ‘trafficking’ can vary in severity, generating a continuum of experience rather than a simple either/or dichotomy.” (citation omitted)).

98. 2011 SURVEY, *supra* note 30, at 138.

The framework of *indentured mobility* provides a nuanced picture of the Filipina hostesses' subjugation as labor migrants, one that acknowledges their susceptibility to human rights violations but simultaneously rejects the prevailing discourse on human trafficking that paints hostesses as helpless victims in need of "rescue." So while [this book] questions the labeling of Filipina hostesses as trafficked persons, at the same time it refuses to dismiss their vulnerability to forced labor.<sup>99</sup>

Cheng similarly observes the multiple aspects of the transnational experience of migrant entertainers:

In spite of the uncertainties and the exploitative conditions in gijichon [kijichon], most of the women constantly engage with the possibilities that migration offers—not just in financial terms but also in social, physical, sexual, and romantic arenas. They do not see themselves as "professionals," "prostitutes," or "victims of sex trafficking" but rather in terms of their multiple subjectivities and possibilities in migration, encapsulated in their sense of "self."<sup>100</sup>

Of key importance is thus not whether to declare a certain migrant as a trafficking victim or not, but to appreciate and respond to one's vulnerabilities, victimization, agency, and aspirations in integrated manners. These aspects are not mutually exclusive, but, instead, they are intertwined in each individual's *transnational being*. Only this nuanced understanding can lead to developing the comprehensive and contextualized legal responses that would actually do good for the individuals that the current anti-trafficking law claim to protect. In this regard, the following Part evaluates the current legal responses of the Korean government as well as global anti-trafficking frameworks.

#### IV. ANALYSIS OF CURRENT LEGAL RESPONSES

##### A. *International and National Legal Frameworks on Human Trafficking*

###### 1. State Obligations Regarding Human Trafficking Under International Law

Currently, the UN Trafficking Protocol is the leading international agreement specifically dealing with human trafficking, with 166 states having joined as of May 2015. It is not a human rights treaty: instead, it constitutes a regime of transnational criminal law with two other Protocols<sup>101</sup> under the UN Convention against

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99. PARREÑAS, *supra* note 65, at 7–8 (footnote omitted).

100. CHENG, *supra* note 20, at 95.

101. See Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, May 31, 2001, 2326 U.N.T.S. 208; Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, 2241 U.N.T.S. 507.

Transnational Organized Crime (CTOC).<sup>102</sup> The state obligations mandated by the Protocol are largely limited to criminalizing trafficking-related acts in domestic legal systems,<sup>103</sup> fortifying border control and relevant interstate cooperation as main measures to prevent human trafficking,<sup>104</sup> and expediting repatriation of victims,<sup>105</sup> which should be safe but could be *involuntary*.<sup>106</sup>

On the other hand, with respect to victim assistance and protection and the possibility of staying in destination states, the Protocol uses evidently weak language, imposing little obligations on states parties in this regard and not providing any meaningful rights or remedies for individuals.<sup>107</sup> It would thus be fair to evaluate the UN Trafficking Protocol as a “transnational criminal justice and immigration control regime,” far from being a human rights framework.<sup>108</sup>

Therefore, state obligations to respect, protect, and fulfill human rights<sup>109</sup> of migrants in trafficking situations still need to be found in the existing international human rights regime. The most relevant instruments would include Article 23 of the Universal Declaration of Human Rights (UDHR),<sup>110</sup> Article 8 of the International Covenant on Civil and Political Rights (ICCPR),<sup>111</sup> several provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>112</sup> Article 6 of the Convention on the Elimination of All

102. See MAGGY LEE, *TRAFFICKING AND GLOBAL CRIME CONTROL* 83–105 (2011); ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 68–89 (2010) [hereinafter GALLAGHER, *INTERNATIONAL LAW*]; Jonathan Todres, *Human Rights, Labor, and the Prevention of Human Trafficking: A Response to A Labor Paradigm for Human Trafficking*, 60 *UCLA L. REV. DISC.* 142, 151–52 (2013).

103. UN Trafficking Protocol, *supra* note 66, art. 5.

104. See *id.* arts. 9–13.

105. See *id.* art. 8.

106. See *id.* art. 8(2) (“[S]uch return shall be with due regard for the safety of that person . . . and shall preferably be voluntary.”).

107. See *id.* arts. 6–7. Regarding remedies for victims, the Protocol only provides, “[e]ach State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.” *Id.* art. 6(6).

108. See Todres, *supra* note 102, at 147–52 (refuting an assertion that the UN Trafficking Protocol and the U.S. anti-trafficking framework are taking a human rights approach).

109. On the typology of state human rights obligations, see, for example, OLIVIER DE SCHUTTER, *INTERNATIONAL HUMAN RIGHTS LAW* 242–53 (2010).

110. Article 23 of UDHR provides “the right to work, to free choice of employment, to just and favourable conditions of work” and to just and favorable remuneration. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 23 (Dec. 10, 1948) [hereinafter UDHR].

111. Article 8 of ICCPR prohibits slavery, servitude, and forced or compulsory labor. See International Covenant on Civil and Political Rights art. 8, Dec. 19, 1966, 999 U.N.T.S. 175 [hereinafter ICCPR].

112. Relevant provisions include the “right to work” freely chosen and accepted (art. 6); the right to just and favorable conditions of work, including equal pay for equal work, “decent living,” “safe and healthy working conditions,” equal opportunity for



Forms of Discrimination against Women (CEDAW),<sup>113</sup> the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW),<sup>114</sup> and ILO Conventions on migrant workers.<sup>115</sup> Some of these treaties explicitly stipulate a duty of states to ensure effective remedies to victims whose rights under the relevant treaties are violated in the states' territories or jurisdictions.<sup>116</sup> However, these international instruments have not been very effective in guaranteeing the rights of migrants in trafficking situations for various reasons. These reasons include the abstract nature of human rights provisions, lack of explicit links with trafficking situations, a low ratification rate (especially for the CMW and ILO Conventions), indirect involvement by state actors in trafficking cases, and scattered locations of relevant provisions around different treaties.<sup>117</sup>

In short, state obligations under the UN Trafficking Protocol are limited to criminal justice and border and immigration control measures, including repatriation, while states' human rights

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promotion, and rest, holiday, and reasonable working hours (art. 7); "the right . . . to an adequate standard of living . . . including adequate food, clothing and housing" (art. 11); and "the right . . . to the enjoyment of the highest attainable standard of physical and mental health" (art. 12). International Covenant on Economic, Social and Cultural Rights arts. 6-7, 11-12, Dec. 16, 1966, 993 U.N.T.S. 3.

113. CEDAW art. 6 provides, "States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13.

114. The most relevant provisions include the right not to be in slavery, servitude, or forced labor (art. 11); "the right to liberty and security of person" (art. 16(1)); the right "to effective protection by the State against violence, physical injury, threats and intimidation" (art. 16(2)); the right against confiscation or destruction of identity, travel, or residence documents (art. 21); the right against collective expulsion and the right to wages and other existing entitlements upon expulsion (art. 22(1), (6), (9)); the right to no less favorable treatment compared to nationals in respect of remuneration, conditions of work, and terms of employment (art. 25); and the right to join trade unions (art. 26). International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families arts. 16, 21, 25-26, Dec. 18, 1990, 2220 U.N.T.S. 93 [hereinafter CMW].

115. See Convention Concerning Migration for Employment, July 1, 1949, 120 U.N.T.S. 72; Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975, 1120 U.N.T.S. 324.

116. See UDHR, *supra* note 110, art. 8; ICCPR, *supra* note 111, art. 2(3); CMW, *supra* note 114, art. 83; see also Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) art. 13, Nov. 4, 1950, 213 U.N.T.S. 222 ("Everyone whose rights and freedoms . . . are violated shall have an effective remedy before a national authority . . .").

117. See Gallagher, *Using*, *supra* note 84, at 430 ("In relation to trafficking and human rights, we know there are laws, but we know them only in the most general terms. Very rarely can we actually apply those laws easily to real situations, involving real people in real countries. This lack of rigor, this absence of concrete detail, has provided a welcome escape clause for governments that, naturally enough, have things other than human rights to consider.").

obligations regarding human trafficking under the existing international human rights laws have been weak in function. The due diligence standard—a widely accepted standard for state obligations in the case of human rights violations committed by private actors<sup>118</sup>—as well as the doctrine of state responsibility, need further development in order to present concrete guidance on states' human rights obligations and victims' right to remedies in the case of human trafficking.<sup>119</sup> For example, the current due diligence standard is clearer and more comprehensive regarding criminal justice measures against perpetrators than on the matter of the rights and protection of victims.<sup>120</sup> The substance of international law is not fully developed with respect to the meanings and methods of effective remedies for victims of human rights violations.<sup>121</sup>

Meanwhile, the European Court of Human Rights made an important decision in *Rantsev v. Cyprus and Russia*, in which the Court found Cyprus violated Article 4 of the European Convention on Human Rights by operating an artiste visa system that failed to provide the victim practical and effective protection against trafficking

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118. Regarding the due diligence standard, see GALLAGHER, INTERNATIONAL LAW, *supra* note 102, at 241–48; ROBERT P. BARNIDGE, JR., NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE 55–110 (2008). See generally DUE DILIGENCE AND ITS APPLICATION TO PROTECT WOMEN FROM VIOLENCE (Carin Benninger-Budel ed., 2008) (collecting papers presented at the symposium *Due Diligence: The Responsibility of the State for the Human Rights of Women*, and additional essays).

119. Regarding the current development of state responsibility, see generally JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (2013) (analyzing state responsibility within the framework of the general law of international responsibility). Gallagher made a significant contribution initiating the study of state responsibility and the right to remedies in the case of human trafficking. See GALLAGHER, INTERNATIONAL LAW, *supra* note 102, at 218–76, 337–69.

120. See, e.g., *Velásquez-Rodríguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 174 (July 29, 1988), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf) [<http://perma.cc/P6H2-4ZB9>] (archived Mar. 10, 2015) (“The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”).

121. Currently, the most salient international document on victims' right to remedies in human rights violations is the UN General Assembly's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005) [hereinafter G.A. Res. 60/147]. This document is not legally binding. A leading document regarding state responsibility and reparation is the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter G.A. Res. 56/83]. However, the Articles only deal with state-to-state responsibility and reparation, not individuals' right to remedies.

and exploitation.<sup>122</sup> The artiste visa system of Cyprus bears close resemblance to the Korean entertainer visa system.<sup>123</sup>

## 2. Dominant Trends at the National Level

For the last fifteen years, popular destination states for transnational migrants have vigorously built anti-trafficking regimes and enthusiastically implemented the mandates of the UN Trafficking Protocol—that is, reinforcing criminal justice and immigration control measures in the name of preventing human trafficking and protecting the victims. The United States has played a leading role in this global campaign. The U.S. anti-trafficking regime, like those of many other states, is founded upon what can be called the “3 Ps and 4 Rs” paradigm: prevention, prosecution, and protection and rescue, rehabilitation, repatriation, and reintegration.<sup>124</sup> Among the 4 Rs, destination states are mostly focused on “rescue” and “repatriation.”<sup>125</sup> In most states, temporary residence, work permits, and other assistance measures for victims are subordinated to a criminal justice regime contingent on a victim’s willingness and usefulness to serve as a witness in criminal procedures.<sup>126</sup> Repatriation is regarded as the primary and ultimate goal of protection measures for victims, regardless of the individual victim’s will, as provided in the UN Trafficking Protocol.<sup>127</sup> Under the current anti-trafficking regime, victims are hardly viewed as holders of rights to be claimed against destination states or traffickers, but are mainly treated as passive receivers of victim-witness treatment schemes unilaterally designed and imposed by destination states. Ensuring a victim’s civil and labor

122. See *Rantsev v. Cyprus & Russia*, App. No. 25965/04, Eur. Ct. H.R. ¶¶ 284, 293 (2010) [hereinafter *Rantsev case*].

123. See *id.* ¶ 291.

124. U.S. DEP’T OF STATE, FACT SHEET, THE 3PS: PREVENTION, PROTECTION, PROSECUTION (July 9, 2012), <http://www.state.gov/j/tip/rls/fs/2012/194722.htm> [<http://www.state.gov/j/tip/rls/fs/2012/194722.htm>] (archived Mar. 10, 2015) (“Effective victim protection efforts include the ‘3Rs’ – rescue, rehabilitation, and reintegration. . . . Reintegration efforts include voluntary repatriation for trafficking victims and assistance in their home communities.”). Since reintegration assumes repatriation in principle, I term the policy “4 Rs.”

125. For further critique of the 3Ps-4Rs framework, see *infra* Part.IV.D.2.

126. See Mike Dottridge, *Introduction to GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN, COLLATERAL DAMAGE: THE IMPACT OF ANTI-TRAFFICKING MEASURES ON HUMAN RIGHTS AROUND THE WORLD* 1, 14–15 (2007) [hereinafter *COLLATERAL DAMAGE*] (“In countries all around the world, access to assistance and protection for trafficked persons has been made conditional on their agreeing to cooperate with law enforcement officials . . . [G]overnments consider it a greater priority to stop illegal or irregular immigration than to provide essential assistance to victims of abuse; they argue that giving unconditional protection and assistance will open a new channel for false claimants to remain in their countries.”). For the conditions of a temporary stay permit for trafficking victims in the United States (T-visa, U-visa and Continued Presence respectively), see 8 U.S.C. § 1101(a)(15)(T)–(U) (2014); 22 U.S.C. § 7105(c)(3)(A)(i) (2014).

127. See UN Trafficking Protocol, *supra* note 66, art. 8.

rights and right to effective remedies is of little or marginal concern to these states when compared to the states' vigorous investments in pursuing the agenda of criminal justice and immigration control.<sup>128</sup>

*B. Judicial Practice in Korea in the Context of Human Trafficking:  
Denial of Victimhood*

1. Judicial Practice

The Korean government does not collect official data on human trafficking and has not officially admitted the existence of transborder trafficking cases in Korea. Since the start of its work in July 2009, My Sister's Home has assisted more than twenty Filipina entertainer clients in filing criminal accusations against their employers under charges of human trafficking and coercion of prostitution. Since My Sister's Home is the only NGO of its kind in Korea to which the police and other NGOs refer their relevant cases, it has assisted in most judicial cases regarding Filipina entertainers in Korea for the last five years. However, none of these efforts has been successful, with each case being dropped by prosecutors. Only two club owners were prosecuted and convicted under a minor charge of "arranging voluntary prostitution," which resulted in minimal sentences with probation.

The following section examines the actual decisions and rationales of the prosecutors and courts in Korea that acquitted the employers of the entertainers. The analysis hopes to shed light on the problems that are not uncommon in other jurisdictions as well.

a. Fictional Dichotomy and "Misuse of Agency"

In most cases, the police and prosecutors fail from the very beginning to treat an individual entertainer's accusations as a human trafficking case. In fact, Filipina entertainers often do not seem to fit into the typical image of trafficking victims. They have migrated through the regular visa system without force or coercion. They were free to make phone calls, and they could sometimes leave the premises on their own. In all the cases in which My Sister's Home has assisted, prosecutors and courts acquitted promoters and club owners from the charges of human trafficking and coercion of prostitution, basically for

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128. See LEE, *supra* note 102, at 6 ("[C]ounter-trafficking efforts become conflated with migration control."); Dottridge, *supra* note 126, at 16 ("[G]overnments around the world have been exploiting the issue of trafficking to reinforce their own political agendas, at the expense of the interests of those who are trafficked or at highest risk of being trafficked.").

the reason that the entertainers did not look like “victims.” Their rationales include the following:<sup>129</sup>

- (1) “The entertainer has worked in two foreigner-only clubs for quite a long time. There were opportunities for her to run away when she went out for ‘bar fine’ with customers or when she was moved to the second club. But she did not escape at those times. It suggests she worked there out of her own will.”
- (2) “The entertainer worked in Club A, then moved to Club B after two months and moved back to Club A. The Court does not understand how she could move back to Club A if there was prostitution in that club and she did not like it.”<sup>130</sup>
- (3) “There is lack of evidence that the club owner locked the victim’s dormitory from the outside.” “The victim stated she did not try to go outside of her dormitory because she did not know Korean and did not have any money.”<sup>131</sup>
- (4) “Although there was a juice quota system at the club, the owner only yelled at her occasionally, and did not beat her.”
- (5) “The entertainer’s allegation about coercion of prostitution at her club is suspicious because the club owner does not speak English.”<sup>132</sup>
- (6) “The entertainer had received a couple of presents from GIs such as a cell phone and a necklace while she was working in the club.”
- (7) “The entertainer seems to have led a relatively free life, writing a message on her Facebook and meeting GIs outside the club.”<sup>133</sup>
- (8) “The promoter stated that the entertainer had begged him to help her go to Korea and that he had told her she would have to entertain customers by ways other than singing. Thus, she cannot be regarded as ‘deceived’ in the course of her migration.”
- (9) “It seems that she voluntarily chose bar fine because of the juice quota system [in order to earn more points to get a bonus].”

These examples demonstrate how a narrow perspective on human trafficking and the stereotype of trafficking victims actually affect judicial practice. As rationales (1), (2), (3) and (4) indicate, if an entertainer was not locked inside the premises, did not try to escape, or was not physically assaulted, she is most likely viewed as a

129. This Article does not disclose the case numbers of prosecutors’ decisions in order to protect the private information of entertainers. Case numbers of court decisions that are open to public access are included.

130. Suwon District Court Pyeongtak Branch [Dist. Ct.], 2011Go-Dan220, 2011 Go-Jung56, Oct. 12, 2011 (S. Kor.).

131. Changwon District Court Tongyeong Branch [Dist. Ct.], 2011Go-Dan6, Feb. 1, 2012 (S. Kor.).

132. Suwon District Court Pyeongtak Branch [Dist. Ct.], 2011Go-Dan220, 2011 Go-Jung56, Oct. 12, 2011 (S. Kor.).

133. *Id.*

voluntary prostitute or hostess by law enforcement authorities. Important circumstantial factors such as passport confiscation, subordinated immigration status, the threats of debts and penalties, restriction in daily life and freedom, abusive juice quota and bar fine systems, and the use of an entertainer's unfamiliarity with Korea are not considered elements of coercion. Rationales (5) and (9) also reveal unsophisticated views of coercion, disregarding circumstantial constraining factors. As rationales (6) and (7) show, a sign of intimate relationships with GI customers or of freedom in daily life is another major ground for prosecutors and courts to deny an entertainer's victimhood and to reject the credibility of their statements. In other words, the entertainers do not seem helpless enough to be victims. Rationale (8) is the only case in which a prosecutor mentioned an element of human trafficking—deception—even briefly. To the prosecutor, the fact that the entertainer was allegedly informed that she would engage in works other than singing signaled she was not innocent enough. Her vague expectation of working beyond the scope of her visa was sufficient to disqualify her for a status as a victim, even though she was not informed of important job conditions and actually experienced abuse and exploitation.

The above-cited examples illustrate how actual legal practices are based on and reproduce a fictional dichotomy between human trafficking and voluntary migration. The law adheres to a mutually exclusive framework of helpless and innocent victims versus voluntary migrants and takes opposite approaches of “protecting victims” and “punishing unlawful migrants.” This practice disregards the fact that individuals in both groups could commonly experience victimization resulting from abusive migration and labor conditions but, at the same time, possess the agency of pursuing their own transnational migration projects.

The dichotomous law intervening with overlapping, ambiguous and complex realities becomes particularly dangerous when the question is not just whether a migrant is a victim or not, but whether she is a victim or criminal; and when this dichotomy is combined with a narrow and fictitious victim stereotype.<sup>134</sup>

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134. See LEE, *supra* note 102, at 64–65 (“[T]hese negative and disempowering images and assumptions about trafficked victims (primarily women) lie at the heart of a prosecution-oriented victim support regime. . . . Victims who do not fit an idealised notion of vulnerability tend to be rendered invisible on the victimological agenda or else regarded as precipitous or blameworthy in popular and criminal justice discourses.”); Wendy Chapkis, *Soft Glove, Punishing Fist: The Trafficking Victims Protection Act of 2000*, in REGULATING SEX: THE POLITICS OF INTIMACY AND IDENTITY 51, 57–58 (Elizabeth Bernstein & Laurie Schaffner eds., 2005) (“[T]he law [TVPA of 2000] relies heavily on the distinction between ‘innocent victims’ of forced prostitution and ‘guilty sex workers’ who had foreknowledge of the fact that they would be performing sexual labor.”); Meyers, *supra* note 65, at 258 (explaining the pathetic victim paradigm, noting “being victimized is understood as excluding agency—that is, as entailing shameful albeit blameless passivity”); Davidson, *supra* note 97, at 9, 16 (“[I]t seems that physical

Ironically, law enforcement authorities and the judiciary in Korea are eager to search for evidence of an entertainer's subjectivity and autonomy, rather than evidence of her vulnerabilities or victimhood, when interrogating the entertainer about her migration processes and workplaces. This is not of course out of respect for her agency but in order to find grounds to deny her victimhood and the consequent legal protections. Under this framework, any indication of agency by Filipina entertainers pursuing their migratory aspirations will disqualify them from claiming victimhood and make them subject to punishment and deportation.<sup>135</sup>

This practice, "misuse of agency," presents hardships for entertainers and their advocates who endeavor to achieve justice without compromising the truth. This practice works as an effective tool for governmental authorities to attribute all the negative consequences of migration to the entertainer's own decisions.<sup>136</sup> This rationale of incriminating victims helps destination states evade responsibility to address human and labor rights violations committed in their territories through their legal systems.<sup>137</sup>

#### b. Prevalent Prejudice Against Filipina Entertainers

Prejudice against Filipina entertainers as "undeserving foreign prostitutes or hostesses" is prevalent among law enforcement authorities and within the judiciary. They expect victims to be helpless

suffering is the litmus test for police officers and immigration officials involved in sorting VoTs [victims of trafficking] from undocumented migrants working illegally in the sex sector."); see also Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 387 (1993) ("[F]eminist work has too often been shaped by an incomplete and static view of women as *either* victims or agents.").

135. See Srikantiah, *supra* note 65, at 199 ("Because the iconic victim is assumed to be passive and in need of rescue, a victim who escapes risks losing the legitimacy associated with lack of volition."); Davidson, *supra* note 97, at 18 ("For many migrants who trade sex, becoming visible is more likely to mean being deported than it is to mean securing rights and protections as workers.").

136. See Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1441-42 (1993) ("[W]e should . . . validate the capacities and choices available to people who have been victimized—but not treat this as a reason to shift all blame to them and away from others or vice versa. . . . The debates should not be short-circuited by an assumption that a victim's capacity for choosing an alternate course of action means the victim is to blame. . . . The problem is not blame and cause, but responsibility.").

137. Cheng mentions a similar rationale is taken also by a sending state (the Philippine government) "attributing all responsibilities for harm to women who have chosen to take the risk of prostitution as 'willing victims.' This operates to erode migrant entertainers' sense of entitlement to state protection of their rights as citizens, migrants, and workers." CHENG, *supra* note 20, at 78. She also notes "[t]he discourse of 'willing victims' allows the [Philippine] state to actively shift all responsibilities to migrant women. It further precludes consideration of the more fundamental issue of migrants' rights and safe migration."

and innocent and so to be “deserving” and trustworthy.<sup>138</sup> Judging based on the prejudice against the entertainers often results in rejecting the credibility of their overall statements. Below are a few examples:

- (1) “The Filipinas still working in the club stated that the accuser [entertainer] and some other Philippine girls ran away from the club in order to get married to GIs.”
- (2) “The accused club owner stated that the accuser arbitrarily ran away from the club and then filed a false accusation in order to extend her stay in Korea.”
- (3) “The statement of the *Mamasan* [a Korean senior woman manager] in the club seems to be the most credible one. She stated that the Filipinas tend to file false accusations, advised by the NGO, in order to stay in Korea longer, and that the NGO encouraged Filipinas to file a false accusation in order to get governmental subsidies for their shelter.”
- (4) “Many Filipinas try to stay in Korea as long as possible to earn money and to get married to GIs. Although the accuser arbitrarily left the club, her deportation was postponed because she filed this suit. She also got her unpaid salary back and is still staying in Korea until this sentencing day, which shows the typical behavior of Filipinas and makes her motivations for this accusation very suspicious.”<sup>139</sup>
- (5) “All the Filipinas who are currently working in the accused club made the same statements as the accused club owner, saying that there was no prostitution in their club.”

Rationales (1) to (4) expose how a general prejudice against Filipina entertainers damages the credibility of an individual entertainer in judicial procedures. Filipina entertainers are suspected of filing false accusations in order to stay longer in Korea or to get married to GIs. My Sister’s Home is even suspected of assisting false accusations to receive governmental subsidies. The judge in rationale (4) blatantly expresses his overt bigotry toward Filipina entertainers. Although filing a criminal complaint and receiving unpaid wages are legitimate exercises of the entertainer’s legal rights, the judge used this very fact as a ground to undermine her credibility.

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138. See Cavalieri, *supra* note 65, at 1436 (“Innocent trafficking victims stand in categorical opposition to the guilty or complicit sex worker . . . [T]his serves as a way to distinguish deserving from undeserving victims in the sex-work realm: the deserving victim is the one who lacked knowledge of the work she would do, while the undeserving victim knowingly chose to do sex work and, therefore, “asked for” any mistreatment that followed. In the policy arena, this distinction functions as a means test for the provision of services to trafficked women.”).

139. Suwon District Court Pyeongtak Branch [Dist. Ct.], 2011Go-Dan220, 2011 Go-Jung56, Oct. 12, 2011 (S. Kor.).



At the same time, as in rationales (1) and (5), the police and prosecutors nonetheless trust the statements by Filipina entertainers who are still working in the clubs. The officials disregard the fact that these entertainers are more likely to testify in favor of their employers, not to incriminate themselves and lose their employment. This suggests that the prejudice is stronger in the case of the entertainers who escaped and try to exercise their rights through legal procedures. This practice can play a function of silencing and penalizing “those who make trouble,” and creates a deterrent effect for those who would hope to report their cases and seek help.<sup>140</sup>

c. Limitations of the Criminal Justice Framework

As a result of judicial practice discussed above, the Filipina entertainers who have filed criminal accusations were treated as “unlawful foreign prostitutes or hostesses” who have confessed their own unlawful acts of “voluntary” prostitution and violation of immigration law. An entertainer’s efforts to seek remedies with true and detailed statements often result in destructive consequences, such as losing jobs and visas and facing deportation. The staff of My Sister’s Home constantly worries that due to the narrow criminal justice perspective taken by law enforcement authorities, its advocacy work may result in harmful consequences for the clients. Moreover, participating in criminal procedures is a frustrating and traumatic experience for many entertainers due to the often intimidating and prejudicial attitude of law enforcement officers as well as their former employers.<sup>141</sup>

Essentialization, utilization, and marginalization of trafficking victims under the criminal justice-centered anti-trafficking regime are prevalent phenomena in destination states.<sup>142</sup> Victims are treated primarily as passive witnesses in criminal procedures: seeking remedies for rights violations as plaintiffs is not the role the regime originally assumed for victims. Another fundamental problem of the criminal justice framework lies in the narrow scope of its protected

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140. See Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 247–48 (2009) (introducing the events of massive raids by the U.S. federal agencies on undocumented migrant workers that led to deportation while workers’ rights violations were under investigation or union negotiations were pending).

141. During the investigation, “confrontation interrogation” between an accusing entertainer and the accused club owners, promoters and entertainers still working in the club, is widely used as a common investigation tactic.

142. See LEE, *supra* note 102, at 59, 72 (“In the field of trafficking, victim protection has to be reconciled with the criminal justice objectives of securing successful prosecutions of traffickers and controlling immigrants who are in breach of immigration, labour, or prostitution laws in countries of destination.”); see also Dottridge, *supra* note 126 (noting that “[i]n countries all around the world, access to assistance and protection for trafficked persons has been made conditional” upon criminal justice objectives).

population. The rules of evidence, and the standard of interpretation, in criminal law are the strictest of all legal areas, which may exclude those who are victimized in human, civil, and labor rights contexts from remedies and protections. These problems are compounded since law enforcement authorities tend to apply a stereotype of trafficking victims that is even narrower than criminal legal definitions.<sup>143</sup> Moreover, criminal justice against offenders does not lead to direct improvement of victims' human rights situations. This series of problems suggests a need for guaranteeing the rights and status of trafficked migrants independently of criminal justice frameworks, so that migrants can seek remedies in civil, labor and human rights contexts, not being subordinated to the position of crime witnesses.<sup>144</sup>

## 2. The Problems of the U.S. TIP Reports on South Korea

When the U.S. Department of State first issued its Trafficking In Persons Report (TIP Report) in 2001, it ranked South Korea at the bottom (Tier 3), along with twenty-two other countries. Statements of the 2001 Report include:

While South Korea is a leader in the region on human rights and democracy generally, the Government has done little to combat this relatively new and worsening problem of trafficking in persons. . . . [T]here are no laws that specifically address trafficking. . . . Aliens are treated as immigration violators and deported. No government assistance is available for trafficking victims or to support NGO's involved in assisting trafficking victims.<sup>145</sup>

Although the rank brought a giant shock and shame to the Korean government, no noticeable changes were made in the following year. However, South Korea was curiously promoted from Tier 3 to Tier 1 in the 2002 report, which stated:

Korea fully complies with minimum standards for the elimination of trafficking, including making serious and sustained efforts to eliminate

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143. See, e.g., Alicia W. Peters, *"Things That Involve Sex Are Just Different": US Anti-Trafficking Law and Policy on the Books, in Their Minds, and in Action*, 86(1) ANTHROPOLOGICAL Q. 221, 242–47 (2013) (criticizing the gap between the law and its implementation, which results in the exclusion of victims of "non-sex" trafficking from protection, as well as those who do not fit into a passive image of sex trafficking victims).

144. Recently, My Sister's Home started its effort to bring civil law suits against employers for past sufferings and embezzled salaries of the entertainers. So far two cases have been successful with monetary compensation even though relevant criminal accusations were dismissed by prosecutors.

145. U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, TRAFFICKING IN PERSONS REPORT 97 (2001), <http://www.state.gov/documents/organization/4107.pdf> [<http://perma.cc/ZD5K-EED8>] (archived Mar. 10, 2015).

severe forms of trafficking in persons with respect to law enforcement, protection of victims and prevention of trafficking.<sup>146</sup>

Such a jump is inexplicable: no country before or after has ascended this rapidly, skipping a level. Since then, the State Department has ranked South Korea as Tier 1 for thirteen consecutive years, as of 2014. This favorable reranking has been a major justification for the Korean government to be largely indifferent to trafficking issues for the last decade.

A detailed critique of the TIP Reports' evaluations would require separate treatment. Briefly, however, at least two factors may have affected the TIP Reports' act of generosity toward Korea. First, TIP reports seem to rely on inaccurate data that the Korean government has submitted each year, data which conflated domestic prostitution cases with human trafficking. Most cases prosecuted under the Prostitution Punishment Act in Korea are domestic cases with "voluntary" prostitution charges, while the sex trafficking provision has yet to be applied. Second, commentators have criticized the ranking practice in the TIPs Reports, saying it is driven by U.S. political considerations.<sup>147</sup> This might be true in the case of South Korea.<sup>148</sup> In 2012, one Korean newspaper released an article revealing the story behind that year's ranking:

The State Department Office to Monitor and Combat Trafficking in Persons had initially decided to rank Korea Tier 2 this year. However, the Korean Embassy in the US found out about this upcoming change and vociferously lobbied, and the State Department officials in charge of the East Asia Pacific region pleaded with the Office up until the last minute, when the Office decided to change the original decision and keep Korea's rank as Tier 1. The relevant officials are said to have argued that the downgrade could negatively affect the US-Korea relationship, especially at the present time, a time when the Korea-US FTA has only recently been adopted.<sup>149</sup>

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146. U.S. DEPT OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, TRAFFICKING IN PERSONS REPORT 86 (2002), <http://www.state.gov/documents/organization/10815.pdf> [<http://perma.cc/RT5K-JHNN>] (archived Mar. 10, 2015).

147. See Anne T. Gallagher, *Improving the Effectiveness of the International Law of Human Trafficking: A Vision for the Future of the US Trafficking in Persons Reports*, 12 HUM. RIGHTS REV. 381, 392 (2010).

148. Ayla Weiss notes that "South Korea's TIP report provides an excellent example of how the TIP system has fallen prey to political influence." Ayla Weiss, *Ten Years of Fighting Trafficking: Critiquing the Trafficking in Persons Report Through the Case of South Korea*, 13 ASIAN-PAC. L. & POLY J. 304, 305 (2012). Regarding the TIP Reports' leniency to South Korea, she argues that "[b]ecause the U.S. military lies at the heart of South Korea's trafficking issues, South Korea's TIP Report could be easily skewed with the inherent conflict between an accurate report on the issues and the U.S.' economic and political concerns." *Id.* at 315 (footnote omitted).

149. *The US State Department, "Korea Had Almost Ranked Tier 2,"* KUKMINILBO, July 29 2012, available at <http://news.kukinews.com/article/view.asp?page=1&gCode=kmi&arcid=0006290939&cp=nv> [<http://perma.cc/N5GK-WL8D>] (archived Mar. 10, 2015) (translated by the author).

Although South Korea is now under more pressure to take action on trafficking issues, concerns continue.<sup>150</sup> As the U.S. anti-trafficking regime would heavily influence South Korea's practice, the exposed problems of the U.S. trafficking law and policy<sup>151</sup> could be repeated or aggravated, considering the legal practice in Korea discussed above.

*C. Legal System in Korea in the Context of Labor Migration:  
Denial of Status and Rights as Migrant Workers*

1. Denial of Status and Rights as "Migrant Workers"

Migrant workers in Korea are generally hired, regulated, and protected under the Foreign Workers Employment Act. However, the Act and its Enforcement Decree exclude E-6 visa migrants from the application of the Act,<sup>152</sup> along with other types of "professionals" such as professors (E-1), language teachers (E-2), researchers (E-3), lawyers, and doctors (E-5). Migrant workers governed by the Act are those classified as "simple-skilled workers." Filipina entertainers are not protected by the Act, being categorized into a group of "professionals," with artists and entertainers who visit Korea for a short time or are not in need of the same regulation and protection as "migrant workers."<sup>153</sup>

This legal exclusion places Filipina entertainers in more vulnerable and disadvantaged situations than other migrant workers, such as E-9 "non-professional workers," protected by the Act. For example, E-6 entertainers can stay and work in Korea for up to two years, whereas E-9 workers can stay up to five years.<sup>154</sup> Unlike employers of E-9 workers, employers of E-6 entertainers are not required to enroll in guaranteed insurance programs for retirement

150. With constant reporting efforts by NGOs in Korea, the TIP Report 2014, while keeping Korea in Tier 1, made a more detailed statement regarding problems with the entertainer's visa system: "NGOs and media alleged officials from the Korean Media Rating Board (KMRB), part of the Ministry of Culture, Sports, and Tourism, granted women E-6 entertainment visas, knowing the women were at risk of being sexually exploited, forced into prostitution, and held under debt bondage." U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 233* (2014).

151. See discussion *infra* Part IV.D.2 (advocating against a criminal justice-centered approach).

152. Woekukin Geunrojau Goyongdeungeh Gwanhan Bupryul Shihangryung [Enforcement Decree of Foreign Workers Employment Act], Presidential Decree No. 25521, July 28, 2014, art. 2 (S. Kor.).

153. The Foreign Workers Employment Act defines a migrant worker (a foreign worker) as "a person who does not have a Korean nationality and works or intends to work in a business or workplace located in Korea for the purpose of earning wages." Woekukin Geunrojau Goyongdeungeh Gwanhan Bupryul [Act on Foreign Workers' Employment, etc.], Act No. 11690, Mar. 23, 2013, art. 2 (S. Kor.).

154. See *id.* arts. 18, 18-2. The Act provides the stay of E-9 workers with initial three years of employment can be renewed once for another two years.

pay,<sup>155</sup> overdue wages,<sup>156</sup> and personal injury insurance (workers compensation).<sup>157</sup> E-6 entertainers do not have the right to request a change of workplace, while E-9 workers are entitled to apply for the change up to three times, based on circumstances such as breaches of employment conditions or maltreatment by employers.<sup>158</sup>

While the government classifies E-6-2 entertainers as “professionals” who do not need legal protections as other migrant workers, it, at the same time, has imposed contradictory burdens on them. Up until November 2010, E-6-2 visa applicants had to submit a HIV-negative certificate, which was not required for other professional visa categories. Some local governments have required club owners to have their entertainers take regular HIV and STD tests during the employment.<sup>159</sup> This dual standard—legally classifying them as “professional” foreigners, while actually treating them as “hostesses”—reflects a discriminatory and exploitative attitude that the state takes toward E-6-2 entertainers. While benefiting from their labor, it denies them legal rights and protections as legitimate migrant workers. Considering their migration process, the substance and conditions of work, and their relations with employers, E-6-2 entertainers are much closer to E-9 “simple-skilled workers,” and have little in common with the foreign professors or lawyers they are currently classified alongside. The vulnerabilities of migrant entertainers are aggravated by this legal system that excludes them from the legal status, rights and protections as migrant workers.

## 2. Denial of Status and Rights as “Workers”

From a theoretical perspective, E-6-2 entertainers can, and should, be recognized as “workers” under the labor law in Korea. The Labor Standards Act<sup>160</sup> defines a “worker” as “a person, regardless of being engaged in whatever occupation, who offers work to a business or workplace for the purpose of earning wages.”<sup>161</sup> The nationality of a person does not matter. The Supreme Court of Korea has decided that even undocumented migrant workers have rights and status as workers under the Labor Standards Act if they have actually offered their labor to their employers.<sup>162</sup> Filipina entertainers, who are

155. See *id.* art. 13.

156. See *id.* art. 23(1).

157. See *id.* art. 23(2).

158. See *id.* art. 25(1).

159. See 2011 SURVEY, *supra* note 30, at 39.

160. The Act applies to “all businesses or workplaces in which not less than five are ordinarily employed.” Geunro Gijunbup [Labor Standards Act], Act. No. 11270, Feb. 1, 2012, art. 11 (S. Kor.) [hereinafter Labor Standards Act].

161. *Id.* art. 2(1)(1).

162. See Supreme Court [S. Ct.], 94Nu12067, Sept. 15, 1995 (S. Kor.) Seoul High Court has decided that undocumented workers have rights to create and join labor unions. See Seoul High Court [Seoul High Ct.], 2006Nu6774, Feb. 1, 2007.

offering labor to their employers in an entertainment business for the purpose of earning wages,<sup>163</sup> fit the definition of “workers” under the Act.

In reality, however, employment practices prohibited by the Labor Standards Act are common in foreigner-only clubs. For example, the Act prohibits arbitrary deductions of employee’s wages by employers and mandates wages to be paid in cash to workers in full.<sup>164</sup> As noted earlier, Filipina entertainers must forgo at least the first two months’ salary to pay “broker fees” and after that, club owners deduct various fines and penalties from their wages. The forced work,<sup>165</sup> overtime work,<sup>166</sup> lack of free time<sup>167</sup> and days off<sup>168</sup> and surveillance of dormitories<sup>169</sup> experienced by Filipina entertainers on a daily basis are strictly prohibited by the Labor Standards Act. Although the Act also prohibits employers from predetermining penalties or indemnities for breach of contract by workers,<sup>170</sup> these are often imposed on Filipina entertainers. However, the government has conducted no labor inspection on these serious labor rights violations in foreigner-only clubs.

When an employer breaches working conditions set forth in a labor contract, the Act entitles a worker to claim damages and terminate her labor contract.<sup>171</sup> A worker can report any violations of the Act by their employers to the Minister of Employment and Labor or a labor inspector.<sup>172</sup> However, it is hard to imagine either entitlement being exercised by Filipina entertainers, considering their positions subordinated to their promoters and club owners. Until recently, many local Labor Relations Commissions did not accept Filipina entertainers’ claims about overdue wages, on the grounds that petitions by migrant entertainers were not within their jurisdiction. Even when the Commissions have taken petitions, settlements have been usually made at around \$350-\$400 a month regardless of the entertainers’ contractual salaries or the statutory minimum wage. The above realities indicate that Filipina entertainers’ rights and status as workers are not properly recognized and guaranteed in law and practice.

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163. The Labor Standards Act defines “wages” as “wages, salary and any other kind of money or valuables, regardless of their titles, which the employer pays to a worker as remuneration for work.” Labor Standards Act, *supra* note 160, art. 2(1)(5).

164. *See id.* art. 43(1).

165. *See id.* art. 7.

166. *See id.* art. 50.

167. *See id.* art. 54.

168. *See id.* art. 55.

169. *See id.* art. 98(1).

170. *See id.* art. 20.

171. *See id.* art. 19(1), (2).

172. *Id.* art. 104(1). An employer cannot dismiss or unfairly treat the worker for making such report. *See id.* art. 19(2).

The “standard performance contract” drafted and recommended by the Korea Media Rating Board for employment of E-6-2 entertainers consolidates the entertainers’ vulnerable and subordinated positions to their employers. According to the standard contract, an entertainer must perform only in a place the dispatching agency designates, and must perform under the direction and supervision of a club owner.<sup>173</sup> An entertainer must “always maintain healthy physical conditions” and “take medical examinations by health authorities on a regular basis.”<sup>174</sup> A dispatching agency must “protect the entertainer’s security and *thoroughly manage and supervise* the entertainer to make sure she *does not leave* the performance place.”<sup>175</sup> The contract also stipulates that a dispatching agency can cancel the contract if an entertainer leaves the workplace or violates the law.<sup>176</sup> This standardized contract demonstrates that the state requires migrant entertainers to be submissive and healthy employees while denying their legal rights and protections as workers.

#### D. Concluding Evaluation

##### 1. Breach of Human Rights Obligations by the Korean Government

The legal system and practice in Korea examined, so far, shows that the law does not recognize Filipina entertainers either as trafficking victims or as migrant workers even though the entertainers, in fact, have the identity and experience of both. Most of the time, migrant entertainers work and live as “underground foreign hostesses.” When they seek remedies and justice in the outside world, they are labeled as “unlawful foreign prostitutes.” The very legal system and practice, not just wrongful acts by private actors, disempower, marginalize and criminalize Filipina entertainers.

The analysis presented above leads to the following conclusions regarding the responsibility of the Korean government. First, in terms of human trafficking, the Korean government not only fails to protect migrant entertainers from human trafficking, but also facilitates and sustains such practice. The examination in Part III.A showed that most Filipina entertainers’ migration processes and working conditions satisfy the definitions of human trafficking. As discussed in Part II.B, the government operates the entertainer visa system to bring migrant hostesses to Korea to work instead of Korean women. The series of acts by the government, including only testing applicants’ singing ability

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173. KOREA MEDIA RATING BOARD, STANDARD PERFORMANCE CONTRACT arts. 1, 6, *available at* <https://www.kmr.or.kr/data/publicDataView.do?idx=59> [<https://perma.cc/L2Q6-U5CS>] (archived May 21, 2015).

174. *Id.* art. 11.

175. *Id.* art. 12 (emphasis added).

176. *Id.* art. 14.

during the visa issuance process while being fully aware of the actual nature and conditions of their assigned work, issuing singer visas then designating them to places where they cannot work as singers but have to work as hostesses under abusive and coercive conditions without just remuneration, and systematically denying their status and rights as migrant workers while subordinating their legal status to employers, offer persuasive grounds to argue that the state, by its own acts, drives these migrants into trafficking situations and benefits from their exploited labor. Although Korea has yet to ratify the UN Trafficking Protocol, the current practice of the government clearly goes against the object and purpose of the Protocol.<sup>177</sup>

Second, in terms of human rights protection, the Korean government does not meet its obligations under the relevant human rights treaties.<sup>178</sup> Considering the nature and extent of the roles played by the government, it could be argued that the state is a direct violator of human rights in complicity with private actors. At a minimum, the Korean government does not meet its obligations in addressing human rights violations committed by private actors. The Human Rights Committee articulated the positive obligations of states parties to protect individuals from violations of Covenant rights by private actors and “to exercise due diligence to prevent, punish, investigate or redress the harm” in such cases.<sup>179</sup>

Regarding the right to work, the Committee on Economic, Social and Cultural Rights clarifies that the state obligations to respect, protect and fulfill this right include preventing the rights violations by private actors.<sup>180</sup> The Korean government fails to meet these positive obligations, not taking appropriate measures to prevent and respond to human rights violations by non-state actors. The Korean government, rather, facilitates human rights violations through its legal system, has been extremely inactive in taking criminal justice measures against perpetrators, and has not made any meaningful effort to redress the harm to or to protect the rights of Filipina entertainers. This state practice also constitutes a violation of Article 6 of CEDAW.<sup>181</sup> The government fails to meet its obligation to ensure

177. UN Trafficking Protocol, *supra* note 66, art. 2 provides its purpose as “[t]o prevent and combat trafficking in persons,” “[t]o protect and assist the victims,” and “[t]o promote cooperation among States Parties.” See Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty . . .”).

178. South Korea is a party to ICCPR, ICESCR and CEDAW. For the most relevant provisions to human trafficking, see *supra* Part IV.A.1.

179. Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 8, U.N. Doc. CCPR/C/21/Rev/1/Add/13 (2004).

180. See Committee on Economic, Social and Cultural Rights, General Comment No. 18, The Right to Work, ¶ 22, U.N. Doc. E/C.12/GC/18 (2005).

181. See *supra* text accompanying note 113.



victims effective remedies for human rights violations committed in its territory. Therefore, the Korean government, either by direct involvement in rights violations, or by not appropriately preventing or responding to violations by private actors, fails to meet its human rights obligations.<sup>182</sup>

Moreover, by designating from the beginning the jobs outside the scope of visas by issuing a singer visa for hostess work, the Korean government knowingly drives migrant entertainers to engage in unlawful acts that violate immigration law (by working beyond their visa scope) and criminal law (by engaging in prostitution). This pre-ordained unlawful status—they face deportation for the very reason they were let in—effectively hinders access to justice and remedies through the legal system for migrant entertainers. This can constitute a separate violation of a state obligation to ensure effective remedies for victims.<sup>183</sup>

## 2. Inadequacy of the Current Global Anti-Trafficking Framework: Empowering States, Disempowering Individuals

This study on migrant entertainers illuminates that the current anti-trafficking framework, centered on the “3 Ps and 4 Rs” paradigm, may not properly serve the needs and interests of the individuals that the regime claims to protect.<sup>184</sup> Despite its human rights rhetoric, the regime seems more focused on pursuing the interests of destination states.

The regime asserts and justifies “fortifying border control” as an effective prevention measure, while numerous critiques agree that it,

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182. See GALLAGHER, *INTERNATIONAL LAW*, *supra* note 102, at 222–48.

183. See sources cited *supra* note 116 and accompanying text. The United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, art. 25(2), U.N. Doc. A/55/383 (Nov. 15, 2000) also provides: “Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.”

184. For critical studies of the U.S. anti-trafficking policy, see, for example, CATHERINE DAUVERGNE, *MAKING PEOPLE ILLEGAL: WHAT GLOBALIZATION MEANS FOR MIGRATION AND LAW* 75–83 (2008); James Gray Pope, *A Free Labor Approach to Human Trafficking*, 158 U. PA. L. REV. 1849, 1857–58 (2010) (discussing the limitations of the “prohibition (of slavery) approach” which focuses on criminalization and prosecution without ensuring alternatives for victims); Jennifer M. Chacón, *Tensions and Trade-offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609 (2010); Haynes, *Exploitation Nation*, *supra* note 65; Haynes, *(Not) Found Chained*, *supra* note 65; Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977 (2006). For the U.K. policy, see BRIDGET ANDERSON, *US AND THEM?: THE DANGEROUS POLITICS OF IMMIGRATION CONTROL* 137–58 (2013). For the Canadian policy, see generally Constance MacIntosh, *Assessing Human Trafficking in Canada: Flawed Strategies and the Rhetoric of Human Rights*, 1 *INTERCULTURAL HUM. RTS. L. REV.* 407 (2006). For a critical study on anti-trafficking policy of eight different countries, see generally *COLLATERAL DAMAGE*, *supra* note 126.

in fact, aggravates trafficking problems.<sup>185</sup> By adopting a victim identification/protection scheme while firmly preserving the “criminalizing immigration” regime as default,<sup>186</sup> destination states exercise immense power to decide the destiny of similarly situated individuals between victims and criminals. By taking a criminal justice-centered approach that focuses on law enforcement against perpetrators, the regime places victimized individuals in marginalized, passive, and subordinated positions, judged and discriminated against by their usefulness as crime witnesses. Their status as rights holders, and their right to effective remedies, are not squarely recognized or realized. Therefore, the projects of the current global anti-trafficking regime, conducted under the rhetoric of human rights, ironically and problematically empower destination states while disempowering individuals.

The victim treatment scheme centered on rescue and repatriation furthers empowerment of states and disempowerment of individuals. Many studies have pointed out that “rescue” missions, conducted in the name of victim protection, often work only as crackdowns on employment of undocumented migrants.<sup>187</sup> “Repatriation,” when conducted against a victim’s will and needs—as in many of cases

185. See LEE, *supra* note 102, at 2, 56; DAUVERGNE, *supra* note 184, at 72; Pope, *supra* note 184, at 1868–69; Karen E. Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT’L L. & CONTEMP. PROBS.* 545, 547, 597–98 (2009); see also SASKIA SASSEN, *LOSING CONTROL?: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 74 (1996) (suggesting that when a government restricts one form of immigration, other forms increase).

186. See generally GOVERNING IMMIGRATION THROUGH CRIME: A READER (Julie A. Dowling & Jonathan Xavier Inda eds., 2013) (providing numerous examples of governments criminalizing unauthorized immigrants); DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* (2008) (using personal accounts to show how the lack of legal status is used to keep people vulnerable and how criminalizing immigrant labor benefits employers); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 *NEW CRIM. L. REV.* 157 (2012) (suggesting that criminal law and immigration law are becoming one field); Ingrid V. Eagly, *Prosecuting Immigration*, 104 *NW. U. L. REV.* 1281 (2010) (providing a broad view of the societal problems associated with criminalizing immigrants on a large scale).

187. See, e.g., Aziza Ahmed & Meena Seshu, “We Have the Right Not To Be Rescued...”: When Anti-Trafficking Programmes Undermine the Health and Well-Being of Sex Workers, 1 *ANTI-TRAFFICKING REVIEW* 149, 153–56 (2012) (providing accounts of brothel raid and rescue missions conducted by the local police in violent manners and rehabilitation programs run in abusive conditions); PARREÑAS, *supra* note 65, at 175 (“Some may not want rescue, which for many means job elimination, but instead job improvement and labor market flexibility.”); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 *U. PA. L. REV.* 1655, 1715–18 (2010) (noting that one well-funded mission in the United States essentially led to raids on brothels, resulting in detention and deportation/involuntary repatriation of targeted women); Davidson, *supra* note 97, at 10 (suggesting that attempts to “catch victims” worsens the status of trafficked persons); Gretchen Soderlund, *Running from the Rescuers: New U.S. Crusades Against Sex Trafficking and the Rhetoric of Abolition*, 17 *NAT’L WOMEN’S STUDIES ASS’N J.* 64, 65 (2005) (“[I]n current sites and practices of abolitionist intervention the line between rescuers and captors has become increasingly blurry.”).

detailed in this Article—is merely another name for deportation.<sup>188</sup> Thus, “rescue and repatriation” is often none other than the implementation of states’ crime-and-immigration-control agendas, expedited with the catchphrase of “modern-day slavery,” rather than an undertaking of state human rights obligations. By imposing a unilaterally designed victim treatment scheme with simplified perception of victims, the regime pays scant attention to the individuals’ actual needs and wants. While those who do not neatly fit into the narrow scope of victims are excluded, discriminated against, and even demonized, those who are recognized as victims are also not being helped. The current global anti-trafficking framework tends to aggravate the situations of marginalized migrants such as Filipina entertainers.

## V. SUGGESTING ALTERNATIVE RESPONSES

### A. Principles for a New Framework

This Article has explored diverse, ambiguous and complex realities of Filipina entertainers, questioning the demarcation between human trafficking and labor migration. The examination exposes the ways that the current legal framework and practice in Korea, and around the globe, approach human trafficking are inadequate in addressing the situations of migrants like these entertainers. The framework instead causes or reproduces the unlawfulness and injustice the entertainers suffer. Alternative legal responses are necessary, which take comprehensive, integrated, and contextualized approaches, in order to address the multiple predicaments of these migrants and eventually to empower them.

First, the focus of the anti-trafficking framework needs to be moved from criminal justice and immigration control to the empowerment of migrant individuals under a comprehensive rights-based framework.<sup>189</sup> While the current regime empowers destination

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188. See GALLAGHER, INTERNATIONAL LAW, *supra* note 102, at 338 (detailing a 2009 report by the Organization for Security and Co-operation in Europe regarding the issue of ‘mandatory return’ of trafficking victims). Lee criticizes the narrow focus of victim protection measures, stating: “While repatriation, rehabilitation and reintegration programmes are designed to be inclusive, critics argued they are often shaped by short-term, narrowly focused policy concerns and by assumptions of what trafficked victims *should* want rather than what they may actually need. In the process, victims who do not want to be ‘rescued’ and repatriated or who seek alternative forms of support (for example, financial assistance) are silenced and marginalised.” LEE, *supra* note 102, at 79 (citation omitted); see also MARIE SEGRAVE, SANJA MILIVOJEVIC & SHARON PICKERING, SEX TRAFFICKING: INTERNATIONAL CONTEXT AND RESPONSE 190–92 (2009).

189. Soft law on human trafficking has raised the need to incorporate human rights approaches into the anti-trafficking regimes. See, e.g., Human Rights Council Res.

states with fortified crime and border control measures, the proposed framework aims to empower migrant individuals with enhanced civil and labor rights and the right to effective remedies in the destination states where they have suffered rights violations. In previous scholarship, ways of empowering migrant workers or trafficking victims have been suggested, largely taking two different approaches. One proposes using existing human rights regimes more effectively.<sup>190</sup> The other favors what can be called a labor migration approach: adopting a “migrant labor rights paradigm,”<sup>191</sup> arguing for migrant workers’ freedom to change employers;<sup>192</sup> or taking more radical steps, such as transnational liberalization of labor<sup>193</sup> or the creation of “transnational labor citizenship.”<sup>194</sup> The former tends to overlook the limitations of the existing human rights frameworks that have been weak in prescribing and enforcing concrete state obligations and effective remedies for trafficked migrants or victimized individuals in general. Suggestions in the latter direction tend to be too abstract (Chang & Kim), or too revolutionary to be realized in the near future (Bravo, Gordon). James Pope’s argument for the right of migrant workers to change employers to reduce their vulnerability is concrete but not comprehensive.<sup>195</sup> This Article proffers more comprehensive and enforceable responses, emphasizing victimized migrants’ civil and labor rights as well as the right to effective remedies to be implemented

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14/2, U.N. Doc. A/HRC/RES/14/2 (June 23, 2010); U.N. High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N. Doc. E/2002/68/Add.1 (May 20, 2002).

190. See generally Jennifer S. Hainsfurther, *A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers*, 24 AM. U. INT’L L. REV. 843 (2009) (arguing that the substantive equality and non-discrimination principles of CEDAW can provide an effective tool to hold relevant states accountable for violations of women migrant workers’ human rights); Gallagher, *Using, supra* note 84 (revisiting exiting international human rights norms, including prohibitions on slavery, forced labor and debt bondage, and exploring their potential in addressing human trafficking cases); Margaret L. Satterthwaite, *Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers*, 8 YALE HUM. RTS. & DEV. L.J. 1 (2005) (noting that many major human rights treaties, not only the Migrant Worker Convention, can be useful to empower migrant workers through an intersectional approach).

191. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 317, 339–40 (2007) (defining and advocating for a “migrant labor rights paradigm”).

192. Pope, *supra* note 184 (arguing for a free labor approach centering on migrant workers’ freedom to change employers).

193. Bravo, *supra* note 185 (suggesting that labor should have the same status as capital, goods, or intellectual property in the international trading system for trade liberalization).

194. Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007) (proposing transnational labor citizenship, a membership in organizations of transnational workers, as the source of rights and duties of migrant workers to replace the current system tying their immigration status to particular employers).

195. See Pope, *supra* note 184, at 1869–70.

through the legal systems of destination states.<sup>196</sup> What is required for the destination states is to change their perspectives on the status of the individuals from crime witnesses to rights holders.<sup>197</sup>

Second, the new framework rejects the current legal dichotomy between trafficking victims and unlawful migrants. This framework instead acknowledges the coexistence of multiple identities in one individual, with an aim to develop integrated responses. Having and exercising agency should not disqualify the victimhood or incriminate victimized individuals, but should be appreciated and respected in shaping effective remedies for them.

By overcoming the victim vs. criminal dichotomy, the new framework challenges the current regime's obsession with "victim identification process," which applies a fixed and closed victim category that excludes and discriminates against the rest who are not identified as such. Instead, it pays attention to, and addresses, "victimized aspects" of each individual in the human, civil and labor rights contexts whether or not she or he fits the definition of a trafficking victim under a criminal framework.

Third, the new framework appreciates the diversity among victimized migrants in their sufferings, needs, and hopes. The new framework aims to develop contextualized responses to best address each individual's distinct situation.

Fourth, in developing alternative remedies for rights violations, the new framework aims to suggest positive, forward-looking, and creative forms of remedies. It develops these remedies based on the above principles of comprehensiveness, integration and contextualization. It aims to go beyond passive, backward-looking forms of remedy, such as monetary compensation for past sufferings.

As an effort to concretize the meaning of remedies in the case of human trafficking, this Part makes several detailed suggestions, revisiting each category of Filipina entertainers identified in Part III. Based on the above principles, it emphasizes the importance of realizing a migrant's civil and labor rights, as well as her right to

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196. See *supra* Part V.B.

197. The United States amended the Trafficking Victims Protection Act of 2000 in 2003 and 2008, allowing victims of severe forms of trafficking to file a civil action against their perpetrators and to stay in the U.S. until the action is concluded. See 22 U.S.C. § 7105(c)(3)(A)(iii) (2014). While this is a positive improvement for enhancing civil rights of victims, those rights are still dependent on the criminal justice framework as a federal law enforcement official first has to file Continued Presence application. See 22 U.S.C. § 7105(c)(3)(A)(i) (2014); see also U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, TOOL KIT FOR PROSECUTORS 14 (2011) (clarifying that a federal law enforcement official has to file the application for an alien stating that she is a victim of severe form of trafficking and may be a potential witness for such trafficking). And the law regards a main civil remedy available for victims as attaining monetary compensation from perpetrators. See 18 U.S.C. § 1595(a) (2014). Thus trafficking victims' role as "private attorney general" is not so independent or comprehensive as Kathleen Kim views. See generally Kim, *supra* note 140.

effective remedies in a destination state with necessary adjustments of her immigration status.

### B. *Alternative Responses Based on the New Principles*

#### 1. Responses Common to All Categories

All the five groups of Filipina entertainers in Part III commonly experienced abusive and exploitive labor practices, whether or not they fit into the current definitions of trafficking victims.

First, in the context of labor law, migrant entertainers must be recognized as *workers* who are entitled to the full protection of labor law in Korea, including the Labor Standards Act and the minimum wage regulations. The relations between migrant entertainers and their promoters and club owners should be fully recognized and treated as an employer-employee relationship. Entertainers should be able to make claims, through official labor petition procedures, against various labor rights violations committed by their employers, and to seek for correction orders for the future. Labor inspectors should monitor foreigner-only clubs on a regular basis to identify and redress unlawful employment practices and working conditions.

Second, as a civil matter, migrant entertainers must be able to request overdue and embezzled salaries from their employers, as well as compensation for their physical and emotional suffering. They should also be able to exercise the right to claim all the earnings they made from prostitution. Moreover, the entertainers have a strong case for claiming remedies against the Korean government based on its responsibility for their suffering. The legal system must ensure the right of entertainers to stay and work in Korea during these civil procedures.<sup>198</sup> Furthermore, positive forms of remedies should be available toward the future employment of migrant entertainers and the betterment of their work conditions. This requires contextualized approaches for each group, as demonstrated in a later section.

Lastly, reforms are required in the relevant immigration system. The actual work migrant entertainers are directed to perform in foreigner-only clubs is that of hostesses, and not singers. The Korean government must directly acknowledge this reality in which it knowingly, and actively, takes part. It has an obligation to rectify the legal system that renders the entertainers vulnerable to human trafficking and human rights violations.<sup>199</sup>

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198. The UN Trafficking Protocol contains a provision supporting the construction of this obligation. UN Trafficking Protocol, *supra* note 66, art. 8(2) (“[S]uch return shall be with due regard . . . for the status of any legal proceedings related to the fact that the person is a victim of trafficking . . .”).

199. This obligation could be regarded as a “cessation” of continuing wrongful acts by the state (a measure that is also classified as a form of “satisfaction”) as well as a

First, the government should stop issuing professional singer visas for entertainers in foreigner-only clubs, except for clubs, if any, that are verified to comply with the official visa purpose, the terms of performance contracts, and relevant laws.

Second, if the Korean government plans to maintain the foreign-only entertainment business and permit migrant women to work in this industry as hostesses,<sup>200</sup> the government should make important legal reforms. The law should first recognize migrant entertainers as a category of regular migrant workers, not as a category of professionals as the current law does. The law should guarantee the migrant entertainers at least the same legal rights and protections as regular migrant workers, including those stipulated in the Foreign Workers Employment Act, such as the right to change employers and the term of visas (currently five years for regular migrant workers).

At the same time, the government should collect updated information about the actual conditions and employment practices of the foreigner-only clubs that seek to hire migrant entertainers. It should permit employment only at verified places that maintain good records. On this premise, the Korean government must ensure a safe, informed, and autonomous migration process for aspiring migrant entertainers. This goal would be easier to achieve than in the case of undocumented migrants, as the migration of entertainers is conducted through an official visa issuance process. Korean consuls first should stop asking the applicants to sing in front of them. They instead should ensure that the applicants have accurate information about their actual work, workplace and work conditions in Korea. The process should confirm that the applicants are fully aware of their contractual terms, legal rights and obligations, available remedies in case of violations of their rights, and ways to exercise those rights. This series of arrangements would not be enough to solve all the problems at present, but will help individuals make more autonomous and informed decisions on their migration and will empower them to be less vulnerable to rights violations and to be able to defend and exercise their legal rights. An effective way to prevent human trafficking is not to prevent migration but to prevent exploitation.

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"guarantee of non-repetition." See G.A. Res. 56/83, *supra* note 121, art. 30; G.A. Res. 60/147, *supra* note 121, ¶¶ 22(a), 23(h); CRAWFORD, *supra* note 119, at 461–69.

200. In this Article, I do not take a position on whether the Korean government should maintain this industry (or should try to eradicate it as a whole) or whether to allow the employment of migrant entertainers. These questions require separate research and discussion.

## 2. "Observing the Contract" and "the Right to Stay and Work" as Effective Remedies

In developing alternative responses to address Filipina entertainers' situations and to ensure them effective remedies, this Article suggests two innovative approaches as important forms of effective remedies: (1) obligating employers to "observe the contract" and (2) guaranteeing "the right to stay and work" in a destination state.

As discussed in Part III, Filipina entertainers in Categories 1 to 3 can be recognized as victims of human trafficking by deception. Deceived about their job type and/or important work conditions, what these migrants experience after migration is a *grave breach of contract* as well as serious violations of human and labor rights. Approaching the consequential situations of trafficking by deception in this way opens new possibilities for constructing creative and effective forms of remedies that victimized migrants could seek as rights holders in a destination state.

In civil law, a primary remedy for breach of contract is to order—usually through civil procedures—the violating party to observe the terms of the contract that were breached. In labor law, workers can request that the government issue correction orders to their employers to ensure their rights in contract and labor law. In other words, violators should be obligated to observe the contract—ensuring the job and employment conditions as in their contract—and the labor law and not just send home the damaged party. This positive approach to remedies based on contract and labor law not only rectifies the past wrong, but also can change the future with improved employment practice. However, the perspective of the current international law regarding civil remedies for trafficking victims has been mostly limited to monetary compensation, a passive, backward-looking form of remedy.<sup>201</sup>

Approaching the trafficking-by-deception case as breach of contract and labor rights violations can empower the migrants in seeking remedies through civil and labor procedures in a destination state. As plaintiffs, they can invoke their contractual rights as well as torts and labor law against various abuses and maltreatment by their employers. Utilizing domestic substantive law can be particularly useful when relevant wrongful acts do not amount to crimes or violations of international human rights.

This alternative approach also presents a new way to think about the meanings and methods of restitution as a form of effective remedy

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201. Two leading treaties on human trafficking mention only victims' access to "compensation." UN Trafficking Protocol, *supra* note 66, art. 6(6); Council of Europe Convention on Action Against Trafficking in Human Beings art. 15(3)–(4), May 16, 2005, 197 C.E.T.S. 38, <http://conventions.coe.int/treaty/en/Treaties/Html/197.htm> [<http://perma.cc/6WMW-NBVC>] (archived May 21, 2015).



for human rights violations.<sup>202</sup> The current law, and relevant discourse, problematically do not distinguish trafficking by force and trafficking by deception, and take repatriation as a main remedy for trafficking victims in general, regarding it as a form of restitution.<sup>203</sup> Repatriation without substantive remedies is the last thing victims would want in most cases and increases a risk of re-migration in more dangerous and abusive forms. Ironically enough, the current regime imposes repatriation, a *de facto* deportation, on victims under the name of a main remedy and an ultimate human rights protection measure for them. At present, staying in destination states independently of criminal procedures is an extremely rare exception, considered only in terms of the non-refoulement principle, or when there is a serious concern about a victim's safety upon repatriation.<sup>204</sup> In most cases, even a temporary stay in destination states is not a right to claim against the governments, but only a discretionary administrative measure taken for a criminal-justice purpose.

This Article initiates the effort to theorize a victim's right to stay and work in a destination state as a right and as an effective remedy itself, independent from the criminal justice context. For the victims of trafficking by kidnapping or other physical force or threat, in which movement of people itself constitutes a serious human rights violation, repatriation may be suggested as a form of restitution. As discussed, such cases are rare. The key wrongs to be rectified in most contemporary trafficking cases lie in human, civil, and labor rights violations that individuals experience in destination states after migration, and not in their migration itself. Such wrongs cannot be remedied by repatriation. Repatriation only deprives victimized migrants of a venue to exercise their rights and to seek remedies.

In suggesting alternative responses and remedies for each group, this Article views the entertainers' "right to stay and work" in Korea (1) as a prerequisite to seek remedies through legal systems in Korea, (2) and crucially, as a form of effective remedy itself.

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202. See G.A. Res. 60/147, *supra* note 121, ¶¶ 18–23.

203. See GALLAGHER, INTERNATIONAL LAW, *supra* note 102, at 254. G.A. Res. 60/147, *supra* note 121, ¶ 19 lists "return to one's place of residence" as an example of restitution. The meaning of restitution was famously articulated in *Factory at Chorzów* (Ger. v. Pol.), Claim for Indemnity, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13, 1928), holding "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Id.* at 47.

204. See UN Trafficking Protocol, *supra* note 66, art. 8, 14(1). Even UN High Commissioner for Human Rights makes recommendations on repatriation that are limited to a "safety" concern and acknowledges involuntary repatriation. United Nations High Commissioner for Human Rights, *supra* note 189, ¶ 11 ("Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.").

Current international law and discourse recognize, at best, only the former aspect—a victim's need to stay in destination states to ensure her procedural access to remedies.<sup>205</sup> The existing discourse thus regards the right to stay only as ancillary to the right to a remedy or to the right to participate in legal procedures.<sup>206</sup> The right to stay and work in a destination state can be constructed as an effective and important form of substantive remedy itself for many trafficking victims, especially those who migrated with legal work visas and employment contracts like Filipina entertainers.

Filipina entertainers have the right to stay and work in Korea according to their visas and employment contracts. They are entitled to work under safe and lawful conditions with proper remuneration under international human rights law and national labor law. They should be able to seek and attain remedies when those rights are violated. These remedies can take positive forms, including: correcting unlawful working conditions, changing employers or workplaces if necessary, and issuing new work visas or extending the terms of original visas, considering the extent and period that the migrants have been unlawfully exploited. These arrangements can be constructed as a duty of the Korean government, which not only bears a general obligation to enforce civil and labor law but also has acted as a key accomplice to human, civil, and labor rights violations the entertainers have suffered.<sup>207</sup> This undertaking can elevate victimized migrants' stay and work in a destination state from a mere discretionary administrative measure to a legal right, and from a procedural right to substantive one. The suggestion of reissuing or extending original work visas as a form of remedies is particularly pertinent to destination states where victims lose their original visas when escaping from abusive workplaces, or have to relinquish their original visas and cooperate with law enforcement authorities in order to apply for a new specialized visa for trafficking victims.

These approaches also have limitations. The applicability of the suggested responses to the case of undocumented migrant workers suffering from trafficking situations seems less clear. Even if the workers have signed an employment contract with their employers, the future enforceability of their contracts currently depends on interpretation by the judiciary in a destination state.<sup>208</sup> Further study

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205. See GALLAGHER, *INTERNATIONAL LAW*, *supra* note 102, at 368; Council of Europe Explanatory Report, *supra* note 81, ¶ 192.

206. See GALLAGHER, *INTERNATIONAL LAW*, *supra* note 102, at 350; Council of Europe Explanatory Report, *supra* note 81, ¶ 202.

207. These arrangements can be constructed as positive forms of restitution, satisfaction, or guarantees of non-repetition. See G.A. Res. 60/147, *supra* note 121, ¶¶ 18–23.

208. See, e.g., *Hoffman Plastic Compounds, Inc. v. Nat'l Labor Relations Bd.*, 535 U.S. 137, 146–47 (2002) (denying backpay to an undocumented alien because he was unauthorized to work in the United States).

would be required to provide a theoretical foundation for the right to stay and work in destination states for the trafficking victims who migrated without work visas or employment contracts from the beginning. However, since employment contracts can be concluded either in a written or oral form, it would be possible in most cases to interpret that trafficking victims have concluded certain forms of employment contracts with their employers which they can claim against their employers. The CMW provides that employers' legal and contractual obligations are not relieved by the irregular immigration status of workers, presenting an important ground to construct this remedy for undocumented migrant victims.<sup>209</sup> Allowing previously undocumented trafficked migrants to work as regular migrant workers under safe and lawful conditions for a certain time period, independently of their usefulness in criminal procedures, could make an effective remedy to redress the serious rights violations they experienced in a destination state, as well as a proactive policy measure to prevent re-trafficking of those migrants. At the minimum, undocumented migrants whose human, civil or labor rights have been violated in a destination state should have an entitlement to stay and work in that state for the purpose of seeking remedies through the state's legal system, regardless of the status of relevant criminal cases. Another concern about this proposal would be a possibility of abuse. However, a worry about abuse cannot outweigh the obligation of destination states to ensure victims effective remedies for the rights violations committed in their territories.

### 3. Contextualized Responses for Each Category

These new approaches can present legal options to each Filipina entertainer that were not imaginable under the criminal justice and immigration control regime. For the first category (those who agreed only to a singer's job), the primary remedy is not sending them home but, instead, changing their workplaces to where they can perform as full-time singers according to their contracts. Furthermore, their visas should be renewed for a new full term to work at new places. The period during which they were unlawfully exploited against their contracts should not count toward the maximum duration of their visa stay.

For the second category (those who agreed to waitressing but not sexual service), the entertainers' initial expectation of work—waitressing and sitting and talking with customers—falls within the lawful boundary of hostess work under Korean law. It can be construed that the entertainers have made with their employers an unwritten contract to work as hostesses, with acquiescence by the Korean government. This fact should not affect their rights to remedies for

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209. CMW, *supra* note 114, art. 25, para. 3.

breach of contract and for human and labor rights violations. The primary remedy for these entertainers would be to move to workplaces where sexual services are not involved and labor standards are observed. However, such a place would be rare among foreigner-only clubs. Thus, as a proactive remedial measure, the government should allow them to work outside the entertainment industry as regular migrant workers if they so desire. Along with allowing a change of workplace, the government should issue them regular migrant worker visas for a new full term.

In the third category (those who agreed to voluntary sexual service only), the entertainers' expectation about their work, except prostitution, falls within the lawful boundary of hostess work. As in the second category, as a positive form of remedy for the breach of contract and rights violations, workers should be allowed to change the place of employment to sites where sexual services are not involved and labor standards are observed. Considering the extent of abuse and exploitation in their current workplaces, their visa periods should be renewed as well. However, if an entertainer wants to engage in sex work, but under safer, voluntary and non-exploitative conditions, she would have to assume a risk of penalty and deportation for violating the criminal and immigration law of Korea. However, it would be self-contradictory for the Korean government to prosecute and deport these migrant entertainers for engaging in sex work, since it issued them visas assuming they would engage in such work. The entertainers should be able to exercise their rights as migrant workers for their work within a lawful boundary, and should be entitled to lenient treatment in the criminal context.<sup>210</sup>

As discussed in Part III, the fourth and the fifth categories are hypothetical, and some entertainers in these groups may not be recognized as victims of trafficking. However, it does not affect the fact that these entertainers also experienced violations of rights under international and national law. Even if they do not neatly fit into the definition of trafficking victims in the context of criminal law, they should be entitled to remedies in the context of human rights, civil law, and labor law.

For the fourth category (those who were fully informed of their work in advance but hope to leave their clubs), the law should allow the entertainers to change their employers and workplaces like other migrant workers, based on unlawful practices prevalent in their current clubs. If the relevant law is reformed to treat migrant entertainers as regular migrant workers, changing employers would become a more solid right for these migrants under Korean law.<sup>211</sup>

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210. This Article does not take a position on whether prostitution itself should be prohibited in the legal system of individual states.

211. See *supra* text accompanying note 158.

For the fifth category (those who were fully informed in advance and hope to continue working in their clubs), a unilateral “rescue mission” either by government authorities or civil societies would be particularly problematic. Like in the third category, the government should be lenient in enforcing immigration and criminal law against these entertainers. The government should not criminalize and deport them on the basis of the very reason they were let in. The entertainers should be able to defend and exercise their human, civil, and labor rights independently of the criminal context.

## VI. CONCLUSION

This Article examined the realities of migrant entertainers and the relevant legal system and practice in Korea that have broader implications for the current anti-trafficking regimes at the international and national levels. This detailed analysis of law and reality through the lenses of human trafficking and labor migration illuminated the diverse and complex situations of these disadvantaged migrants, which the dichotomous and paternalistic approaches of the current regimes are incapable of addressing.

A positive reform of the framework would start by recognizing trafficking victims’ identity and aspirations as migrant workers and the need to fully address the rights violations suffered by any migrants whether or not they fit into the definition of trafficking victims. The concrete suggestions this Article makes seek to inspire discourse and law-making to develop proactive ways to empower marginalized migrants to make them less vulnerable to rights violations and to concretize their human rights, which are presently captured in mere rhetoric. Those efforts would produce much more effective measures to prevent human trafficking and exploitation than the current global campaigns of rigid prosecution and border control. Lastly, the empowerment of these victimized right-holders can be facilitated through their active participation in decision-making processes to make their voices count in developing better legal frameworks and responses for them.