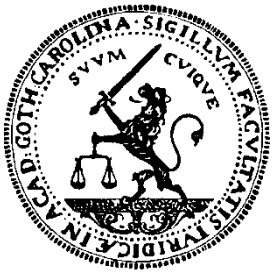


FACULTY OF LAW

Lund University

Chhour Vongdarareach

Trapped in Forced Labor and Discrimination: Cambodian Migrant Domestic Workers under the Memorandum of Understanding between Malaysia and Cambodia on the Recruitment and Employment of Domestic Workers

JAMM07 Master Thesis

International Human Rights Law

30 higher education credits

Supervisor: LEE SWEPSTON

Inspired by the story of Bong Srey Moa

Summary

Following the suspension of sending Cambodian migrant domestic workers (MDWs) to Malaysia in 2011, Cambodian and Malaysia have recently promulgated the Memorandum of Understanding (MOU) on the Recruitment and Employment of Domestic Workers. The purpose of this study is to examine the implications of the MOU on the human rights of Cambodian MDWs and to assess the compatibility of the MOU with International Human Rights Law. Using the legal dogmatic method and comparative legal method, the study analyzed the implications of the MOU on the fundamental human rights of Cambodian MDWs, specifically the elimination of all forms of forced or compulsory labor and the elimination of discrimination in respect of employment and occupation. The MOU is believed to expose Cambodian MDWs to forced labor situations, including trafficking in persons (TIPs), and discrimination in respect of employment and occupation. Their vulnerability is further compounded by the lack of access to justice under the MOU and related Malaysian legislation. In addition, the study discovered that a majority of the MOU's provisions are incompatible with or violate International Human Rights Law Standards, which either Malaysia or Cambodia is a State Party to; are recognized as the fundamental principles and rights at work by the ILO and other human rights treaty bodies; or are invoked by national courts and tribunals of non-ratified States. The research has definitively answered questions concerning the implications of the MOU on the human rights of Cambodian MDWs and the compatibility of the MOU with International Human Rights Standards. However, further studies are needed on the aspects of child labor, freedom of association, occupational and safety health, labor inspection, social security benefits, and repatriation.

Key words:

Cambodian Migrant Domestic Workers, Cambodia, Malaysia, Memorandum of Understanding, ILO Convention (No.189), International labor standards, International human rights standards, Terms and conditions of employment, Admission procedures and recruitment practices, Access to justice, Forced labor, Trafficking in persons, Discrimination in respect of employment and occupation.

Table of Contents

Acknowledgment

I would like to begin by thanking the Raoul Wallenberg Institute for making my academic dream here at Lund University a reality. To have been awarded the Institute's scholarship is an honor, and I hope to make them proud through my academic and professional career, wherever it may take me! Lena, I am grateful for your assistance in finding resources for this project. You are the greatest.

To my supervisor, Mr. Lee Swepston, you were indeed a fountain of knowledge from which to draw from throughout this project. Thank you for getting the best out of me: knowing when to motivate, advise, console, praise, and counsel! Your guidance has been invaluable.

To my parents, watching you working hard every day for our family is what has inspired me to work hard for this researcher project. My achievements would not have been possible without your love and support. You mean the world to me. My big brother and my little sister, you are my role models.

To all professors at the Law Faculty of Lund University, I employed everything you taught me in this research project. You earned my admiration and respect.

My best friends in Cambodia, Polin, Moniruoth, Leaphea, and Vathanak, you are the most remarkable human beings. Our friendship will always remain the same, even though we are walking on different paths. WE ARE GOING TO BE SUCCESSFUL.

Colm, you are my very best friend. I would not be who I am without you. *"Your thesis might not be the best, but you DID YOUR BEST. You should be proud of yourself,"* said Colm Kelly-Ryan. This is the biggest motivation. My dearest friends in Sweden, Lovisa, Iryna, Nadiath, Emma, Elina, Alvin, Stavroula, Fani, my journey in Sweden would not have been so marvellous without you. You exposed me to a new perspective on life. Your words and support and help in blowing off steam helped balanced my fears, anger, anxiety, and emotions. I am grateful for your kindness, patience, and care. I count myself fortunate to have such wonderful friends in my life.

To my mentors and former colleagues at the Khmer Rouge Tribunal and the Department of International Studies of the Royal University of Phnom Penh, I am grateful for your mentorship and guidance.

Abbreviations

ASEAN:	Association of Southeast Asian Nations
ATIPSOM:	The Malaysian Anti-Trafficking and Anti-Smuggling of Migrant Act
CDRI:	Cambodian Development Resources Institute
CEACR:	Committee of Experts on the Application of Conventions and Recommendations
CEDAW:	Convention/Committee on the Elimination of All Forms of Discrimination against Women
CMW:	Committee on the Protection of the Rights of All Migrant Workers and Members of Their families
COMPAS:	Center of Migration and Society
CPC:	Criminal Procedure Code
CRA:	Cambodian Recruitment Agency
DCA/CA:	Danchurchaid/Christian Aid Cambodia
DOL:	The Malaysian Department of Labor
ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
FOMEMA:	Foreign Workers' Medical Examination Monitoring Agency
HDI:	Human Development Index
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICMW:	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
IDWF:	International Domestic Workers Federation
ILC:	International Labor Conference
ILO:	International Labor Organization
ITUC:	International Trade Union Confederation
JWG:	Joint Working Group
MDWs:	Migrant Domestic Workers
MEF:	Malaysian Employers Federation

MOFAIC:	The Cambodian Ministry of Foreign Affairs and International Cooperation
MOHA:	The Malaysian Ministry of Home Affairs
MOHR:	The Malaysian Ministry of Human Resources
MOU:	Memorandum of Understanding
MRA:	Malaysian Recruitment Agency
MYR:	The Malaysian ringgit
NLAF:	National Legal Aid Foundation
OECD:	Organization for Economic Cooperation and Development
OSH:	Occupational Safety and Health
PAPA:	The Association of Employment Agencies
RELA	*Ikatan Relawan Rakyat Malaysia* (Volunteer Malaysian People)
SAP-FL:	The ILO´ Special Action Programme to Combat Forced Labor
SOPs:	Standard operating procedures
TIPs:	Trafficking in Persons
UN:	United Nations
UNDP:	United Nations Development Programme
UNFPA:	United Nations Population Fund
VCLT:	Vienna Convention on the Law of Treaties
VIS:	Victim Impact Statement

Chapter 1 Introduction

1.1. Contextual Background

In 1973, sociologist *Lewis Coser* made a bold anticipation that paid domestic workers would soon be obsolete because modernization and industrialization would significantly accelerate a global decline in domestic service. He designated domestic service as a pre-modern occupation that was done by an underclass of social inferiors who had no place in the social scheme of things.[1] His prediction was nevertheless misguided because paid domestic work has significantly increased during the last 20 years. In 2013, the International Labor Organization (ILO) estimated that at least 67 million people were employed as domestic workers globally. The estimates also put the number of migrant domestic workers (MDWs) globally at 11.5 million, representing 17.2 percent of all domestic workers and 7.7. percent of all migrant workers worldwide. To simplify, one in every five domestic workers was an international migrant. About 74 percent of all MDWs are women, compared to 80 percent of national domestic workers.[2]

The Asia and the Pacific region alone has the most substantial percentage of domestic workers, with over 40 percent of the global total.[3] Women and girls are the predominant laborers in this section of employment, with 83 percent of domestic workers represented by women.[4] This figure represents 7.8 percent of all women workers in paid employment.[5] In the region, just as the sector is dependent on women workers, it is also dependent on migrants, with approximately 2.24 million of the 9.1 million domestic workers are migrants.[6] These figures represent 19 percent of all migrant workers in Southeast Asia and the Pacific region.[7] Therefore, the region is home to the largest share of women MDWs, at least 24 percent of the global total.[8] Migrant children are also employed in domestic work in the region; however, their number is

---

[1] Lewis A Coser, 'Servants: The Obsolescence of an Occupational Role' (1973) 52 Social Forces 31, at p.31.
[2] Marie-Jose Tayah, 'Decent Work for Migrant Domestic Workers: Moving the Agenda Forward' (International Labour Organization 2016) Report p.25 <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_535596/lang--en/index.htm> accessed 17 March 2020.
[3] *ibid*, p.34.
[4] ILO, 'TRIANGLE in ASEAN: Towards Achieving Decent Work for Domestic Workers in ASEAN: 10th ASEAN Forum on Migrant Labour (AFML) – Thematic Background Paper' (International Labour Organization 2018) <https://www.ilo.org/asia/publications/WCMS_631089/lang--en/index.htm> accessed 8 March 2020.
[5]'Tayah (n 2) p.34.
[6] Claire Hobden, 'Domestic Workers Organize – but Can They Bargain?' (2015) Fact sheet <http://www.ilo.org/global/topics/domestic-workers/WCMS_345704/lang--en/index.htm> accessed 19 March 2020.
[7] International Labour Office and others, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers: Results and Methodology: Special Focus on Migrant Domestic Workers* (ILO 2015) p.5.
[8] Bridget Anderson, *Worker, Helper, Auntie, Maid? Working Conditions and Attitudes Experienced by Migrant Domestic Workers in Thailand and Malaysia* (First published, ILO Regional Office for Asia and the Pacific 2016) p.1.

not systematically monitored. ILO global estimates on child labor indicate that some 6.3 million children aged 5 to 14 years were engaged in domestic work in 2012.[9]

The last three decades have witnessed the tremendous growth in the number of migrant workers, notably female migrant workers, who equal half of an estimated 214 million international migrant workers worldwide.[10] In 2009, women migrants alone numbered about 83 million international migrants, which is equivalent to 48 percent of migrant workers globally.[11] That can be explained by the fact that many countries in the Middle East, awash with foreign exchange from the export of oil since the 1970's, began to recruit a significant number of migrant workers from Southeast Asia to work in construction and business.[12] As a case in point, the Malaysian economy heavily relies on foreign migrant workers. In an estimated labor force of 12.9 million in 2012, 1.6 million documented and an estimated 1.3. million undocumented foreign workers contributed to the national low-wage economic growth strategy.[13] The number reached its peak in 2017, with an estimated 1.7 million documented migrant workers and 3-4 million undocumented migrant workers. These figures represented more than 30 percent of the country's labor force.[14] The geographic location and extended coastline of Malaysia make it attractive for foreign migrant workers from the Asian region to enter the country in search of better employment opportunities in manufacturing, plantation, construction, and domestic work.[15]

The demands for temporary low wage Asian transitional women domestic workers in Malaysia began during the 1970s. It coincided with the industrialization of the Malaysian jobs market, which provided

---

[9] ILO, 'TRIANGLE in ASEAN: Towards Achieving Decent Work for Domestic Workers in ASEAN: 10th ASEAN Forum on Migrant Labour (AFML) – Thematic Background Paper' (n 4).

[10] United Nations Department of Economic and Social Affairs, *'United Nations' Trends in Total Migrant Stock: The 2008 Revision'* (United Nations Department of Economic and Social Affairs 2008), at p.1.

[11] United Nations Development Programme, *'Overcoming Barriers: Human Mobility and Development'* (Palgrave Macmillan 2009), at p.1.

[12] International Organization for Migration (2003), *Labour Migration: Trends, Challenges and Policy Responses in Countries of Origin* (International Organization for Migration 2003) pp.14-17.

[13] United Nations Development Programme, 'Country Programme Action Plan 2013-2015' (2012) p.6.

[14] ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project), *Review of Labour Migration Policy in Malaysia* (ILO 2016) p.1.

[15] Maria G Giammarinaro, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro: Mission to Malaysia' (United Nations Human Rights Office of the High Commissioner 2015) A/HRC/29/38/Add.1 para 5 <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15631&LangID=E> accessed 11 March 2020.

alternative employment opportunities for Malaysian women workers.[16] The aging of societies and the inadequacy of policy measures to facilitate the reconciliation of family life and work also underpinned this trend.[17] A significant leap in the numbers of MDWs occurred in the 1900s.[18] In the mid-1980s, roughly 4,000 work permits were issued to Filipina and Indonesian MDWs, and by early 2003, it was reported that 233,000 work permits had been issued to women MDWs.[19] According to a recent ILO quarterly briefing note, 300,000-400,000 migrant women have been employed as domestic workers in Malaysia, 250,000 of whom are legally registered from Cambodia, Indonesia, and the Philippines.[20] It is noteworthy that Malaysia operates the quota system in terms of sector, gender, and nationality to regulate the employment of all low-skilled migrant workers. The aim is to reduce the dependency on any single population of migrant workers and protected job opportunities for its citizens.[21] In the case of domestic work, approved countries are Indonesia, Philippines, Cambodia, Thailand, Sri Lanka, India, Vietnam, and Laos. The first three nations share the largest number of MDWs in Malaysia.[22]

Simultaneously, low-income Southeast Asian countries have pursued labor emigration as a strategy for generating foreign exchange, reducing domestic unemployment, and bolstering the economic survival of households through the payment of remittances.[23] The World Bank reiterated that migrant workers sent home at least USD 440 billion in 2010, of which USD 325 billion went to developing countries.[24] From a macroeconomic perspective, remittances are an excellent source of foreign exchange for Cambodia's economy. Remittances from Cambodian migrants increased in volume, steadily between 2000 and 2008,

---

[16] Shirlena Huang, Brenda SA Yeoh and Noor Abdul Rahman (eds), *Asian Women as Transnational Domestic Workers* (Marshall Cavendish Academic 2005) p.262.

[17] International Labour Conference, 'Fourth Item on the Agenda: Decent Work for Domestic Workers' (International Labour Organization 2011) Record of proceedings 15 para 2 <http://www.ilo.org/ilc/ILCSessions/previous-sessions/100thSession/reports/provisional-records/WCMS_157696/lang--en/index.htm> accessed 23 March 2020.

[18] Anderson (n 8) p.2.

[19] Huang, Yeoh and Noor Abdul Rahman, (n 16), at p.265.

[20] ILO, 'TRIANGLE in ASEAN Quarterly Briefing Note: Malaysia' (Regional Office for Asia and the Pacific 2019) <https://www.ilo.org/asia/publications/WCMS_614381/lang--en/index.htm> accessed 7 March 2020.

[21] ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project) (n 14) p.8.

[22] Immigration Department of Malaysia and Ministry of Home Affairs, 'Foreign Domestic Helper (FDH)' (*Foreign Domestic Helpers (FDH)*) <https://www.imi.gov.my/index.php/en/foreign-domestic-helper-fdh.html> accessed 29 February 2020.

[23] International Monetary Fund, *'World Economic Outlook: Globalization and External Imbalances'* (IMF 2005).

[24] World Bank, *Migration and Remittances Factbook 2011 Second Edition* (World Bank 2012) p.x <http://hdl.handle.net/10986/2522> accessed 17 August 2020.

from USD 121 million to USD 188 million or three percent of GDP. They decreased slightly over 2009 but rose again to USD 542 million in 2015. This was the highest record.[25]

It is essential to look beyond raw data and contextualize the Cambodian or Khmer society in which these MDWs originated. Cambodia is one of the poorest countries in Southeast Asia. According to the United Nations Development Programme (UNDP)'s Human Development Index (HDI), Cambodia's current HDI value is 0.581, which puts the country in the medium human development categories. The nation ranked 146th out of 189 countries and territories on the United Nations HDI in 2019.[26] The country has the largest youth and adolescent population in the Southeast Asia-Pacific region, with one in five Cambodians currently aged between 15 and 24 years old. Almost approximately two-thirds of the population are under the age of 30. Notwithstanding 300,000 young Cambodians entering the labor market annually, the job market in the country is inadequate to meet the demands of younger workers given the lack of economic diversification from agricultural activities.[27] The youth unemployment rate stood at 3.8 percent and 2.4 percent in 2012 and 2014, respectively, while the estimated average monthly income of paid employees in 2012 was only USD 119.[28] Together with the absence of a national set-minimum wage,[29] young Cambodian workers, therefore, see little choice than to emigrate in search of better economic conditions and wages.[30]

The country also experiences a vast gender inequality gap. According to the 2018 Gender Inequality Index of the HDI, Cambodia's rating for this measure is a mere 0.474, and the nation ranked 114th of the 162 countries. Only 15.1 percent of adult Cambodian women have reached a secondary level of education, as compared to 28.1 percent of Cambodian men.[31] As a result, the largest sectors of employment for Cambodian women workers are in the garment and informal economy. The garment sector alone employs

---

[25] OECD and Cambodia Development Resource Institute, *Interrelations between Public Policies, Migration and Development in Cambodia* (OECD 2017) p.40 <https://www.oecd-ilibrary.org/development/interrelations-between-public-policies-migration-and-development-in-cambodia_9789264273634-en> accessed 7 March 2020.

[26] United Nations Development Programme, 'Human Development Reports: Cambodia' (*United Nations Development Programme: Human Development Reports*, 2019) <http://hdr.undp.org/en/countries/profiles/KHM> accessed 17 August 2020.

[27] OECD and Cambodia Development Resource Institute (n 25), p.40.

[28] 'Youth Employment Policy Summary - Cambodia' (1 November 2016) <http://www.ilo.org/asia/publications/WCMS_534260/lang--en/index.htm> accessed 17 August 2020.

[29] The minimum wage scheme is only applicable for workers in garment sector.

[30] OECD and Cambodia Development Resource Institute (n 25), p.20.

[31] UNDP, 'Inequalities in Human Development in the 21st Century: Briefing Note for Countries on the 2019 Human Development Report: Cambodia' (United Nations Development Programme 2019) <http://hdr.undp.org/en/content/national-human-development-report-2019-cambodia> accessed 19 March 2020.

600,000 people, and up to 85 percent of workers are women.[32] There is a striking similarity between the garment sector and domestic workers who hail from Cambodia. It is not to say that men do not also engage in such economic activities, but it reflects the gender segregation and stereotypes in Cambodian employment and society more broadly. However, the country's garment sector was adversely affected by the global economic crisis, with over 30,000 garment workers were laid off in 2009.[33] Therefore, Cambodian women workers decided to migrate and take up job opportunities, notably domestic work, abroad.

An estimated 1.19 million Cambodians, which were equivalent to 7.6 percent of the total population, were emigrating for employment purposes in 2015. Thailand has been the most common destination country, receiving 68 percent of Cambodia's emigrants in 2015. The majority of whom were men being employed in manufacturing and services.[34] The feminization of Cambodian labor migration is nevertheless pronounced in Malaysia even though the country houses only one percent of all Cambodian migrant workers. It was also the first nation to sign a Memorandum of Understanding (MOU) with Cambodia to provide a legal framework to govern labor migration between both nations.[35] In 1996, the Malaysian Ministry of Human Resources (MOHR) first permitted Cambodian workers to be legally employed in the country. This led to an influx of migrant workers from 1998 onwards. In total, 46,541 Cambodians obtained official permission to work in Malaysia between 1998 and 2016. Up to 86 percent of them were women, and more than 70 percent migrated for domestic work, while the rest are employed in Malaysia's manufacturing industries.[36]

---

[32] Laurie Parsons and Sabina Lawreniuk, '"I Know I Cannot Quit." The Prevalence and Productivity Cost of Sexual Harassment to the Cambodian Garment Industry' p.2 <http://rgdoi.net/10.13140/RG.2.2.25475.35366> accessed 17 August 2020.

[33] Jyotsna Poudyal, *'They Deceived Us at Every Step': Abuse of Cambodian Domestic Workers Migrating to Malaysia* (Human Rights Watch 2011) p.20.

[34] International Labour Organization, *Kingdom of Cambodia Decent Work Country Programme (DWCP) 2019-2023* (2019) pp.20-21 <http://www.ilo.org/asia/publications/WCMS_710183/lang--en/index.htm> accessed 17 August 2020.

[35] OECD and Cambodia Development Resource Institute (n 25) p.38.

[36] Ministry of Labor and Vocational Training, 'Number of Cambodian Workers in Malaysia 1998-2016' (MOLVT 2017); Rebecca Napier-Moore, 'Protected or Put in Harm's Way?' (International Labour Organization & UN Women 2017), p 39, Report <http://www.ilo.org/asia/publications/WCMS_555974/lang--en/index.htm> accessed 17 March 2020. Other source offers slightly different figures. It was estimated that Cambodian sent a total of *52, 265* workers to Malaysia between 1998 and 2015. 76 percent of them were women. Read Ministry of Labor and Vocational Training, 'Statistic on Cambodian Workers Officially Sent to Work Abroad' (MOLVT 2015).

The number of Cambodian MDWs spiked in 2009 when Indonesia decided to impose a moratorium on sending their workers to Malaysia.[37] Before this ban, Malaysia was reportedly hosting 300,000 MDWs, mostly from Indonesia and the Philippines, but the number dropped during the two-year suspension introduced by Indonesia. Consequently, there were over 35,000 Malaysians on the waiting list for domestic workers. recruitment agencies consequently turned to Cambodia to make up the shortage, substantially increasing the number of Cambodian MDWs in Malaysia.[38] In 2010, the Cambodian Government reported that 11,918 women migrating to Malaysia for domestic work.[39] In an interview with the Human Rights Watch, the former Second Secretary of the Royal Embassy of Cambodia in Malaysia, Mr. Ung Vantha, stated that 25,000 nationals were working in Malaysia between 2008 and 2011. However, he did not demonstrate the proportion shared by Cambodian MDWs in this number.[40] According to the same source, the Malaysian Embassy in Phnom Penh estimated that the number of visas issued to Cambodian domestic workers more than tripled between 2008 to early 2010. Roughly 18,038 Cambodians domestic workers obtained employment visas between January and August 2010, as compared to 5,304 and 12,682, in 2008 and 2009, respectively.[41]

Regrettably, reports of abuse and exploitation of Cambodian MDWs had been recorded. In response, the Cambodian Government suspended the first-time migration to Malaysia for domestic work, on 15 October 2011, as per Circular No. 11 SRNN of the Royal Government of Cambodia on Suspension of recruitment, training, and sending female domestic workers to Malaysia. The suspension excluded Cambodian MDWs who had already been employed in Malaysia.[42] The ban resulted in a sudden drop in Cambodia's official numbers of MDWs, from 3,510 in 2011 to only 70 women workers migrating from Cambodia to all work sectors in Malaysia in 2012. These figures reflect how dependent Cambodian migrant women in Malaysia were on the domestic work sector. According to the Cambodian Ministry of Labor and Vocational Training

---

[37] 'Indonesia/Malaysia: New Pact Shortchanges Domestic Workers: Weak Protection as Global Body Finalizes Comprehensive Standards' (*Human Righst Watch*, 31 May 2011) <https://www.hrw.org/news/2011/05/31/indonesia/malaysia-new-pact-shortchanges-domestic-workers> accessed 2 March 2020.

[38] Liz Gooch, 'A Cry for More (Domestic) Help in Malaysia - The New York Times' *The New York Times* (22 February 2011) <https://www.nytimes.com/2011/02/23/world/asia/23iht-maids23.html> accessed 2 March 2020.

[39] Ministry of Labor and Vocational Training, 'Policy on Labor Migration for Cambodia' (MOLVT 2014) p.14.

[40] Poudyal (n 33) p.22. Estimates also vary. Tenganita, a migrant rights NGO in Malaysia, cited Cambodian embassy estimates of over 50,000 Cambodian domestic workers in Malaysia, "Malaysian Employers Continue to Act with Impunity in the Abuse, Torture & Ill-treatment of Cambodian Workers," Tenaganita news release, August 11, 2011.

[41] Poudyal (n 33), p.22.

[42] Rebecca Napier-Moore (n 36) p.39.

(MOLVT), there was no migration to Malaysia for domestic work since the 2011 ban.[43] However, the Malaysian Government reports a figure of 169,043 MDWs, of which 5,800 from Cambodia.[44] The number decreased to a total of 3,143 Cambodian MDWs by 31 August 2016. It is unknown how many, if any, of these domestic workers traveled to Malaysia before the 2011 ban, but it is possible that some did.[45] Danchurchaid/Christian Aid Cambodia (DCA/CA) estimates that over 10,000 Cambodian women were working in the sector as of 2015.[46]

Table 1: Data before and and after the 2011 Cambodian ban on migration to Malaysia to domestic work

Data Source	**Before 15 October 2011 Ban**	**After 15 October 2011 Ban**
Cambodian Government Data	11,918 registered with the Cambodian Government (2010)	0 registered with the Cambodian Government (2012-2016)
Malaysian Government Data	18,038 obtained Visa from the Malaysian Embassy in Cambodia	3,143 registered with the Malaysian Government (2016)
NGO estimate	18,038 obtained Visa from the Malaysian Embassy in Cambodia	10,000 estimated registered and unregistered in Malaysia

By 10th October 2015, several years of bilateral negotiation culminated with Cambodia and Malaysia signing two MOUs. One of them is on the recruitment and employment of domestic workers, which is the primary focus of this research paper. The objective of the MOU is to establish the framework for the recruitment, employment, and repatriation of the domestic workers.[47] Simply put, the MOU intends to re-open a regular channel for domestic workers' migration to Malaysia, as well as enhance legal protections

[43] Ministry of Labor and Vocational Training, 'Policy on Labor Migration for Cambodia' (n 39), at p.9.
[44] *Direct Request (CEACR) - adopted 2018, published 108th ILC Session, Migration for Employment Convention (Revised), 1949 (No.97), Malaysia (Sabah)*.
[45] Rebecca Napier-Moore (n 36) p.34.
[46] Carol Strickler and Khun Sophea, 'We Are Not Invisible - Analysis of the Situation of Cambodian Migrant Domestic Workers in Malaysia and Singapore — English' (DANCHURCHAID/ CHRISTAIN AID CAMBODIA 2015) p.1 <https://idwfed.org/en/resources/we-are-not-invisible-analysis-of-the-situation-of-cambodian-migrant-domestic-workers-in-malaysia-and-singapore> accessed 9 March 2020.
[47] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 2.

for Cambodian MDWs.[48] Under Article 17(1) of the MOU, this bilateral agreement comes into force on the date of signing and remains in force for a period, which has been yet determined by the MOU's parties. Here, it can be implied that the MOU is a legally-binding bilateral agreement, but it depends on both Governments to decide on how long this bilateral agreement shall be in force. In addition, each party is entitled to terminate the agreement by notifying the other party of its intention to terminate the MOU by notice in writing through diplomatic channels, at least three months before its intension to do so. The termination of the MOU does not affect the contract of employment, or any permit or license granted before the date of the termination.[49]

The 2015 MOU lifted the 2011 suspension, in theory. However, MOLVT sent a letter to the directors of private recruitment agencies on 3rd June 2016 informing that *"the suspension of recruitment and sending of female domestic workers in Malaysia is still in force according to the Circular No.111 SRNN, dated 15 October 2011."*[50] Besides, the MOU implementation policy or Standard Operating Procedures (SOPs) had not yet been officially agreed between December 2015 and March 2017. Therefore, regular migration channels for domestic work to Malaysia were not officially opened, and the restriction remained in place.[51] However, the enforcement policy is fluid, and MOLVT noted in September 2016 that recruitment agencies were already sending domestic workers to Malaysia under the MOU despite the lack of established procedures.[52] It was until 2018 when the very first batch of Cambodian domestic workers was officially sent to Malaysia in 2018 under the framework of the MOU.[53]

---

[48] Shah Aliza, 'Labor Rights Groups Stunned by Malaysia-Cambodia Agreement to Protect Domestic Maids' *New Straits Times* (4 December 2017) <https://www.nst.com.my/news/nation/2017/12/310428/labour-rights-groups-stunned-malaysia-cambodia-agreement-protect-domestic> accessed 3 March 2020.

[49] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 17.

[50] Rebecca Napier-Moore (n 36), p.29.

[51] Rebecca Napier-Moore (n 36), p.29. A 18-19 July 2016 Task Team Meeting to discuss the SOP was inconclusive, with a particular disagreement about setting a minimum wage for domestic workers, and fee structures for recruitment and training.

[52] *ibid*. Also read "Mission report" a paper presented at workshop to review the implementation of Cambodia's Labor Migration Policy and develop a plan of action, Phnom Penh, 31 Aug-2 Sep.

[53] FMT Reporters, 'Report: Cambodia to Resume Sending Maids to Malaysia' (*Free Malaysia Today*, 23 January 2018) <https://www.freemalaysiatoday.com/category/nation/2018/01/23/report-cambodia-to-resume-sending-maids-to-malaysia/> accessed 22 April 2020; Leonie Kijewski and Yon Sineat, 'Cambodian Maids to Head to Malaysia in June | Phnom Penh Post' *The Phnom Penh Post* (24 January 2018) <https://www.phnompenhpost.com/national/cambodian-maids-head-malaysia-june> accessed 3 March 2020.

1.2. Research Purpose and Research Questions

The purpose is to examine the implications of the MOU's provisions on the human rights of Cambodian MDWs and to assess their compatibility with International Human Rights Law. Only through this could the research paper shine the light on abuses, exploitation, and challenges experienced by Cambodian MDWs. Pursuant to this aim, the researcher seeks to address the following main research questions:

Main research question: What are the implications of the Memorandum of Understanding between Cambodia and Malaysia on the Recruitment and Employment of Domestic Workers on the human rights of Cambodian migrant domestic workers (MDWs)? How does the MOU differ from the International Human Rights Law Standards? In seeking the answer to this dissertation's overarching research problem, the following clusters of questions will be asked:

1. How does the MOU regulate the admission procedures and recruitment practices of Cambodian MDWs? What are the implications of the MOU-compliant framework of admission procedures and recruitment practices on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the admission procedures and recruitment practices of MDWs? How does the MOU differ from the International Human Rights Law Standards?

2. How does the MOU regulate the employment of Cambodian MDWs? What are the implications of the MOU-issued contract of employment and related provisions on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the employment of MDWs? How does the MOU differ from the International Human Rights Law Standards?

3. How does the MOU regulate the right of access to justice? What are the implications of the MOU's provisions and related national legislation on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the right of access to justice? How does the MOU differ from the International Human Rights Law Standards?

1.3. Significance of the Study

The dissertation deals with a category of workers who perform one of the oldest and most important occupations. However, domestic work remains undervalued, unprotected, and poorly regulated under national legislation and bilateral agreements. Domestic workers' vulnerability increases if they are migrants and women. This dissertation puts spotlights the intersection of labor law and immigration law when

regulating the recruitment and employment of MDWs. This topic is indeed crucial, but remains insufficiently researched. This dissertation narrows this gap by explaining how MDWs live in the shadows of these two legal frameworks, which always exclude or differentially include MDWs.

There has been a shortage of literature and research studies about the 2015 MOU between Cambodia and Malaysia on the recruitment and employment of domestic workers. By way of example, the 2017 ILO and UN Women-commissioned study prepared by Rebecca Napier Moore solely examined policy restrictions on women's migration in Southeast Asia, particularly the 2011 Cambodian ban on migration to Malaysia for domestic work. However, it made no critical assessment of the MOU concerned.[54] Jenna Holliday's recent ILO study about standard employment contracts for migrant workers in the plantation and domestic work sectors in Malaysia may address the MOU-issued contract, but disregards other MOU provisions concerning the recruitment and employment of Cambodian MDWs.[55] Therefore, her study does not provide an adequate analysis of the MOU. The same holds for the 2015 International Domestic Workers Federation (IDWF)-commissioned research report of Cambodian MDWs in Malaysia and Singapore prepared by Carol Stricker and Khun Sophea,[56] the 2016 ILO-commissioned study of working conditions and attitudes experienced by MDWs in Malaysia prepared by Bridget Anderson,[57] and the 2017 report "Interrelations between Public Policies, Migration, and Development in Cambodia" prepared by the Cambodian Development Resource Institute (CDRI) and the OECD Development Center.[58] This research paper fills in the existing loophole by analyzing the implications of the MOU on the human rights of Cambodian MDWs and assessing the MOU's compatibility with International Human Rights Law Standards.

Most studies also disregard the implications of legislation and migration policies of the host states on Cambodian migrant workers, including MDWs. As a case in point, the study prepared by CDRI and the OECD Development Center, examining the impacts of Cambodian migration policies on Cambodian migrant workers, concluded that migration for employment significantly contributes to the development of Cambodia and the prosperity of Cambodian workers even though the potential of migration is not fully exploited. However, this conclusion could be misguided because it disregards the influence of migration policies and legislation of the host States on Cambodian migrant workers. The MOU stipulates that the

---

[54] Rebecca Napier-Moore (n 36).
[55] 'Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia' (2020) Report <http://www.ilo.org/asia/publications/WCMS_749704/lang--en/index.htm> accessed 18 July 2020.
[56] Carol Strickler and Khun Sophea (n 46).
[57] Anderson (n 8).
[58] OECD and Cambodia Development Resource Institute (n 25).

recruitment and employment of Cambodian MDWs are conducted in accordance with the terms of the MOU and domestic laws, rules, regulations, national policies and directives of Cambodia and Malaysia.[59] Likewise, the Cambodian MDWs' contract of employment is governed and construed by the laws of Malaysia.[60] Therefore, the analysis of the MOU concerned must incorporate the related Malaysian legislation, regulations, directives, and policies, in order to mitigate any distorted analysis by adequately presenting actual challenges experienced by Cambodian MDWs.

In addition, there have been limited studies about Cambodian MDWs in every field of research. For instance, Piyasiri Wickramasekara's recent study specifically focuses on the admission and recruitment of Indonesian MDWs under the Malaysian related legislation and policies.[61] Other studies conflated the experiences of Cambodian MDWs to the cluster of migrant workers generally or with MDWs from other countries. For instance, The study of work-life experiences of women MDWs in Malaysia by Wee Chan Au conducted a qualitative interviews with 13 women MDWs from Indonesia and Philippines working in Malaysia.[62] The study's research method sets aside the experience of Cambodian MDWs, whose terms and conditions of employment, particularly wages, hours of work, and conditions of terminating the employment, are different from their counterparts.[63] Thus, her study may have taken a universalist claim about women MDWs in Malaysia. Furthermore, the ILO-commissioned study prepared by Jane Hodge, which assesses the complaint mechanisms established by the Cambodian Government for Cambodian migrant workers, did not segregate the experiences of Cambodian MDWs from Cambodian women migrant workers in other sectors. Besides that, the interviews in her study were restricted with the representative of migrant workers and Cambodian Government officials, thereby possibly leading the misrepresentation of Cambodian MDWs' voices.[64]

Professor Kimberle Crenshaw, in her central feature of intersectionality, once said that *"this focus on the most-privileged group members marginalizes those who are multiply-burdened, and obscures claims that*

---

[59] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Article 3.

[60] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015 pt Appendix B, clause 12.

[61] Piyasiri Wickramasekara, 'Malaysia: Review of Admission and Recruitment Practices of Indonesian Workers in the Plantation and Domestic Work Sectors and Related Recommendations' (2020) Report <https://www.ilo.org/global/publications2/WCMS_749695/lang--en/index.htm> accessed 24 July 2020.

[62] Wee Chan Au and others, 'The Work-Life Experiences of an Invisible Workforce: The Case of Live-in Women Migrant Domestic Workers in Malaysia' (2019) 39 Equality, Diversity and Inclusion: An International Journal 567.

[63] Please read the fourth chapter.

[64] Jane Hodge, 'Assessment of the Complaints Mechanism for Cambodian Migrant Workers' (2016), Report, at p.1 <http://www.ilo.org/asia/publications/WCMS_466494/lang--en/index.htm> accessed 17 March 2020.

cannot be understood as resulting from discrete sources of discrimination. I suggest further that this focus on otherwise-privileged group members creates a distorted analysis of racism and sexism because the operative conceptions of race and sex become grounded in experiences that actually represent only a subset of much more complex phenomenon."[65] Therefore, because Cambodian MDWs become the important theme in this dissertation, it represents the actual voice of Cambodian MDWs and serves as a catalyst to narrow the gaps in the existing literatures related to MDWs.

The Governments of Malaysia and Cambodia have been encouraged to sign and ratify the ILO Convention concerning Decent Work for Domestic Workers (No.189) and other relevant international human rights instruments. However, neither State has manifested any sign of interest in ratifying such instruments. The ratification of international human rights instruments requires strong advocacy and pressure from academic think tanks. The author wishes to be a part of it by producing a thorough research paper that is conducive to Malaysian and Cambodian ratifications of the ILO Convention (No.189) as well as other relevant Conventions.

1.4. Methods and Materials

Since each research question differs in materials and methods being used as well as complexity levels, the author has decided to divide them into separate clusters to simplify the presentation of the methodological considerations that have been made. As indicated above, there are three sub-research questions, and each sub-research question contains three parts. The first part examines how the MOU, together with States Parties' legislation, regulates the recruitment of Cambodian MDWs, their terms and conditions of employment, and access of justice. On the other hand, the second part concerns how International Human Rights Law Standards, including related ILO Conventions and Recommendations, address aforementioned subjects. Lastly, the third part aims at assessing the implications of the MOU on the human rights of Cambodian MDWs and the compatibility of the MOU with International Human Rights Law Standards.

Primarily, the first part of each sub-research question has been categorized within one cluster since it has been evaluated solely through the "Legal Dogmatic Method" to explore and scrutinize the related legal norms and standards concerning the recruitment, employment, and access to justice for Cambodian MDWs. The "Legal Dogmatic Method" means the study of norms and the interpretation of norms. It is used to determine *de lege lata*, namely the meaning and significance of the rule law, by studying all relevant sources

[65] Kimberlé Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] u. Chi. Legal f. 139, p.140.

of law and interpretation of the law, such as legislation, case law, and doctrine.[66] Simply put, it engages with legal practice by reacting to changes to the law by legislators and courts, turning legal doctrine into a living system that aims to achieve both constancy and change in the development of law. Consequently, it accommodates new developments such as recent case law and legislation against the background of social change. This is well captured in the original meaning of the Latin term "*doctrina,"* which refers to knowledge or learning which is passed on from one generation to the next. It sets the approach apart from the comparative method that is geared towards the different goals of understanding another legal system than the positivist legal system.[67]

Article 3 of the MOU states that "the parties agree that the recruitment, employment, and repatriation of the domestic workers shall be conducted in accordance with and subject to the terms of this MOU and the domestic laws, rules, regulations, national policies and directive of each party and within the limits of its competencies, jurisdiction and available resources." This provision implies the essence of using States Parties' legislature, case law, and directives to interpret the MOU's provisions and the MOU-compliant contract's clauses. However, the legal sources being used have solely consisted of the paragraphs in the legislature because of the lack of transparency in both countries regarding all areas of the legal system, including the absence of legal sources such as preparatory work and case law. Even though there is case law available online, it only entails the final award, without detailing legal arguments presented by parties and legal reasoning presented by the judges, or the full-versioned case laws are written in Bahasa Malaysia (*Malay*). Furthermore, Malaysia does not have a legislation that governs the recruitment of foreign workers, including MDWs. However, the Malaysian rules that govern the recruitment of foreign workers, including MDWs, are constituted on an *ad hoc* basis at the ministerial level by the Cabinet Committee on Foreign Workers and Illegal Immigrants or at the department level by the Immigration Department. These rules take the form of policies and circulars. They are not published, and their content changes frequently. Knowledge of their contents is available only from press releases and third-party web sources.

[66] South Ural State University and others, 'Formal-Dogmatic Approach in Legal Science in Present Conditions' [2018] Journal of Siberian Federal University. Humanities & Social Sciences 968, p.968.

[67] Jan M Smits, 'What Is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (Cambridge University Press 2017) pp.212-213 <https://www.cambridge.org/core/product/identifier/9781316442906%23CT-bp-6/type/book_part> accessed 11 June 2020.

Despite this, Practical Guidelines for Employers on the Recruitment, Placement, Employment, and Preparation on Foreign Workers in Malaysia,[68] ILO materials,[69] information from Immigration Department's websites, and the ethnographic research about Indonesian MDWs in Malaysia by Olivia Killias,[70] provide an adequate presentation of the Malaysian admission procedures and recruitment practices of foreign workers, including MDWs. Cambodia's Sub Decree (No.190) on the Management of Sending Cambodian Workers Abroad Through Private Recruitment Agencies,[71] other eight *Prakas* (Circulars or Ministry-level Decrees) adopted by Cambodian MOLVT, and ILO-commissioned studies[72] sufficiently explain the recruitment of Cambodian MDWs taking place in the country of origin. Studies from the United Nations Inter-Agency Project on Human Trafficking (UNIAP)[73] and the study of the recruitment of Cambodian migrant workers by Jenna K. Holliday helped further supplement the presentation.[74]

Terms and conditions of employment are vaguely stipulated in the model contract of employment attached to MOU. Given to the fact that the Governments of Cambodia and Malaysia have been slow in producing data concerning the employment of Cambodian MDWs, this dissertation referred to the study of MDWs in Thailand and Malaysia prepared by Bridget Anderson,[75] the study of Cambodian MDWs in Malaysia and Singapore commissioned by Danchurchaid/Christian Aid Cambodia (DCA/CA),[76] the Guidelines and Tips for Employers of Foreign Domestic Workers prepared by the Malaysian MOHR,[77] and newspapers, to construe provisions embedded in the model contract. These studies are the most recent reliable data. Even though they were publicized before the promulgation of the MOU in 2015, the author believes that they are

---

[68] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia 2014.
[69] Wickramasekara (n 61).
[70] Olivia Killias, *Follow the Maid: Domestic Worker Migration in and from Indonesia* (NIAS Press 2018).
[71] Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies 2011 (190).
[72] International Labor Organization, *Recruitment Fees and Related Costs: What Migrant Workers from Cambodia, the Lao People's Democratic Republic, and Myanmar Pay to Work in Thailand* (2020) <http://www.ilo.org/asia/publications/WCMS_740400/lang--en/index.htm> accessed 20 June 2020.
[73] UNIAP (ed), *Recruitment Agencies and the Employment of Cambodian Domestic Workers in Malaysia* (United Nations Inter-Agency Project on Human Trafficking 2011) <https://hdl.loc.gov/loc.gdc/gdcovop.2012330494> accessed 6 March 2020.
[74] Jenna K Holliday, 'Turning the Table on the Exploitative Recruitment of Migrant Workers: The Cambodian Experience.' (2012) 40 Asian Journal of Social Science 464.
[75] Bridget Anderson is the Director of Migration Mobilities Bristol and Professor of Migration, Mobilities and Citizenship. Anderson (n 8).
[76] It is an NGO that has been supporting the Cambodian people since 1979. Today, it works with 14 local partners to take on some of the country's most pressing challenges. For further information: https://www.danchurchaid.org/where-we-work/cambodia.
[77] Guidelines and Tips for Employers of Foreign Domestic Workers, 2017.

indicative of the situation today because the laws nor the practices have been changed. Therefore, the partial data available concerning the present situation suggests that the situation remains the same.

Regarding the right of access to justice in the fifth chapter, the researcher refers to the study entitled *"Migrant Workers' Access to Justice: Malaysia"* from the Malaysian Bar Council to comprehend the interpretation and visualize the implementation of related Malaysian legislation in relation to forced labor, including trafficking in persons (TIPs).[78] The Malaysia Bar Council has been the most independent professional association for legal practitioners operating in Peninsular Malaysia since 1947. The analysis is further supported by the 2015 Mission Report in Malaysia by the Special Rapporteur on TIPs, Especially Women and Children, Maria Grazia Giammarinaro,[79] and the TIPs Reports prepared by the United States' Department of State.[80] These reports have gathered anti-trafficking law enforcement data from various sources, which provide insights into trends over time and enhance understanding of the implementation of Malaysian legislation and policy framework concerning anti-trafficking and forced labor.[81]

Secondly, the researcher has categorized the second part of each sub-research questions within the same cluster even though the "Legal Dogmatic Method" remains the sole method for legal interpretation. The slight difference in this cluster is that the researcher underlines more the importance of principles and provisions in the 1969 Vienna Convention on the Law of Treaties (VCLT), drafted by the International Law Commission of the United Nations, adopted by the UN Conference on Law of Treaties in 1969, and since then ratified by many but not all States. The author does not deny the influence of VCLT in interpreting MOU's provisions, but its influence is far greater in this cluster. Article 31(1) of VCLT entitled *"General Rule of Interpretation"* stipulates that "a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purposes."[82] It underlines the linguistic expression of the provision. Article 31(2) is a subsidiary in respect of Article 31(1), as it defines what is to be taken as the "context" against which individual treaty provisions are to be understood. It lists the whole text of the treaty (including its preamble and annexes), as well as any separate agreements or instruments that were adopted or accepted simultaneously with the treaty by the

---

[78] Bar Council Malaysia, 'Migrant Workers' Access to Justice: Malaysia' (Bar Council Malaysia) <https://www.malaysianbar.org.my/document/about-us/committees/migrants-refugees-and-immigration-affairs-committee&rid=38729> accessed 14 July 2020.
[79] Giammarinaro (n 15).
[80] U.S. Department of State, 'Trafficking in Persons Report 20th Edition' (US Department of State 2020) <http://my.usembassy.gov/our-relationship/official-reports/2020-trafficking-in-persons-malaysia/> accessed 14 July 2020.
[81] *ibid*, p.14.
[82] Vienna Convention on the Law of Treaties, 1969, Article 31(1).

same States. Therefore, the interpretation must consider that all other provisions in a treaty (and other texts adopted in parallel to it), and it will affect how that linguistic expression is to be understood. A single provision is hence subject to systematic interpretation.[83]

Article 32 entitled "Supplementary Means of Interpretation" provides that "recourse may be had to supplementary means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Both the title of the provision and its own terms – understood in their ordinary meaning – make clear that additional means of interpretation mentioned in this provision are secondary,[84] as they, according to the provision itself, are resorted to when an effort under Article 31 has left the meaning of the treaty provision to be interpreted as "ambiguous or obscure," or has led to a "manifestly absurd or unreasonable results."[85] Only two supplementary means of interpretation are mentioned in the provision, but with a wording that clearly shows that the list of two is not exhaustive: including *preparatory of work of the treaty (travaux preparatoires) and the circumstances of its conclusion*. The latter means other statements or events related to the conclusion of the treaty than those already included under the context in Article 31 (2).[86]

The reference to preparatory works (*travaux preparatoires*), also being of supplementary nature, is to be approached much more carefully, as the ordinary meaning of the wording of Article 32 suggests that they would be consulted only in exceptional circumstances. Preparatory works will inevitably be relied upon also under Article 31, for instance, to establish in good faith what the object and purpose were, or how the ordinary meaning of the terms of the treaty was understood at the time it was drafted. Hence, *travaux preparatoires* as a supplementary means of interpretation should be understood as given them a decisive role when an interpretative effort has failed under Article 31, not as excluding arguments derived from preparatory works already when applying the general rule.[87]

Given the fact that the second part of each sub-research question includes international sources such as international human rights conventions and covenants rather than national sources, this awareness has not

---

[83] Bård-Anders Andreassen, HO Sano and Siobhán Mclnerney-Lankford (eds), 'The Art and Science of Interpretation in Human Rights Law', *Research methods in human rights: a handbook* (Edward Elgar Publishing 2017) p.23.
[84] *ibid,* p.24.
[85] Vienna Convention on the Law of Treaties, 1969, Article 32.
[86] Andreassen, Sano and Mclnerney-Lankford (n 83) p.24.
[87] *ibid,* p.25.

been applied to the same extent. The author mainly references to the digest of comments and decisions developed by the ILO's Committee of Experts of Conventions on the Application of Conventions and Recommendations (CEACR). The primary function of the CEACR is to examine and evaluate the reports submitted by ILO members on ratified and unratified Conventions; measures taken to bring newly adopted Conventions before the competent authorities for the enactment of the legislation, and the action taken by these authorities; as well as to guide governments, where necessary, toward a fuller measure of compliance. The conclusions of the CEACR are in the form of comments on the various reports examined. These comments may be either in the form of observations or direct requests.[88] The observations are used by the Committee to draw the attention of a reporting member to acute or long-standing failure to comply with such Members' obligations. On the other hand, direct requests are often used to obtain clarification from member States concerning their reports, or for matters or questions of a technical nature.[89] The CEACR's observations and direct requests are not recognized as legally binding to member States. Yet, its comments are extensive and provide clarification regarding the interpretation of the articles. International human rights treaty bodies, together with national courts and tribunals of Members States, have increasingly used the CEACR's observations and direct requests to interpret international human rights instruments (further examined in Chapter 2).[90]

The author also acknowledges the role of other United Nations treaty bodies in developing human rights law. These treaty bodies elucidate and develop states' obligations under the various treaties through the adoption of general comments and concluding observations in response to States' reports. These are described as "secondary treaty law." They are reinforced when States comply with the reporting requirements and are responsive to the concluding observations made by the various committees.[91] This dissertation refers to general comments, recommendations, and concluding observations developed by the Human Rights Committee,[92] the Committee on the Protection of the Rights of Migrant Workers and

[88] Ebere Osieke, *Constitutional Law and Practice in the International Labour Organisation* (M Hijhoff 1985) pp.173-174.
[89] *Rules of the Game: A Brief Introduction to International Labour Standards (Revised Edition 2014)* (2014) p.102 <http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm> accessed 25 March 2020.
[90] Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' (2020) 49 Industrial Law Journal 86.
[91] Daniel Moeckli and others (eds), *International Human Rights Law* (Third edition, Oxford University Press 2018) p.79.
[92] The Human Rights Committee is the body of independent experts with a mandate to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR) by its States Parties.

Members of their Families (CMW),[93] and the Committee on the Elimination of Discrimination against Women (CEDAW).[94]

The researcher also utilizes written communications heard by the Human Rights Committee, which has a form of quasi-judicial competence. The mandate is established under Article 41 of the ICCPR.[95] Its decisions and views are not legally binding, but communications allow for the treaties bodies to develop jurisprudence on the interpretation and application of relevant treaties and their opinions may be cited before decision-makers, used as supporting-evidence of current human rights law, and cited in judicial proceedings.[96] The Human Rights Committee has described its view as having some of the characteristics of judicial decisions in that they *" arrived at in a judicial spirit, including the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions and as such provide an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument."*[97] This view appears to be accepted by the International Court of Justice (ICJ), which has stated that *"the Human Rights Committee has built up a considerable body of interpretative case law, in particular through its finding in response to the individual communications which may be submitted to it in respect of States parties to the first Optional Protocol, and in the form of its General Comments. Although the Court is no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body."*[98]

Lastly, the researcher clustered the third part of each sub-research question in another category, mainly due to the apparent need for a comparative method. However, it also entails a certain degree of legal dogmatic method. The comparative method has become more essential than ever because no country can escape the effects of international norm-setting and the aftermaths of globalization. The comparative method will;

---

[93] The CMW is the body of independent experts with a mandate to monitor the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). 'The International Convention on Migrant Workers and Its Committee: Fact Sheet No.24 (Rev.1)' (Office of the United Nations High Commissioner for Human Rights 2005) p.10.

[94] The CEDAW is the body of independent experts, consisting of 23 experts on women's rights from around the world, that monitors the implementation of the CEDAW.

[95] International Covenant on Civil and Political Rights, 1966.

[96] Moeckli and others (n 91) p.79.

[97] General Comment (No.33): The Obligation of States Parties under the Optional Protocol to International Covenant on Civil and Political Rights 2009 paras 11–13.

[98] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (International Court of Justice (ICJ) p.639.

therefore, become even more important in the future.[99] There is also a great deal of evidence that in drafting labor laws, the legislator is interested in international experience and sometimes even uses it.[100] The third part will be evaluated through a comparative method mainly because it is acknowledged as the best method for examination of the application of international minimum standards.[101]

S.A. Ivanov emphasized the importance of having an adequate understanding of the pitfalls of the comparative method because the wrong comparative study might be worse than none. One essential part of the comparative method is the study of law in action, or so-called "living law" so that comparative legal scholars can arrive at substantiated conclusions from comparative research, to study judicial practice, sociological materials, and, the specialist legal literature.[102] It hinges upon the use of reliable sources of information; original sources are therefore acknowledged as the best ones to study. Moreover, one needs to compare the function institutions perform rather than the institution themselves.[103] It is not sufficient solely to compare the text of the legislation, as the core of the method is to examine whether and how laws are applied and how the institutions function in practice. As a consequence, the researcher made inquiries for an interview with government officials, trade unions, and NGOs in Malaysia (Tenaganita) and in Cambodia (DCA/CA).

1.5. Delimitations and Legal Definitions

Delimitations are conscious choices made by the researcher. This research paper primarily focuses on "Domestic Work" which is defined in this dissertation as work performed in or for a household or households, drawing a reference from the Domestic Workers Convention (No.189).[104] The simple, but ever distinctive feature of being employed by and providing services for a private household is therefore at the heart of the Convention's definition.[105] In other words, this definition captures the non-lucrative nature of domestic work by excluding assistance with commercial or professional activities that may be performed

[99] R Blanpain and J Baker (eds), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (XIth edition, Kluwer Law International 2014) pp.3-5.
[100] William Elliott Butler, BA Hepple and Alan C Neal (eds), *Comparative Labour Law: Anglo-Soviet Perspectives* (Gower in conjunction with the International Journal of Comparative Labour Law and Industrial Relations 1987) p.11.
[101] Blanpain and Baker (n 99) p.10.
[102] Butler, Hepple and Neal (n 100) p.17.
[103] Blanpain and Baker (n 99) p.12.
[104] Convention concerning Decent Work for Domestic Workers 2011 (No189), Article 2.
[105] Malte Luebker and Conditions of Work and Employment Branch, *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (International Labour Office 2013) p.8.

within the home.[106] The corresponding statistical definition found in the International Standard Industrial Classification of all Economic Activities (ISIC Rev.3.1) for Division 95 "Activities of private households as employers of domestic staff" refers to:

> "the activities of households as employers of domestic personnel such as maids, cooks, waiters, valters, butlers, launderesses, gardeners, gatekeepers, stable-lads, chauffeurs, caretakers, governesses, babysitters, tutors, secretaries, etc. It allows the domestic personnel employed to state the activity of their employer, in censuses or studies, even though the employer is individual."[107]

The research has a specific focus on Cambodian women, who are engaged in domestic work, because 80 percent of domestic workers globally are female.[108] The research explores the plight faced by Cambodian domestic workers, who migrate to fellow ASEAN states, in the hope of sending back remittances to their poverty-stricken families.[109] Hence, this paper solely centers on the situation for such Cambodian women domestic workers in Malaysia. This delimitation was made in light of the recent MOU signed between Cambodia and Malaysia. Besides, domestic workers' vulnerabilities are worsened when they are migrants and women, as asserted by the Chief of the ILO Branch related to Inclusive Labor Markets, Philippe Marcadent.[110]

Due to Cambodian MDWs being the important theme in this research, we should pause briefly here to comprehend the key word "migrant domestic workers" (MDWs). It can be broken down into two terms "domestic workers" and "migrant workers." According to the ILO Convention (No.189), the term "domestic workers" means any person engaged in domestic work within an employment relationship. The definition excludes those who perform domestic work only occasionally or sporadically but not on an occupational basis.[111] This means that workers, who supplement their main source of income by taking up a second job as a domestic workers, will be excluded from the scope of the research study. On the contrary, Article 2(2) of the ICMW defines the term "migrant workers" as "any persons, who is to be engaged, is

---

[106] International Labour Conference (n 17), Fourth item on the agenda: Decent Work for Domestic Workers, para 101.
[107] *ibid*, at p.9
[108] 'Who Are Domestic Workers (Domestic Workers)' <https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm> accessed 18 August 2020.
[109] Hor Kimsay, 'Cambodia's Remittance Payments Reach $1.4B' <https://www.phnompenhpost.com/business/cambodias-remittance-payments-reach-14b> accessed 18 August 2020.
[110] 'Recognizing the Rights of Domestic Workers' (23 August 2018) <http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_641738/lang--en/index.htm> accessed 18 August 2020.
[111] Convention concerning Decent Work for Domestic Workers 2011 (No189), Article 2.

engaged or has been engaged in a remunerated activity in a State of which he or she is not a national." In its General Comment, the CMW asserted that MDWs are included in the term "migrant workers" as defined in Article 2(2) of the ICMW, and that any distinction made to exclude MDWs from protection would constitute a prima facie violation of the Convention.[112] Here, the term "migrant workers" is used interchangeably with the term "migrants for employment" in the Migration for Employment Convention (Revised) (No.97), and term "migrant workers" in the Migrant Workers (Supplementary Provisions) Convention (No.143), because the ICMW takes into account principles and standards set forth in the relevant instruments elaborated within the framework of the ILO.[113] Therefore, the term "migrant domestic workers" (MDWs) in this dissertation is defined as "any Cambodian women domestic workers aged between 21 and 45 years of age, who is to be engaged, is engaged, or has been engaged in domestic work in Malaysia." This definition excludes Cambodian MDWs, whose age is below the legal age for general admission to employment by the MOU. It also disregards Cambodian MDWs who perform domestic work only occasionally or sporadically but not on an occupational basis.

The research project is delimited to aspects which are most essential for Cambodian MDWs, such as (1) the recruitment, (2) terms and conditions of employment, (3) and access to justice. The recruitment of Cambodian MDWs is worth examining because malpractices in recruitment processes can erode the benefits of labor migration for MDWs and their families.[114] The term "recruitment" here means (i) the engagement of a person in one territory on behalf of an employer in another territory, or (ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory, together with the making of any arrangements in connection with the operations including the seeking for and selection of emigrants and the preparation for the departure of the emigrants."[115] This definition covers not only direct engagement by the employer or his or her representative, but also operations conducted by an intermediary, including public and private recruitment bodies. The definition covers situations where the prospective migrant is offered a definite job and where a recruiter undertakes to find a job for the migrant. It also covers operations accompanying the recruitment procedure, in particular, selection operations.[116]

---

[112] General Comment (No.1) on Migrant Domestic Worker 2011 para 6.
[113] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, Preamble.
[114]Asian Development Bank Institute and International Labour Organization, *Safeguarding the Rights of Asian Migrant Workers from Home to the Workplace.* (2017) <https://doi.org/10.1787/9789264268937-en> accessed 17 March 2020.
[115] Migration for Employment Recommendation (Revised) 1949, (No.86), para 1(b).
[116] International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers*

Thus, the notion is a very broad, but this research paper will narrow the aspects of the recruitment to admission procedures, recruitment practices, recruitment fees, and medical examinations of MDWs.

The fourth chapter addresses the terms and conditions of employment cover various aspects, but this dissertation will focus on (i) the contract of employment, (ii) wages, (iii) hours of work, and (iv) the termination of employment. In the contract of employment, the study centers on (i) the content and substance, (ii) the understanding of the contract by Cambodian MDWs, and (iii) the right to receive the contract prior crossing national borders for the purpose of taking up the domestic work. By contrast, the study of wages are delimited to (i) the minimum wage coverage, (ii) the payment of wages, and (iii) in-kind payment in respect of accommodation. Hours work only entails (i) the regular daily and weekly hours of work, (ii) the standby, (iii) daily and weekly rest, and (iv) overtime payment. Lastly, the termination of the contract mainly focuses the termination of employment, without notice, initiated by the employer.

The fifth chapter focuses on the right of access to justice in the country of employment, Malaysia. It completely disregards the exercise of this fundamental right in the country of origin, Cambodia, and restricts the analysis to victims of forced labor, including trafficking in persons (TIPs), and MDWs charged with immigration offences. The United Nations Development Programme (UNDP) defines the term "access to justice" as the ability of individuals to make full use of existing legal processes designed, formally or informally, to protect their rights in accordance with substantive standards of fairness and justice.[117] It applies in every stage of the "justice chain,"[118] from the right and the practical possibility to make a complaint in the first place, to have a case heard in the court of law, and obtain the appropriate remedy.[119] In other words, access to justice is the possibility to make use of the processes established to provide redress where rights may have been violated. This definition is widely used by various legal scholars, such as Alix Nasri, Wissam Tannous, and Jeremy McBride.[120]

The researcher limits the legal analysis of the third and fourth chapters to ILO standards because ILO standards are adequate to make a critical assessment on the recruitment and employment of Cambodian

---

(Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975 (Internat Labour Off 1999) para 135.

[117] United Nations Development Programme, *Programming for Justice: Access for All : A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (United Nations Development Programme 2005) p.5.

[118] Vereinte Nationen (ed), *In Pursuit of Justice* (UN Women 2011), at p.11. The 'Justice Chain' is the series of steps that a woman has to take to access the formal justice system, or to claim her rights.

[119] United Nations Development Programme (n 117) p.5.

[120] Alix Nasri, Wissam Tannous and International Labor Office, *Accès à La Justice Des Travailleurs Domestiques Migrants Au Liban* (BIT 2014), at p.25. Also read Jeremy McBride, *Access to Justice for Migrants and Asylum Seekers in Europe* (Council of Europe 2009).

MDWs under the MOU. However, the author made an exception for the fifth chapter. The research paper needs to employ ILO instruments and UN treaties so that it can critically and comprehensively evaluate the right of access to justice under the MOU.

One of the purposes in this research is to examine the implications of the MOU concerned on the human rights of Cambodian MDWs. The term "human rights" are delimited to principles concerning the fundamental rights set out in the ILO Declaration on Fundamental Principle and Rights at Work, namely: (1) the elimination of all forms of forced labor or compulsory labor, and (2) the elimination of discrimination in respect of employment and occupation. The research largely excludes the freedom of association and collective bargaining, the abolition of child labor, the occupational safety and health (OSH), social security benefits, and the labor inspection from the scope because these subjects are technical and deserve to be examined independently.

The Forced Labor Convention (No.29) provides the legal definition for forced labor, which is reaffirmed by the Forced Labor Protocol. Article 2 of the ILO Convention (No.29) defines the term "Forced or Compulsory Labor" as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[121] It contains three essential elements (i) the work or service, (ii) the threat of punishment, and (iii) the absence of free and informed consent. Article 2(2) of the Convention (No.29) describes five situations, which constitute exceptions to the "forced labor" definition under certain conditions, such as (i) compulsory military service, (ii) normal civil obligations, (3) prison labor (under certain conditions), (iv) work in emergency, situations (such as war, calamity or threatened calamity), and (v) minor communal services (within the community). In 2012, the ILO's Special Action Programme to Combat Forced Labor (SAP-FL) produced a booklet in which it extended indicators of forced labor. These indicators include the main possible elements of a forced labor situation, including (i) abuse of vulnerability, (ii) deception, (iii) restriction of movement, (iv) isolation, (v) physical and sexual violence, (vi) intimidation and threats, (vii) retention of identity documents, (viii) withholding of wages, (ix) debt bondage, (x) abusive living and working conditions, and (xi) excessive overtime.[122]

The concept of forced labor is strongly linked to the concept of trafficking in persons (TIPs) as defined in Article 3(a) of the Palermo Protocol. The term "Trafficking in Persons" shall mean "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms

[121] Forced Labour Convention, 1930, Article 2.
[122] International Labour Organization, 'ILO Indicators of Forced Labor' (ILO 2012).

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 of benefits to achieve the consent of a person having control over another person, for the purpose of exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services**,** slavery or practices similarly or practices similar to slavery, servitude or the removal of organs."[123] A crucial element of the definition of TIPs is its purpose, namely, the exploitation expressly including forced labor or services, slavery or similar practices, servitude, and various forms of sexual exploitation. The notion of exploitation of labor inherent in this definition allows for a link to be established between the Palermo Protocol and ILO Convention (No.29).[124] The CEACR asserted that *"another important element of the definition of trafficking in persons in the Palermo Protocol, from the point of view of the application of Convention No.29, is the means of coercion used against an individual, which include the threat or use of force, abduction, fraud, deception, the abuse of power or a position of vulnerability, etc, which definitely exclude voluntary offer or consent of the victim. With regards to the latter, the Palermo Protocol contains a qualifying provision that the consent of a victim of trafficking to intended exploitation shall be irrelevant where any of the above-mentioned means have been used."*[125]

By contrast, Article 1(1)(a) of the Discrimination (Employment and Occupation) Convention (No.111) defines the term "discrimination" as "any distinction, exclusion or preference, made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment." The Convention does not strictly prohibit distinctions on the basis of nationality, that is, nationality is not a prohibited ground under the Convention, unless countries have included nationality as a prohibited ground in their national legislation. However, both nationals and non-nationals enjoy protection against discrimination on the seven grounds explicitly prohibited by the Convention.[126] Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination. In this research, the terms "employment and occupation" include access to vocational training, access to employment and to particularly occupations, and terms and conditions of employment.[127] Through this broad definition, the

[123] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000.
[124] International Labour Office (ed), *Eradication of Forced Labour* (1st ed, International Labour Office 2007) para 77.
[125] *ibid*, at para 79.
[126]*Equality and Non-Discrimination at Work in East and South-East Asia: Guide* (2012) p.42 <http://www.ilo.org/asia/publications/WCMS_178415/lang--en/index.htm> accessed 9 August 2020.
[127] Discrimination (Employment and Occupation) Convention 1958.

1958 Convention cover all the situations which may affect the equality of opportunity and treatment that they are to promote.

1.6. Limitations

The study of law in action helps comparative legal scholars arrive at the substantiated conclusion from the comparative research, to study judicial practice, sociological materials, and, of course, the specialist legal literature. It hinges upon the use of the reliable sources of information, and the original sources of law are acknowledged as the best ones to study. However, this is not always the case due to language barriers. Since the researcher cannot write or read Malaya, he has been required to study the Malaysian legislature translated into English, which he believes could affect the meaning of some legal concepts.

Furthermore, the legal sources used in the study have solely consisted of paragraphs in the legislature, given the lack of transparency in both countries regarding all areas of the legal system, including the absence of legal sources such as preparatory work and case law. As a case in point, the researcher approached the Department of Labor of the Malaysian MOHR for the internal standard of procedures for handling labor cases, which are essential for the fifth chapter. However, his request was denied on the ground that it is an internal procedure and is not appropriate to share with the public. Besides, the Malaysian rules governing the recruitment of migrant workers are created on an *ad hoc* basis at the ministerial level by the Cabinet Committee on Foreign Workers and Illegal Immigrants, or at the department level by the Immigration Department. These rules take the form of policies and circulars, and are not published. Their content changes frequently. Knowledge of their contents is available only from press releases and third-party web sources. However, it should be noted that the readership of the newspapers, such as *New Straits Time, Phnom Penh Posts, The Star, and KhmerTimes,* is not likely to reflect the Malaysian society more broadly. This challenge is further compounded by the fact that certain materials about the regulations of MDWs, including Cambodian MDWs, in Malaysia cannot be sent from Malaysia to Sweden. This was due to the fact that there had never been practices of sending literature published in Malaysia to other countries.

Plus, data collection is another challenge because the recruitment and employment of Cambodian MDWs under the 2015 MOU between Cambodia and Malaysia can be considered as a newly emerging phenomenon. As mentioned in section 1.1, the regular migration channels for Cambodian MDWs to Malaysia under the MOU was officially opened in early 2018. Besides, both countries have been slow in producing recent and reliable data on most aspects of the recruitment and employment of Cambodian MDWs under the MOU. For instance, the latest figures of Cambodian MDWs being and have been employed in Malaysia given by the Cambodian MOLVT was in 2017, and these figures were inconsistent

with data given by the Malaysian Government and NGOs.[128] The lack of data is further complicated by the MOU's obligation imposed on contracting parties to observe the confidentiality and secrecy of documents, information, and other data received or supplied to another Member State during the period of the implementation of this MOU, or any other agreement made pursuant to this MOU.[129]

In his book, Blanpain argued that it is problematic to apply a comparative method in studies involving foreign countries solely by a desk study. Researchers must make a frequent visit and inquire, with the aid of extensive interviews with local scholars and practitioners (lawyers, employers, and trade unionists) about the realities of the situation, to provide an adequate understanding of the country examined.[130] As stated in section 1.4, the researcher arranged questions for interviews with government officials from the Malaysian MOHR, the Malaysian Immigration Department, the Cambodian MOLVT, the Royal Embassy of Cambodia in Kuala Lumpur, Malaysia, and the Malaysian Embassy in Phnom Penh, Cambodia by email. He also approached trade unions, such as the Malaysian Trade Union Congress and the Association of Employment Agencies (PAPA), NGOs in Cambodia and Malaysia, including IDWF, the Malaysian Tenaganita, DCA/CA), and various researchers and legal scholars by email (Siti Suraya Abd Razak and Nik Ahmad Kamal Nik Mahmod). However, none of them made any response. Neither did they explain why they were not available for the interview. However, the researcher assumes that the aforementioned MOU's obligation (Article 13 of the MOU) largely deferred the government officials from sharing information with the researcher. In addition, a study trip to Cambodia for gathering information from Cambodian government officials was cancelled because of travel restrictions concerning COVID-19. The researcher also has limited financial resources to plan another study trip to Malaysian for the data collection. Therefore, the research project experienced a lack of primary data to analyze the legal source critically and is solely based on the secondary source of information. However, this limitation was mitigated by cautiously evaluating all secondary sources of information so that the research can bring a realistic notion of how subjects are practiced as well as reveal what rights Cambodian MDWs enjoy in actuality.

[128] In 2014, to illustrate, the Cambodian MOVLT reported that there was no migration to Malaysia for domestic work, while the Malaysian Government reported 5,800 Cambodian domestic workers employed in Malaysia. Please read section 1.1. of the first chapter.
[129] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 13.
[130] Blanpain and Baker (n 99) pp.16-17.

1.7. Overview

This dissertation is divided into six chapters. The second chapter entitled *"International Human Rights Standards with a Focus on ILO Convention (No.189)"* is clustered into three sub-chapters. The first sub-chapter will explain why the researcher employed the ILO Conventions, particularly Convention concerning Decent Work for Domestic Workers (No.189), as a prime model for comparison. It will be then followed by another sub-chapter that gives a glimpse of the Domestic Workers Convention (No.189) and its Recommendation (No.201). The last sub-chapter examines the coverage of MDWs under the Convention (No.189) and other relevant international human rights law instruments. This dissertation has taken the position that International Human Rights Conventions or Recommendations cover domestic workers, including MDWs, unless stated otherwise.

The third chapter focuses on the recruitment of Cambodian MDWs. It is likewise structured into three sub-chapters. The first sub-chapter indicates the admission procedures and recruitment practices of Cambodian MDWs under the MOU, as well as related national legislation, regulations, directives, and policies. By contrast, the second sub-chapter examines how International Human Rights Law Standards regulate the admission procedures and recruitment practices of MDWs. The last sub-chapter is designed to answer the first sub-research question of the dissertation. Having observed contradictions and gaps with International Human rights Law Standards, the dissertation discovered that the MOU-issued recruitment framework of Cambodian MDWs expose subjects concerned to forced labor, including TIPs, and discrimination.

Having the intention to answer the second sub-research question, the fourth chapter, with the establishment of three sub-chapters, thoroughly discusses about the employment of Cambodian MDWs. The first sub-chapter presents relevant MOU-compliant contract's clauses, national legislation, regulations, directives, and policies in relation to the employment of Cambodian MDWs. Meanwhile, the second sub-chapter explains in detail the employment of MDWs under International Human Rights Law Standards. The last sub-chapter will first discuss the implications of related national and bilateral provisions on the human rights of Cambodian MDWs and then discuss the compatibility of such provisions with International Human Rights Law Standards. Having observed contradictions existed against the International Human Rights Law, the dissertation found that the MOU-issued contract, together with related provisions, has put Cambodian MDWs in forced labor-like situations, including TIPs, and failed to ensure the equality of treatment and opportunity between Cambodian MDWs and workers generally. The discrimination experienced by Cambodian MDWs goes further and takes the form of compounded discrimination on ground of nationality.

In contrast, the fifth chapter gives a great emphasis on the right of access to justice. It serves as a sequel to the third and fourth chapters because of a high prevalence of forced labor, including TIPs, experienced by Cambodian MDWs. In order to answer the last sub-research question, this chapter must be clustered into sub-chapters. The first sub-chapter illustrates how the MOU guarantees the right of access to justice for Cambodian MDWs. However, this sub-chapter draws a hypothesis that Cambodian MDWs have to rely on Malaysian legislation and authorities, in the determination of their legal rights, obligations, and criminal charged against them. The next sub-chapter similarly examines right of access to justice under International Human Rights Law Standards. The last sub-chapter is designed to sum up above-mentioned sub-chapters and answer the last sub-question. The central argument is that the right of access to justice is not fully respected, protected, and fulfilled under Malaysian legislation, as well as not in a full compliance with International Human Rights Law Standards.

Lastly, the sixth chapter sums up each chapter and answers the main research question of the dissertation.

Chapter 2 International Human Rights Standards with a Focus on ILO Convention (No.189)

> *"The legal system of the Convention is not a watertight, self-sufficient system. It is in constant dialogue with other legal systems,"* said Judge Rozakis.[131]

2.1. Introduction

This chapter has brought together ratified and non-ratified treaties, non-treaty instruments, adjudicative decisions, other interpretative materials, and additional international legal materials from several different sources, to provide the broadest possible picture of the legal protection of migrant domestic workers (MDWs). This chapter is clustered into three sub-chapters. The first sub-chapter will explain why International Labor Standards, particularly the Convention concerning Decent Work for Domestic Workers (No.189), are employed as a prime model for comparison. The main argument is that International Labor Standards are international human rights standards, having made a significant contribution to the interpretation of international human rights provisions. It will then be followed by another sub-chapter that will provide a glimpse of the ILO Convention (No.189) and its accompanying Recommendation (No.201). The last sub-chapter examines whether the Convention (No.189) and other international human rights instruments, which are employed for discussion in this dissertation, cover MDWs. This dissertation is written from a perspective that international human rights instruments, such as Conventions and Recommendations established by International Labor Organization (ILO), cover MDWs, unless such instruments provide otherwise.

2.2. International Labor Standards as a Model for Comparison

Taking the form of Conventions and Recommendations, International Labor Standards, commonly known as ILO Standards, refer to legal instruments drawn up by International Labor Organization (ILO)'s constituents, such as representatives of governments, employers, and workers from around the world.[132] When it comes to assessing bilateral agreements, which regulate the recruitment and employment of MDWs, International Labor Standards are the perfect model for a critical evaluation. This is owed to the

[131] Christos L Rozakis, 'The European Judge as Comparatist' (2005) 80 Tul. L. Rev. 257, p.268.
[132] *Rules of the Game: A Brief Introduction to International Labour Standards (Revised Edition 2014)* (International Labor Office 2014) p.15 <http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm> accessed 25 March 2020.

fact that ILO Standards are International Human Rights Law and have been used to interpret provisions embedded in various international and regional human rights treaties.

In his essay, Nicolas Valticos strongly asserted that ILO Standards have an independent influence on universal human rights standard-setting because International Human Rights Law and ILO Standards uphold the same core value.[133] His research underlined the impact of the International Labor Standards system on human rights that was, in fact, equally apparent in the sphere of civil and political rights, as well as social, cultural, and economic rights.[134] Rene Cassin, who was the principal co-author of the Universal Declaration Human Rights (UDHR), stated in 1950 that the ILO Constitution represented the first instance of a contractual foundation for international law regarding fundamental individual freedom. A decade afterward, Wilfred Jenks, the former Director-General of International Labor Office, also acknowledged the ILO's pioneering role in the international protection of human rights. He asserted all ILO Conventions and Recommendations had contributed to the promotion and protection of human rights, and the relationship between these ILO Standards and International Human Rights Law had been very close.[135]

Furthermore, the ILO has a practical and day-to-day involvement in human rights in many fields. The mandate of the Organization goes beyond the limited impression that one might have from its name. It covers social affairs and is not restricted to labor questions, which some understand to mean labor relations in the formal sector.[136] In 1968, on the occasion of the 20th anniversary of the Universal Declaration of Human Rights (UDHR), the Director-General of the ILO submitted a report to the International Labor Conference (ILC) and the International Conference on Human Rights convened by United Nations (UN) and ILO. In that report, the ILO's human rights-related activities were analyzed in terms of the great objective of freedom, equality, economic security, and dignity.[137] In 1998, the Organization designated (i) freedom of association and collective bargaining, (ii) child labor, (iii) forced labor, (iv) and discrimination at work as the fundamental principles and human rights at work.[138] The Organization also addresses other

---

[133] Nicolas Valticos, 'International Labor Standards and Human Rights: Approaching the Year 2000' (1998) 137 Int'l Lab. Rev. 135, p.136.
[134] *ibid*, at pp.138-140.
[135] Clarence W Jenks, *Social Justice in the Law of Nations: The ILO Impact after 50 Years* (Oxford University Press 1970) p.6.
[136] Catarina Krause (ed), 'International Labour Organization and Human Rights', *International protection of human rights: a textbook* (2., rev ed, Åbo Akademi Univ, Inst for Human Rights 2012) at p.355.
[137] ILO, 1968, *The ILO and human rights.* Report of the Director-General (Part I) to the International Labor Conference, 52nd Session, 1968, Report presented by the International Labor Organization to the International Conference on Human Rights, 1968. Geneva.
[138] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, clause 2.

human rights issues, including migrant workers, and has made – continue to make – substantial contributions to the human rights discussion globally.[139]

However, Nicolas Valticos, in his work, also acknowledged the criticism that ratified Member States have frequently failed to implement ILO instruments, and that the action by supervisory bodies alone cannot sufficiently ensure full compliance with these instruments. Simultaneously, regional human rights instruments have existed with ILO instruments, thereby justifying the argument that ILO standards are not universal but culturally specific.[140] However, this argument has been diminished. Tzehainesh Tekle has observed that the European Court of Human Rights (ECtHR) has been making an increasing, albeit not regular and even with significant steps backs, use of ILO Standards and the pronouncements of ILO supervisory bodies to interpret provisions enshrined in European Convention on Human Rights (ECHR). The use of ILO standards is consistent and instrumental to ECtHR's integrated and dynamics method of interpretation.[141] His assertion is coherent with the conception of the legal system of the ECHR as interrelated with other legal systems. "*The legal system of the Convention is not watertight, self-sufficient system. It is in constant dialogue with other legal systems*," said Judge Rozakis.[142]

It started with the landmark *Demir and Baykara* case, in which the ECtHR asserted that the right to collective bargaining is an essential element of the right to freedom of association covered by Article 11 of the ECHR.[143] To reach this conclusion, the ECtHR perceived that *"in defining the meaning of the terms and the notions of Convention, it must and can take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common value."*[144] ILO Standards on freedom of association and the corpus of pronouncements of international supervisory bodies, such as the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the Committee on Freedom of Association (CFA), reveal the existence of an international consensus that should be used to interpret the ECHR.[145] Since then, the ECtHR has handed down five judgments on discrimination relying on ILO standards. Two cases

[139] Krause (n 136) p.356.
[140] Valticos (n 133) p.141.
[141] Tzehainesh Teklè, 'The Contribution of the ILO's International Labour Standards System to the European Court of Human Rights' Jurisprudence in the Field of Non-Discrimination' (2020) 49 Industrial Law Journal 86. The author is the legal scholar from the International Institute for Labor Studies of the ILO.
[142] Rozakis (n 131) p.268.
[143] *Demir and Baykara v Turkey* [2008] European Court of Human Rights (ECtHR) No.34503/97, para 154.
[144] *ibid*, para.85.
[145] Teklè (n 141).

concern discrimination on the grounds of political opinion,[146] two concern discrimination on the grounds of HIV status,[147] and one in regards to a case of discrimination on the ground of sex.[148] The significance of this development rests upon the fact that case-law is recognized as fundamental in giving effect to the provisions of the ILO Conventions. The CEACR states that *"particularly where texts are of a more general nature or scope as regards termination of employment…in the absence of explicit provisions, judicial decision may also establish certain general principles of law on particular questions in many countries."*[149]

In its 2008 general observation, the CEACR noted that the principles of the ILO Conventions are an important source of law for labor courts and tribunals in countries that have or have not ratified the ILO Conventions. A review of case law compiled by the ILO International Training Center provides evidence that national courts have directly invoked or referred to the ILO Conventions in delivering their judgments. This practice has been observed in countries that have ratified the ILO Conventions, and those that have not. Here, one may observe the influence of ILO Conventions beyond ratifying States. The Committee specifically asserted that ILO Conventions have been invoked by national courts of non-ratifying countries for a multitude of reasons, including (i) as a norm of direct application in the legal systems; (ii) as an aid to interpretation of national legislation, where such national legislation is ambiguous or incomplete; (iii) as an instrument to strengthen the application of national law, in which it highlights the fundamental feature of the law or principle in question; and (iv) as a source of equity.[150]

2.3. The Light Emerges: The First ILO Convention for Domestic Workers

The quest for constructing international human rights standards for domestic workers is not a new task for the ILO. In 1948, the ILC adopted a resolution concerning the conditions of employment of domestic workers. The ILC's statement that *"the time has now arrived for a full discussion on this important subject"* recognized the need for a discussion about the employment and legal status of domestic workers.[151] In 1965,

---

[146] *Sidabras v Dziautas v Lithuania* [2004] European Court of Human Rights (ECtHR) No.55480/00 and 59330/00. *Rainys and Gasparavicus v Lithuania* [2005] European Court of Human Rights (ECtHR) No.70665/01.

[147] *Kiyutin v Russia* [2011] European Court of Human Rights (ECtHR) No.2700/10; *IB v Greece* [2013] European Court of Human Rights (ECtHR) No.552/10.

[148] *Markin v Russia* (European Court of Human Rights (ECtHR).

[149] The Employment Analysis and Research Unit (Sector II) and the Social Dialogue International Labour Standards Department (Sector I), 'Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment' (2009) Meeting document p.18 <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/employment-security/WCMS_171404/lang--en/index.htm> accessed 25 June 2020.

[150] *ibid*, p.19.

[151] ILO Governing Body, 'Date, Place and Agenda of the 99th Session (2010) of the International Labor Conference: Second Item on the Agenda' (International Labour Office 2008) GB301_2_[2008-02-0115-1]-En.doc/v3 para 55.

the ILC adopted another resolution that reiterated the urgent need to provide domestic workers with the basic elements of protection so that they can have a minimum standard of living compatible with the self-respect and dignity essential to social justice.[152] Both resolutions have significantly turned the ILO's normative attention to the conditions of domestic workers in the global economy, and encouraged more thorough studies about domestic workers.[153] Those studies commonly confirmed that domestic work is mainly performed by women, and migrant workers contributed to a large part of domestic labor.[154] The need for the protection of MDWs was consequently endorsed by the ILC in adopting the conclusion of the general discussion on migrant workers held in 2004.[155] The 2006 non-binding Multilateral Framework on Migration likewise enunciates that *"the following guidelines may provide valuable in giving effect to principles (of the Multilateral Framework concerned): adopting measures to ensure that national labor legislation and social laws and regulations cover all male and female migrant workers, including domestic workers and other vulnerable groups, in particular in the areas of employment, maternity protection, wages, OSH and other conditions of work in accordance with relevant ILO instruments."*[156]

In 2008, workers' organizations initially proposed to the ILO's Governing Body for placing the item of *"Promoting Decent Work for Domestic Workers"* on the agenda of the 2010 ILC. The proposal was intended to develop the legal instrument, possibly in the form of Convention supplemented by a Recommendation, to offer adequate guidance for policies and practices in the area of domestic work.[157] Meanwhile, having observed some aspects of fundamental rights at work for domestic workers, the ILC acknowledged that domestic workers' human rights and conditions of work, including MDWs, may not have been dealt with adequately in existing international human rights standards by the ILO and other international human rights organizations.[158] Therefore, the negotiation on the promulgation of ILO instruments for domestic workers officially started in the 99th session of ILC (June 2010) and finalized in

---

[152] *ibid*, para.56.
[153] Adelle Blackett, 'International Legal Materials Introductory Note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)' (2014) 53 International Legal Materials 250, p.250.
[154] Jose Maria Ramirez-Machado, 'Domestic Work, Conditions of Work and Employment: A Legal Perspective, Conditions of Work and Employment Series No. 7.' (International Labour Office 2003) Working paper <http://www.ilo.org/travail/whatwedo/publications/WCMS_TRAVAIL_PUB_7/lang--en/index.htm> accessed 23 March 2020.
[155] ILO Governing Body (n 151) para 58.
[156] *ILO Multilateral Framework on Labour Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration* (International Labour Office 2006) guideline 9.8.
[157] ILO Governing Body (n 151) para 50.
[158] *ibid, at* para 46.

the 100th session of ILC (June 2011).[159] The product was the promulgation of the Convention concerning Decent Work for Domestic Workers (No.189) and its accompanying Recommendation (No.201). Both instruments represent the first specific ILO Standards developed for domestic workers, by expressly acknowledging the fundamental human rights of domestic workers, laying down principles and measures for realizing decent work, and granting domestic workers with the right to benefit from social and labor protections as other workers.[160] They also summed the efforts of the Committee on Domestic Workers, composed of 209 members (102 Governments members, 35 Employers members, and 72 Workers members),[161] and domestic workers' organizations in campaigning for the promulgation of international human rights instruments specifically for domestic workers during the last six decades.[162]

Since 2011, 30 countries have ratified the Convention.[163] Manuela Tomie, the Director of the ILO's Working Conditions and Equality Department, said that *"the ILO Convention (No.189) and its accompanying Recommendation (No.201) have effectively started to play their role as a catalyst for change. They now serve as a starting point for devising new policies in a growing number of countries."*[164] Lorena Poblete, in her study, likewise observed the influence of the ILO Convention (No.189) and Recommendation (No.201) on significant legal reforms in South American countries that ratified the Convention (No.189), such as Argentina, Chile, and Paraguay.[165]

By contrast, Malaysia abstained from voting to adopt the Convention (No.189), thereby having no obligation to be bound by the Convention.[166] The Government believed that its existing law and guidelines

---

[159] Blackett (n 153) 250.
[160] *ibid*, at p.251.
[161] Committee on Domestic Workers, 'Report of the Committee on Domestic Workers (PR No.15)' (International Labour Conference 2011) Record of proceedings para 1 <http://www.ilo.org/ilc/ILCSessions/previous-sessions/100thSession/reports/provisional-records/WCMS_157696/lang--en/index.htm> accessed 19 August 2020.
[162] ACTRAV, *Achieving Decent Work for Domestic Workers* (2012) p.6 <http://www.ilo.org/actrav/info/fs/WCMS_181344/lang--en/index.htm> accessed 23 March 2020.
[163] 'Ratifications of C189: Domestic Workers Convention, 2011 (No.189)' (*International Labor Organization (ILO)*) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO> accessed 19 August 2020.
[164] 'Landmark Treaty for Domestic Workers Comes into Force' (5 September 2013) <http://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_220793/lang--en/index.htm> accessed 25 March 2020.
[165] Lorena Poblete, 'The Influence of the ILO Domestic Workers Convention in Argentina, Chile and Paraguay' [2018] International Journal of Comparative Labour Law and Industrial Relations 177, p.200.
[166] Masriwanie Muhamading, 'Gov't Urged to Adopt Convention 189, Provide Domestic Workers with Fundamental Workers' Rights' (*NST Online*, 16 June 2017) <https://www.nst.com.my/news/nation/2017/06/249559/govt-urged-adopt-convention-189-provide-domestic-workers-fundamental> accessed 15 June 2020.

on foreign workers has always been adequate to accommodate MDWs' needs and concerns.[167] In 2016, Cambodia considered the possibility of ratifying the Convention (No.189), but there has never been any progress in preparing for the ratification of the Domestic Workers Convention (No.189).[168] However, the non-ratification of the ILO Convention (No.189) by both countries does not necessarily bar reference to the Convention concerned and its Recommendation for the analysis of the recent MOU between Cambodia and Malaysia on the recruitment and employment of domestic workers.

2.4. The Coverage of Migrant Domestic Workers under the ILO Convention (No.189) and other International Human Rights Instruments

2.4.1. Convention concerning Decent Work for Domestic Workers

There are only a number of provisions embedded in the ILO Convention (No.189), such as Articles 8, 9(3), and 15, that particularly employ the term *"Migrant Domestic Workers"* (MDWs). However, it does not necessarily mean that MDWs are excluded from other provisions of the ILO Convention (No.189) and Recommendation (No.201). Article 2(1) of the ILO Convention (No.189) states that "the Convention applies to all domestic workers." When drafting the Convention (No.189), the Committee on Domestic Workers was of the position that the term "all domestic workers" has a broad coverage, including domestic workers who are recruited through private employment agencies.[169] In addition, the Preamble of the Convention (No.189) expressly recognizes that "domestic work is mainly carried by women and girls, many of whom are migrants."[170] The Committee on Domestic Workers also referred to the experiences of MDWs to formulate provisions of the Convention (No.189) and Recommendation (No.201). For example, when drafting paragraph 14 of the ILO Recommendation (No.201), Ms. H. Yacob, the Worker Vice-Chairperson, said that *"the remuneration of domestic workers was usually meager and that many such workers, especially MDWs, had no choice but to live in their employer residence."*[171] She also reiterated that *"MDWs made substantial contributions to social security schemes, but lost entitlements when they moved to another country and had to start building new entitlements from zero."*[172] This concern led to the adoption of paragraph 20(2) of the ILO Recommendation (No.201), which calls on Members States to consider concluding bilateral, regional or multilateral agreements to provide, for MDWs, equality of treatment in

[167] 383th Report, Case 2637, para.58.
[168] Mom Kunthear, 'Unions Happy Over Labor Protections' *Khmer Times* (1 December 2016) <https://www.khmertimeskh.com/62667/unions-happy-over-labor-protections/> accessed 19 August 2020.
[169] Committee on Domestic Workers (n 161) para 701.
[170] Convention concerning Decent Work for Domestic Workers, 2011, (No.189).
[171] Committee on Domestic Workers (n 161) para 1079.
[172] *ibid*, para 1121.

respect of social security. Therefore, all provisions of the ILO Convention (No.189) and its Recommendation (No.201) cover MDWs, and the exclusion of MDWs from any provisions of instruments concerned can diminish the essence of the ILO Convention (No.189).

2.4.2. ILO Fundamental Conventions

The second Preambular paragraph of the Convention (No.189) stipulates that *"mindful of the commitment of the ILO to promote decent work for all through the achievement of the goals of the ILO Declaration on Fundamental Principles and Rights at Work and the ILO Declaration on Social Justice for a Fair Globalization."* Article 3(2) obliges members States, concerning domestic workers, to take measures set out in the Convention to respect, promote and realize the fundamental principles and rights at work; namely (a) freedom of association and the effective recognition of the right to collective bargaining, (b) the elimination of all forms of forced or compulsory labor, (c) the effective abolition of child labor, (d) the elimination of discrimination in respect of employment and occupation. These provisions imply that domestic workers, including MDWs, are protected under fundamental ILO Conventions. Those are (1) Freedom of Association and Protection of the Right to Organize Convention (No.87), (2) Right to Organize and Collective Bargaining Convention (No.98), (3) Forced Labor Convention (No.29) and its 2014 Protocol, (4) Abolition of Forced Labor Convention (No.105), (5) Minimum Age Convention (No.138), (6) Worst Forms of Child Labor Convention (No.182), (7) Equal Remuneration Convention (No.100) and (8) Discrimination (Employment and Occupation) Convention (No.111). As of 1st January 2019, there were 1,376 ratifications of these Conventions, representing 92 percent of the possible number of ratifications.[173]

2.4.3. Other Relevant ILO Conventions

The sixth Preambular paragraph of the ILO Convention (No.189) established that *"International Labor Conventions and Recommendations apply to all workers, including domestic workers, unless otherwise provided."* By contrast, the seventh Preambular paragraph provides as follows: *"Noting the particular relevance for domestic workers of the Migration for Employment Convention (Revised), 1949 (No.97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143), the Workers with Family Responsibilities Convention, 1981 (No.156), the Private Employment Agencies Convention, 1997 (No.181), the Employment Relationship Recommendation, 2006 (No.198), as well as of the ILO Multilateral Framework on Labor Migration: Non-binding Principles and Guidelines for a Right-Based Approach to*

[173]'Conventions and Recommendations' (*International Labor Organization (ILO)*) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 20 August 2020.

Labor Migration (2006) and recognizing the special conditions under which domestic work is carried out that make it desirable to supplement the general standards with standards specific to domestic workers so as to enable them to enjoy their rights full." Both paragraphs imply that the human rights of domestic workers, including MDWs, are protected and promoted under all International Labor Standards, unless otherwise stated.

2.4.3.1. Specific Conventions relating to Migration

The Migration for Employment Convention (Revised) (No.97) focuses on the standards applicable to the recruitment of migrants for employment and their conditions of work in the host country.[174] It was prompted by the interest in facilitating the movement of surplus labor from Europe to other parts of the World.[175] However, it covers only those migrant workers in a regular status.[176] The Migration for Employment Recommendation (No.86) supplements with an annex of a Model Agreement on Temporary and Permanent Migration for Employment that ILO member States can reference in constructing agreements to arrange the transfer of groups of migrant workers.[177] By contrast, the Migrant Workers (Supplementary Provisions) Convention (No.143) is the first multilateral treaty to address the right of irregular migrants directly. The Convention was introduced in the era when governments were extremely apprehensive of an increase in irregular migration and seeking for standards to bring migration flow under control.[178] The first part of the Convention (Migration in Abusive Conditions) focuses on the clandestine migration calling for sanctions against the perpetrators of human trafficking.[179] The Migration Workers (Supplementary Provision) Recommendation (No.151) supplements the Convention with more detail on equality of treatment and opportunity for regular migrants and on equality of treatment for the irregular ones.[180]

2.4.3.2. Specific Conventions and Non-Binding ILO Frameworks relating to Recruitment

There are specific ILO instruments that apply to fair recruitment issues. The ILO Private Employment Agencies Convention (No.181), which applies to all private employment agencies, all categories of works, and all branches of economic activity, establishes that *"workers shall not be charged directly or indirectly,*

[174] Migration for Employment Convention (Revised) 1949 (No.97).
[175] International Labour Office (ed), *International Labour Migration: A Rights-Based Approach* (International Labour Office 2010), p.128.
[176] Migration for Employment Convention (Revised) 1949 (No.97), Article 6.
[177] Migration for Employment Recommendation (Revised) 1949 (No.97).
[178] International Labour Office (n 175) p.129.
[179] Migrant Workers (Supplementary Provisions) Convention, 1975, (No.143), Article 5.
[180] Migrant Workers Recommendation 1975 (R151) paras 2 & 8.

in whole or in part, any fees or costs, by private employment agencies."[181] The ILO's non-binding General Principles and Operational Guidelines for Fair Recruitment and the Definition of Recruitment Fees and Related Costs entail the general principle of *"No recruitment fees or related costs should be charged to, or otherwise borne by, workers or job seekers*."[182] This instrument covers the recruitment of all workers, including migrant workers, whether directly by employers or through intermediaries. It applies to recruitment within or across national borders, as well as to recruitment through temporary work agencies, and cover all sectors of the economy.[183]

2.4.3.3. Specific Conventions relating to Terms and Conditions of Employment

The omission of other ILO instruments in the seventh Preambular paragraph of the ILO Convention (No.189) gives the impression that such instruments are irrelevant to domestic workers, including MDWs. However, this is not the case because the sixth Preambular paragraph states that *"international Labor Conventions and Recommendations apply to all workers, including domestic workers, unless otherwise provided."* Article 1(1) of the Minimum Wage Fixing Convention (No.131) obliges ratifying Members States to "establish a system of minimum wages which covers all group of wage earners whose terms of employment are such that coverage would be appropriate." Article 1(2) permits "the Governments, in the agreement or after full consultation with the representative organizations of employers and workers concerned, where such exist, to determine the groups of wage earners covered by the Convention." Article 1(3) requires each ratifying States to "list in the first report on the application of the Convention any groups of wage earners which may not have been covered in pursuance of this Article, giving the reasons for not covering them, and shall state in subsequent reports the positions of its law and practice in respect of the groups not covered, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such group." The CEACR repeatedly requested ratifying Members States to make every effort to extend to domestic workers the protection afforded by the minimum wage system and to provide information on any measures taken or envisaged in this regard.[184]

Article 2(1) of the Termination of Employment Convention (No.158) provides that "the convention applies to all branches of economic activity and to all employed persons." Article 2(2) permits a Member State to

---

[181] Private Employment Agencies Convention, 1997, (No.181), Articles 2(1)&(2), and 7(1).
[182] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs, 2019.
[183] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs, 2019.
[184] *Direct Request (CEACR) -adopted 2019, published 109th ILC Session (2020) - Sri Lanka - Minimum Wage Fixing Convention, 1970 (No.131)(Ratification:1975).*

exclude the following categories of employed persons from all or some of the Convention's provisions*:* (a) workers engaged under a contract of employment for a specific period of time or a specific task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of a reasonable duration; (c) workers engaged on a casual basis for a short period. The CEACR has requested the ratifying Governments to take all possible steps to ensure that domestic workers enjoy adequate protection in the spheres covered by the Termination of Employment Convention.[185]

2.4.4. Other Relevant International Human Rights Instruments

The eighth Preambular paragraph of the ILO Convention (No.189) stipulates that *"other relevant international instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Convention against Transnational Crimes, and in particular, its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and Its Protocol against the Smuggling of Migrants by Land, Sea and Air, the Convention on the Rights of the Child and the International Convention on the Protection of the Right of All Migrant Workers and Members of the Their Families."* This paragraph implies that the ILO Conventions and Recommendations are not the only relevant international human rights instruments for domestic workers, including MDWs. It is crucial to cross-reference other international instruments.[186] There was a question if there might be an issue of importation whereby legal obligations would be created for governments that might not have ratified those instruments.[187] The Committee on Domestic Workers explained that the Preamble was not a binding part of the Convention but serves to provide the necessary context and background for the Convention. Besides, the listed instruments, including the UDHR, ICCPR, and the ICESCR, have been widely ratified and known as the International Bill of Human Rights.[188] The omission of these instruments can give the false impression that the human rights of domestic workers, including MDWs, are not protected under these

[185] *Observation (CEACR) - adopted 2017, published 107th ILC Session (2018) Termination of Employment Convention, 1982 (No.158) - Cameroon (Ratification 1988).*
[186] Committee on Domestic Workers (n 161) para 142.
[187] *ibid*, para 144.
[188] *ibid*, para 145.

instruments.[189] Other listed instruments are also relevant to domestic workers because trafficked domestic workers were particularly vulnerable to abuse.[190]

[189] *ibid*, para 148.
[190] *ibid*, para 151.

Chapter 3 The Recruitment of Cambodian Migrant Domestic Workers

"High costs, long duration, and complexity of formal migration channels forced many Cambodian migrant workers to migrate through irregular channels."[191]

3.1. Introduction

Migrant recruitment issues have come to the forefront of the international agenda, with a growing realization that malpractices in recruitment processes erode the benefits of labor migration for migrant workers and their families.[192] In its General Survey of Migrant Workers Instruments, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) stated as follows: "In recent years, it has become increasingly clear that governance of recruitment practices has been an essential role to play in preventing migrant workers from experiencing abusive and fraudulent conditions, including trafficking in persons and forced labor."[193] Therefore, the governance of admission procedures and recruitment practices of migrant workers plays a significant role in determining the outcome of labor migration. In this dissertation, admission procedures and recruitment practices entail the stages of recruitment, introduction, and placement. The Migration for Employment Recommendation (Revised) (No.86) defines the term "recruitment" as the engagement of a person in one territory on behalf of an employer in another territory, or the giving of an undertaking to a person in one territory to provide him with employment in another territory, together with the making of any arrangements in connection with the operations including the seeking for and selection of emigrants and the preparation for the departure of the emigrants.[194] The term "introduction" means any operations for ensuring or facilitating the arrival in or admission to a territory of persons who have been recruited. The term "placement" refers to any operations

[191] International Labour Organization, *Kingdom of Cambodia Decent Work Country Programme (DWCP) 2019-2023* (2019) p. 21 <http://www.ilo.org/asia/publications/WCMS_710183/lang--en/index.htm> accessed 17 August 2020.
[192] Asian Development Bank Institute and International Labour Organization (n 114) p.23.
[193] International Labor Conference (ed), *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution): International Labour Conference, 105th Session, 2016* (first edition 2016, International Labor Office 2016).
[194] Migration for Employment Recommendation (Revised) 1949, (No.86), para 1(b).

for the purpose of ensuring or facilitating the employment of persons who have been introduced to a territory.[195]

This chapter primarily focuses on the recruitment practices and admission procedures of Cambodian MDWs. This chapter is structured into three sub-chapters. The first sub-chapter covers the admission procedures and recruitment practices enshrined in the Memorandum of Understanding (MOU) between Cambodia and Malaysia on Domestic Workers. The second sub-chapter examines how International Human Rights Law regulates admission procedures and recruitment practices of MDWs. The last sub-chapter is designed to answer the first sub-research question. The central claim is the MOU-based admission procedures and recruitment practices dissuade Cambodian MDWs to take up the legal migration for employment and further expose workers to situations of forced labor, including trafficking in persons, and discrimination. MOU-based admission procedures and recruitment practices are not in line with International Human Rights Law Standards.

3.2. Admission Procedures and Recruitment Practices of Migrant Domestic Workers under the MOU

Previously based on informal arrangements, the recruitment of Cambodian MDWs is done by authorized Malaysian Recruitment Agencies (MRAs) and Cambodian Recruitment Agencies (CRAs) under the MOU.[196] It means the direct recruitment by employers is strictly prohibited. These private recruitment agencies perform a useful labor market matching function, and they are more accessible to potential migrants than government agencies.[197] MRAs refer to private employment agencies that are licensed by the Department of Manpower of the Malaysian Ministry of Human Resources (MOHR), in accordance with the Malaysian Private Employment Act 1981 (Act 246), and registered with the Malaysian Immigration Department.[198] The Association of Employment Agencies (PAPA) is appointed to bring all MRAs to recruit and bring in Cambodian MDWs.[199] On the contrary, CRAs mean Cambodian private recruitment agencies

[195] Migration for Employment Recommendation (Revised) 1949, (No.86), para 1 (c) and (d).
[196] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 4.
[197] Asian Development Bank Institute and International Labour Organization (n 114) p.28.
[198] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 1.
[199] 'Persatuan Agensi Pekerjaan Malaysia: Malaysian Association of Foreign Maid Agencies' (2020) <http://www.papa.org.my/> accessed 27 August 2020.

approved and licensed under the Cambodian Ministry of Labor and Vocational Training (MOLVT)'s *Prakas* (Circular) on Private Recruitment Agency (No.047/13).[200]

In addition, the recruitment of Cambodian MDWs is conducted in accordance with and subject to the terms of the MOU, together with domestic laws, rules, regulations, national policies and directive of each country.[201] It reflects that the entire process of admitting and recruiting Cambodian MDWs takes place in both countries, and each country reserves its sovereign rights to independently regulates the admission and recruitment of Cambodian MDWs. This provision also shapes the structure of this section. The first two parts will examine how Cambodian MDWs are admitted and recruited under Malaysian and Cambodian legislation; respectively. They are followed by other sections which illustrate the medical examinations subject by and recruitment fees imposed on Cambodian MDWs. These sections will together give a full image of how Cambodian MDWs are admitted and recruited under the MOU.

3.2.1. Admission Procedures and Recruitment Practices in Malaysia

3.2.1.1. Eligibility for Malaysian Employers

According to information available on the website of the Malaysian Immigration Department, the employers must demonstrate that (1) the household has a net income of at least MYR 3,000 per month, or MYR 5,000 per month if the maid is sought from the Philippines, India, or Sri Lanka; and (2) the employer has children under 15 years of age or parents who are sick or ill. [202] A bankrupt employer or an employer with a criminal record is forbidden from hiring a MDW, according to the Director-General of the Malaysian Immigration Department, Datuk Seri Mustafar Ali.[203]

3.2.1.2 Admission Procedures and Recruitment Practices

The admission procedures and recruitment practices of Cambodian MDWs is clustered into two phases, namely the pre-arrival and the post-arrival phases. In the pre-arrival phase, the employer must first obtain confirmation from the Manpower Department of the Malaysian MOHR that he has exhausted the service of the Job Clearing System (JCS) to recruit local workers.[204] It takes two months to obtain approval from

---

[200] Prakas on Private Recruitment Agency, 2013.

[201] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 3.

[202] Immigration Department of Malaysia and Ministry of Home Affairs (n 22).

[203] Lokman Tasnim and Fong Fernando, 'No Maids for You If You Have a Record' *New Straits Times* (1 March 2018) <https://www.nst.com.my/news/exclusive/2018/03/340084/no-maids-you-if-you-have-record.> accessed 27 August 2020.

[204] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, at p.14.

the Department of Manpower.[205] A MRA is subsequently obliged to apply on behalf of an employer for approval from the Foreign Worker Management Division of the Ministry of Home Affairs (MOHA) to recruit or employ MDWs.[206] This stage involves interview with an employer concerned or a representative from an MRA. Applications that satisfy all conditions in the checklist will be processed, and the decision will be given on the same day.[207] The entire process takes one week to complete.[208] An employer concerned must then pay a levy for each worker within 48 hours.[209] The levy system was introduced in the eleventh Malaysian Plan 2016-2020 to limit the share of foreign labor to 15 percent by 2020.[210] The levy for a household's first foreign maid is fixed at MYR 410 (USD 99), the second MYR 590 (USD 143), while the third, fourth, and subsequent ones are at MYR 590 (USD 143).[211] It is then followed by the issuance of Conditional Letter from the Malaysian MOHA. Afterwards, such employer has 18 months to seek consent from an origin country's Embassy to recruit MDWs in that country. It requires the payment of a fee to the Embassy and takes one week to complete.[212]

In addition, such employer is obliged to apply to the Malaysian Immigration Department for a Visa with Reference (VDR), commonly called a Calling Visa, for the domestic worker to enter Malaysia. The Malaysian Representative Office in Cambodia is also mandated to issue the VDR by placing it in the MDWs' passport.[213] The cost of the VDR depends on the nationality of MDWs.[214] Cambodian MDWs need to pay 20 MYR (5 USD) for a single-entry VDR, while the employer helps cover MYR 250 (61 USD) of a

[205] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, at p.35.
[206] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause A(i) and clause B(ii). Foreign Workers Management Division of the MOHA is the secretariat of the Foreign Worker One-Stop Approval Agency that was established to handle application for foreign workers following the employers' failure to secure local workers.
[207] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, p.14.
[208] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014 p.35.
[209] Bar Council Malaysia (n 78) p.55.The levy is an annual amount paid to MOHR, which remits the money to the Ministry of Finance, for every documented migrant worker in the country.
[210] Wickramasekara (n 61) p.13.
[211] Tasnim Lokman, 'Employers to Pay Levy for Foreign Workers from Jan 1, 2018' *NST Online* (20 December 2017) <https://www.nst.com.my/news/nation/2017/12/316614/employers-pay-levy-foreign-workers-jan-1-2018> accessed 23 June 2020.
[212] Bar Council Malaysia (n 78), at p.55.
[213] Immigration Department of Malaysia and Ministry of Home Affairs (n 22).
[214] Bar Council Malaysia (n 78), at p.58.

personal bond.[215] Personal bond is a contract between an employer, on behalf of a MDW, and the Government, in which an employer and a MDW agree to comply with the provisions of the Malaysian legislation, ordinance, regulations, and any conditions imposed by the Immigration Department. According to the Malaysian Employers Federation (MFE), fourteen different documents are required from the employer for the application of a VDR.[216] Those are (i) an application letter from employer, (ii) visa application by reference form, (iii) letter of approval from MOHR, (iv) original receipts of payment of the levy, (v) Form IMM.12 (Visit Pass Application Form), (vi) Payment form, (vii) VDR Application form for new foreign workers, (viii) bank draft, (ix) Deposit/Insurance Guarantee/Bank Guarantee (security bond),[217] (x) Copy of workers' passport, (xi) Worker's Photograph, (xii) Stamped personal bond, and (xiii) Medical report from the country of origin approved by the Ministry of Health, and (xiv) other supporting documents (like birth certificates, passport, marriage certificate). Cambodian MDWs must remain in Cambodia while waiting for the VDR approval from the Malaysian Immigration Department.[218]

The pre-arrival phase is then followed by the post-arrival stage. Cambodian MDWs are only allowed to enter the country at authorized entry points using the VDR issued by the Immigration Department and entry visa issued by the Malaysian Embassy in Cambodia. An employer concerned must ensure the clearance process of a Cambodian MDW has been conducted upon entry to Malaysia within 24 hours from the arrival time. Henceforth, such employer needs to apply for the Visit Pass (Temporary Employment) at the Immigration Department,[219] which, unlike the VDR, permits Cambodian MDWs to work legally in Malaysia.[220] The issuance of the Visit Pass (Temporary Employment) will only be done after a Cambodian MDW concerned have passed the medical examination in the country of employment. The Visit Pass is valid for twelve months, and the employer can apply for the extension three months before the expiry date. The application must include (1) Passport, (2) Application letter to extend the Visit Pass, (3) identification document of employee/company representative, (4) security bond in the form of bank guarantee/deposit,

---

[215] 'Foreign Workers' (*Immigration Department of Malaysia*, 9 August 2020) <https://www.imi.gov.my/portal2017/index.php/en/main-services/foreign-workers.html> accessed 9 August 2020.
[216] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, p.17.
[217] Payment of Security Bond by the employer to the Immigration Department as a guarantee against the worker absconding and requiring removal. The bond amount depends on nationality of the worker, and ranges from MYR 250 for Cambodian workers to MYR 1,500 for Vietnamese migrant workers.
[218] Immigration Department of Malaysia and Ministry of Home Affairs (n 22).
[219] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, p.17.
[220] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Article 1.

(5) insurance policy of Health Insurance Protection Scheme Foreign Workers (SPIKA), (6) Slip of Foreign Workers Compensation Scheme (FWCS), and (7) Medical documents.[221]

3.2.1.3. Processing of Biodata

The MRA must provide biodata of the potential domestic workers in accordance with the employer's specifications for the selection.[222] It is nonetheless uncertain how this provision is implemented in practice. In his book, Killias observed the common practice of disseminating MDWs' biodata to the employer by MRAs. He defines the term "biodata" as personal and general information on the age, height, weight, ethnicity, and years of work experience of MDWs. Malaysian employers are promised plentiful supplies of the MDWs' biodata for the selection.[223] He noted MRAs are dissatisfied with the biodata system because the biodata alone cannot provide their clients with sufficient information.[224] Employers claim they need to know MDWs from inside-out because MDWs are required to stay with them for a contract period of at least two years. Therefore, having given priority to the clients' interests and preference in the center of duties and services,[225] he argued that MRAs are compelled to inform the employer anything, in particular, they need to know to manage MDWs.[226] By contrast, MDWs are given only minimal information on their future employers and have no say in the selection of the employer.[227] This is confirmed in the ethnographic study of labor migration by Indonesian and Filipina domestic workers to Hong Kong by Nicole Constable.[228]

Killias' assertion is valid in the context of Cambodian MDWs. On most recruitment agencies' websites, such as the DG Maid Agency and Agensi Pekerjaan Venture Provision (APVP),[229] which have been in the industry for the last ten years and affiliated with PAPA (the crucial partner of CRAs) the employer is promised "quality maids for quality life," "a maid with a great working attitude," or "the most reliable, honest and competent domestic maids." Evidently, these MRAs put MDWs' biodata on webpages.[230]

---

[221] 'Foreign Workers' (*Immigration Department of Malaysia*, 9 August 2020) <https://www.imi.gov.my/portal2017/index.php/en/main-services/foreign-workers.html> accessed 9 August 2020.
[222] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appendix A, clause B(iii).
[223] Killias (n 70) p.145.
[224] Killias (n 70), at p.143.
[225] 'Persatuan Agensi Pekerjaan Malaysia' (26 May 2020) <http://www.papa.org.my/> accessed 26 May 2020.
[226] Killias (n 70) p.149.
[227] Killias (n 70), p.143.
[228] Nicole Constable, *Maid to Order in Hong Kong: Stories of Migrant Workers* (Cornell University Press 2007) p.68.
[229] Both agencies have experiences of recruiting MDWs for the last 10 years.
[230] 'Best House Maid Agency in Kuala Lumpur & Selangor | Maid Station' <https://www.maidstation.com/, https://www.maidstation.com/, https://www.maidstation.com/> accessed 27 August 2020. Also visit 'Agensi

According to Hamid, biodata profiles de-humanize female workers and give employers the impression that they can choose between standardized and homogeneous products.[231] As Williams and Gavanas have asserted, the employment of MDWs creates a societal image of the employers and employment as an act of modern, middle-class consumption.[232] It cannot be reasonably argued that Cambodian MDWs are protected under the MOU's provision that obliges "the parties to observe the confidentiality and security of documents, information and other data received or supplied to other Party during the implementation of this MOU or any other agreements made pursuant to this MOU."[233] This is justified by the fact that the Malaysian Private Employment Agencies Act does not regulate the processing of migrant workers' biodata. The Cambodian MOLVT's *Prakas* on Private Recruitment Agency, which requires "the information and personal documents of workers to be kept confidential, unless a request from a competent authority" has no legal weight on MRAs.[234]

3.2.2. Admission Procedures and Recruitment Practices in Cambodia

3.2.2.1. Eligibility for Cambodian Migrant Domestic Workers

To be eligible, Cambodian MDWs must be female and aged between 21 and 45 years old.[235] They shall not be a "Prohibited Immigrant" under the Malaysian Immigration Act. This term includes any non-citizens, who falls within certain prohibited classes: (1) cannot show employment in Malaysia, or the means of supporting oneself; (2) are entering or have entered Malaysia unlawfully under any Malaysian law; (3) are not in possession of valid documents or using forged or altered travel documents; (4) have a pass or permit that has been canceled; (5) refuse to undergo a medical examination; and (6) have been convicted of any criminal offense in any country.[236]

Pekerjaan Danu Gemliang Sdn Bhd: DG Maid Agency' (2020) <https://www.dgmaidagency.com.my/index.php> accessed 27 August 2020.

[231] BA Hamid, 'The Identity Construction of Women/Maids in Domestic Help for Hire Discourse in Selected Malaysian Newspapers' (2009) 9 European Journal of Social Sciences 168, p.174.

[232] Helma Lutz, *Migration and Domestic Work: A European Perspective on a Global Theme* (Routledge 2016) p.13.

[233] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Article 13.

[234] Prakas on Private Recruitment Agency, 2013, Article 10.

[235] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Article 5.

[236] Laws of Malaysia: Immigration Act, 1959, (Act 155) Section 8.

3.2.2.2. The Recruitment of Cambodian Migrant Domestic Workers

CRAs are responsible for providing a potential Cambodian MDW to the employer's specification for selection.[237] The MOU does not detail how Cambodian MDWs are recruited under the MOU. However, it is known that the first point of contact between a CRA and the potential Cambodian MDWs is through independent brokers, who are well-known and trusted members of the community.[238] Good relations are also established with the village chief and headmasters of schools to provide fresh school leavers who are interested in working abroad.[239] Brokers often target impoverished families and present them with foods and immediate financial benefits to secure immediate commitment. These families perceive such immediate incentives to be sufficiently reasonable to consider labor migration.[240] Prospective Cambodian MDWs are then required to take pre-departure trainings arranged by CRAs.[241] The pre-departure trainings must be gender-sensitive and subject to provisions of Cambodian MOLVT and other relevant institutions.[242] The trainings must cover crucial aspects for MDWs, including languages, traditions, work conditions, skills, the employment contract, and labor laws and other laws related to health and work safety, health and the protection and prevention of infectious diseases, such as HIV.[243] In actuality, potential candidates are taken for pre-departure training at one of the CRA's training centers in Phnom Penh, Cambodia, for three to six months.[244] They are trained for general duties, such as laundering, ironing, and the use of household equipment,[245] as well as language (either Malay and English) and culture.[246] In other words, CRAs promote the effort invested in the training of inherently unskilled MDWs from rural areas to adapt them to what are perceived to be the expectations of urban middle-class Malaysian families.[247]

---

[237] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appedix A, clause C (i).
[238] Carol Strickler and Khun Sophea (n 46) p.25.
[239] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, p. 32.
[240] Holliday (n 74) pp.464-466.
[241] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 5.
[242] Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies 2011, Article 23.
[243] Prakas on Promulgation of Minimum Standards of Job Placement Services Abroad Contract 2013 s Article 4.
[244] Poudyal (n 33) p.44.
[245] UNIAP (n 73) p.30.
[246] Carol Strickler and Khun Sophea (n 46), p. 34.
[247] Killias (n 70) p.145.

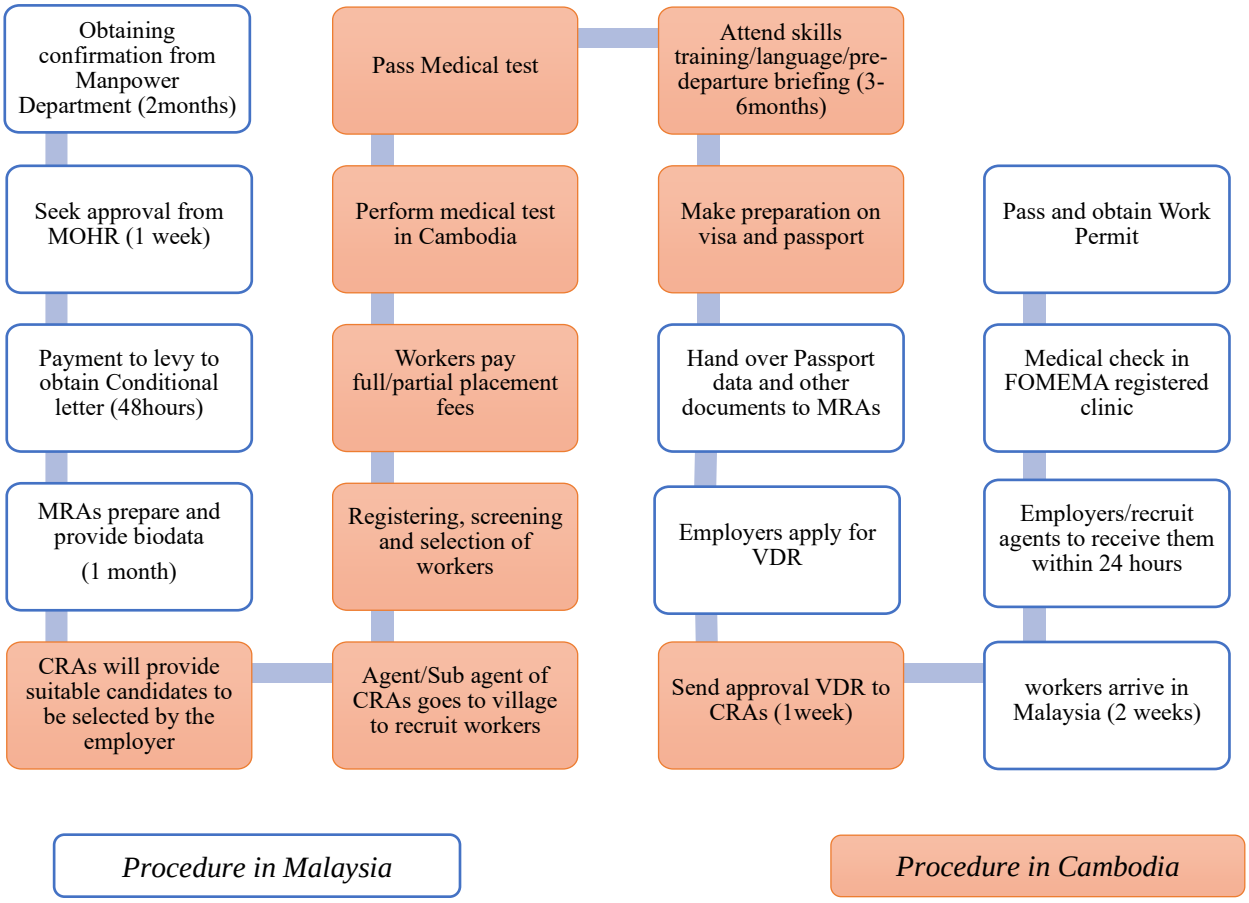
3.2.3. Medical Examinations

There are two rounds of medical examinations which Cambodian MDWs are subject to. First, Cambodian MDWs are obliged to undertake and pass medical examinations at the designated medical center in Cambodia before their departure for the employment in Malaysia.[248] However, the medical examinations reportedly take place inside the recruitment agencies.[249] Afterwards, Cambodian MDWs need to undergo a second round of medical examinations within thirty days from the date of arrival in Malaysia.[250] In Malaysia, the medical examinations are conducted through the state-authorized medical consortium, known as the Foreign Workers' Medical Examination Monitoring Agency (FOMEMA).[251] The MOU does not stipulate the types of diseases and medical conditions to be examined, but the Cambodian MOLVT's *Prakas* expressly requires the examinations to comply with provisions of the authorities of the destination country.[252] The Malaysian Immigration Department requires all migrant workers, including MDWs, to be tested for communicable diseases, such as HIV/AIDS, tuberculosis, sexually transmitted diseases, hepatitis A and B, urine cannabis, urine opiates, cancer, and epilepsy. For MDWs specifically, the annual pregnancy examination is mandatory. MDWs need to sign a consent form before being tested.[253] Upon examination, results will be electronically sent to the Malaysian Ministry of Health and the Immigration Department to facilitate the issuance of Visit Pass (Temporary Employment) or deportation.[254] Deportation within 24 hours is undertaken upon detection of pregnancy, HIV, or failure of any other medical tests.[255] The employer may appeal the decision through the examining doctor within two weeks.[256] Either way, the CRAs are required to negotiate with the MRAs for the substitution of Cambodian MDWs or reimbursement of costs and expenses for the employer.[257]

---

[248] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause C (ii).
[249] Poudyal (n 33), p.41.
[250] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause A (ix).
[251] 'FOMEMA: Prevention & Care' (2020) <http://www.fomema.com.my/> accessed 27 August 2020.
[252] Prakas on Promulgation of Minimum Standards of Job Placement Services Abroad Contract, part Annex, Article 4.
[253] International Labour Organisation and International Organization for Migration (eds), *Mandatory HIV Testing for Employment of Migrant Workers in Eight Countries of South-East Asia: From Discrimination to Social Dialogue* (ILO 2009) p.34.
[254] *ibid*.
[255] Immigration Department of Malaysia and Ministry of Home Affairs (n 22).
[256] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, p.17.
[257] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause C (xi).

Figure 1: Steps involved formal procedures in employing Cambodian MDWs



3.2.4. Recruitment and Placement Fees

The MOU establishes that Cambodian domestic workers are responsible for paying the cost of (a) visa; (b) travel documents and other related documentation imposed by the relevant authority in Cambodia; (c) medical examination in Cambodia before the employment; (d) accommodation and incidental expenses charged by the CRA in Cambodia before departure; (e) transportation cost from the place of residence to the original exit point in Cambodia; and (f) other expenses incurred in Cambodia.[258] The following table

[258] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause D (iii).

indicates administrative fees related to labor migration borne by a Cambodian migrant worker, including MDWs, in 2019.[259]

Table 2: Administrative Fees per Cambodian Migrant Workers

Administrative Fees per Cambodian Migrant Workers		
1	Application form to obtain passports to be signed at the village level by district and provincial police	5,000 to 10,000 Cambodian riel (KHR) (equivalent to USD 1.20 -2.50)
2	Issuing of Passport	KHR 4000,000 (USD 100) for the normal process within 30 days (KHR 800,000 (USD 200) for the premier process within three days);
3	Criminal Records Certificate	KHR 10,000 -20,000 (USD 2.25-5)
4	Health check-up	KHR 20,000 -40,000 (USD 5-10)
5	Approval of name list at the MOLVT's Department of Employment and Manpower	KHR 10,000 -KHR 20,000 (USD 2.50 -USD 5)
6	Department of Skills Development and Employment issuing permission for sending worker and issuing of the work permit	KHR 50,000 -80,000 (USD 12.50 -USD50)
7	Applying for a work visa (Visa with Reference at the Malaysian Embassy	The cost of the Visa with Reference depends on the nationality of the migrant worker. 20MYR for a single entry VDR
8	Pre-departure training services	KHR 80,000 -100,000 (USD 20-25)
9	Insurance	KHR 40,000-80,000 (USD10-20) for six to 12 months for migrant workers overseas employment

Accordingly, the administrative costs borne by a Cambodian MDWs is equivalent to USD 169-USD 304. This estimated amount excludes the costs of any service fees charged by private recruitment agencies, which can be substantial and vary considerably.[260] The phrase *"incidental expenses charged by the CRA in Cambodia before departure"* is not defined by the MOU, thereby having a spillover effect on Cambodian MDWs to be responsible for recruitment fees charged by CRAs. A study in 2012 by Jenna K. Holliday suggested that Cambodian MDWs were expected to pay at least between USD 900 and USD 1,300 for the

[259] International Labour Organization, *Recruitment Fees and Related Costs* (n 72) p.6.
[260] *ibid*.

recruitment expenses.[261] A report from the United Nations Inter-Agency Project on Human Trafficking (UNIAP) found slightly different figures of USD 810 to USD 1,200.[262] The Malaysian employers usually advance the recruitment fees but are later repaid through the first six or seven months of salary deductions.[263] The concept of Cambodian MDWs paying these recruitment fees remain valid and is indicative of the potential financial obligation which these workers are likely to incur under the MOU. In fact, Cambodian migrant workers have been known to pay high recruitment fees, at least USD 650, for taking up employment in a neighbouring country like Thailand.[264]

Under the MOU, Malaysian employers are required to bear costs on (a) security deposits, (b) processing fees, (c) Visit Pass (Temporary Employment), and (d) medical examination in Malaysia.[265] The significant change in Malaysian policy additionally requires the Malaysian employers to pay the levy for new MDWs as well as for MDWs, who have renewed their Visit Pass (Temporary Employment).[266] In 2019, the international newspaper Reuters quoted figures between MYR 12,000 (USD 2,866) and MYR 18,000 (USD 4,299) borne by Malaysian employers for recruiting MDWs through formal channels, by using private employment agencies.[267] Piyasiri Wickramsasekara, in his study, discovered lower figures between MYR 10,000 (USD 2389) to MYR 15,000 (USD 3583).[268] The above estimates range from the equivalent of USD 2,400 to USD 4,000.

Such high recruitment fees are attributed to the absence of a legal framework for recruitment charges. Article 3(1) of the Cambodian Code of Conduct for Cambodian Private Recruitment Agencies states that "recruitment fees and related costs must be limited to those permissible by the law."[269] However, Cambodia's existing legislation does not specify the maximum or "ceiling fees" that recruitment agencies are allowed to charge from migrant workers.[270] The Malaysian Private Employment Agencies Act limits

---

[261] Holliday (n 74) pp.464-466.
[262] UNIAP (n 73) p.38.
[263] Killias (n 70) p.150.
[264] Thomson Reuters Foundation, 'Cambodia to Curb Recruitment Fees' *Bangkok Post* (19 September 2019) <https://www.bangkokpost.com/world/1753684/cambodia-to-curb-recruitment-fees> accessed 27 August 2020.
[265] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause A (ix).
[266] 'Foreign Workers' (n 215).
[267] 'Malaysia's First "ethical" Job Agency Targets Modern Slavery' *Reuters* (7 October 2019) <https://www.reuters.com/article/malaysia-migrants-rights-idUSL5N25F2KY> accessed 9 August 2020.
[268] Wickramasekara (n 61), at p.15.
[269] Code of Conduct for Cambodian Private Recruitment Agencies, 2020.
[270] International Labour Organization, *Recruitment Fees and Related Costs* (n 72) p.6. It should be noted at the time of developing these eight *Prakas* there were discussions about another *prakas that would specify the costs permitted to be charged to migrant workers and the maximum or ceiling fees that recruitment agencies are allowed to charge.*

the placement fees to no more 25 percent of the first month's pay.[271] However, it applies to Malaysian workers who look for employment in the country and abroad.[272] The amended Malaysian Private Employment Agencies (Amendment) Act establishes that migrant workers may be charged only one month's worth of their basic wage in placement fees.[273] However, it remains uncertain how this new provision is implemented in practice. Besides, MRAs have shown no interest in implementing this particular Act. The Representative of PAPA described the amended Act as "long overdue for change."[274]

Evidently, recruitment agencies are the only actors which benefit the most from the MOU's framework. Their benefits are further protected by Article 4 of the Cambodian *Prakas* on Promulgation of Minimum Standards of Job Placement Services Abroad Contract, which establishes that "the recruitment agency is only responsible for the expenses and care for the migrant worker, who is waiting to reach the working place in the destination country, which is not more than five working days."[275] The lack of transparency hinders the access to information concerning revenues generated by CRAs from sending Cambodian MDWs to Malaysia. The Cambodian newspaper *Khmertimes* nevertheless mentioned that a small CRA known as *Maid in Cambodia* earned USD 1,500 a month by training only 14 Cambodian domestic workers.[276] Therefore, CRAs, such as Ung Rithy Group and Sok Leap Metrey, which have always been selected for pilot projects, must have made fat-cat profits from the business.[277] The same holds for MRAs. Irna Nurlina discovered that Malaysian employment agencies make a net profit of between MYR 3,000 (USD738) and MYR 4,000 (USD985) for each foreign worker they bring in.[278]

3.3. Admission Procedures and Recruitment Practices of Migrant Domestic Workers under International Human Rights Standards

3.3.1. Admission Procedures

The Migration for Employment Convention (Revised) (No.97) obliges Members States to take appropriate measures, within its jurisdiction, to facilitate the departure, journey, and reception of migrants for

---

[271] Laws of Malaysia: Private Employment Agencies Act 1981 Section 14.
[272] Bar Council Malaysia (n 78), at p.51.
[273] Wickramasekara (n 61) p.17.
[274] Bar Council Malaysia (n 78), at p.51.
[275] Prakas on Promulgation of Minimum Standards of Job Placement Services Abroad Contract s Article 4.
[276] 'Maid in Cambodia Turning Tidy Profits' *Khmer Times* (12 October 2014) <https://www.khmertimeskh.com/51908/maid-in-cambodia-turning-tidy-profits/> accessed 9 August 2020.
[277] Zsombor Peter, 'Agencies With Government Ties to Send Maids to Hong Kong' *The Cambodia Daily* (9 August 2017) <https://english.cambodiadaily.com/news/agencies-with-govt-ties-to-send-maids-to-hong-kong-133458/> accessed 9 August 2020.
[278] Irna Nurlina, 'Migrant Worker Recruitment Costs: Malaysia' (Transient Workers Count too 2016) p.4.

employment.[279] It means that receiving countries are not responsible for departure arrangements and conditions on the journey for incoming migrants for employment in sending countries.[280] However, receiving countries have to take measure to facilitate the smooth transition of migrant workers to the host country.[281] This obligation is read in conjunction with the Migration for Employment Recommendation (Revised) (No.86), which establishes that "it should be the general policy of Members to develop and utilizes all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency."[282] It is further guided by the Model Agreement of the Recommendation (No.86) which provides that "the parties agree to take measures with a view to accelerating and simplifying the carryout of administrative formalities relating to departure, travel, entry, residence and settlement of migrations and as far as possible for the members of their families."[283] The ILO Multilateral Framework on Labor Migration also calls ILO Members States to consider simplifying administrative procedures involved in the migration process.[284] These standards are now enshrined in Goal 10.7 of the United Nations 2030 Sustainable Development Goals (SDGs), which calls for facilitating orderly, safe, and responsible migration and mobility of people, including through implementation of planned and well-managed migration policies.[285]

---

[279] Migration for Employment Convention (Revised), 1949, (No.97), Article 4.

[280] International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Internat Labour Off 1999) para 237.

[281] International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Internat Labour Off 1999) para 253.

[282] Migration for Employment Recommendation (Revised), 1949, (No.86) para 4(1).

[283] Migration for Employment Recommendation (Revised), 1949, (No.86), the Model Agreeement on Temporary and Permanent Migration for Employment, Article 3.

[284] *ILO Multilateral Framework on Labor Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labor Migration* (International Labor Office 2006), Guideline 12.

[285] Department of Economic and Social Affairs, 'Global Indicator Framework for the Sustainable Development Goals and Targets of 2030 Agenda for Sustainable Development' (2020) E/CN.3.3/2020/2.

3.3.2. Recruitment Practices

3.3.2.1. Recruitment Machinery

Article 3(2) of Annex I and Article 3(2) of Annex II to Convention (No.97) stipulates that the right to engage in the operation of recruitment, introduction, and placing shall be restricted to (a) public employment offices or other public bodies of the territory in which the operations take place, (b) public bodies of a territory other than that in which the operations take place which are authorized to operate in that territory by agreement between the Government concerned; (c) any body established in accordance with the terms of international instrument. Article 3(3) of Annex I states that "in so far as national laws and regulations or a bilateral agreement permit, the operations of recruitment, introduction, and placing may be undertaken by (a) the prospective employer or a person in his service acting on his behalf, subject if necessary in the interest of the migrant, to the approval and supervision of the competent authority, and (b) a privacy agency, if given prior authorization so to do by the competent authority of the territory where the operations are to take place, in such cases and under such conditions as may be prescribed by (i) the laws and regulations of that territory, or (ii) agreement between the competent authority of the territory of emigration or any body established in accordance with the terms of an international instrument and the competent authority of the territory of immigration. The competent authority of the territory where the operations take place shall supervise the activities of bodies and persons to whom authorization have been issued. Articles 3 and 4 of Annex II reaffirm these provisions.[286] Thus, hiring activities can be undertaken either by official recruitment bodies, or by other bodies or individuals authorized to do by the State.

3.3.2.2. Medical Examinations

The Convention concerning Decent Work for Domestic Workers (No.189) obliges Members States, in relation to domestic workers, take the measures set out in the Convention to respect, promote, and realize the fundamental principles and rights at work; one of them is the elimination of discrimination in respect of employment and occupation. This obligation is rooted in the Discrimination (Employment and Occupation) Convention (No.111), which requires each members for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.[287] The term "employment and occupation" includes access to vocational training, access to employment and to particular occupations, and terms and

[286] Migration for Employment Convention (Revised), 1949, (No.97).
[287] Discrimination (Employment and Occupation) Convention, 1958, (No.111) Article 2.

conditions of employment.[288] It is read together with the Private Employment Agencies Convention (No.181), which obliges Members States to ensure that private employment agencies treat workers without discrimination on the basis of race, color, sex, religion, political opinion, national extraction, social origin, or any other form of discrimination covered by national law and practice, such as age or disability, in order to promote equality of opportunity and treatment in access to employment and to particular occupations.[289] The ILO's General Principles and Operational Guidelines for Fair Recruitment likewise stipulates that "the recruitment should take place in a manner that respects, protects and fulfills internationally recognized human rights, including those expressed in international labor standards, including the elimination of discrimination in respect of employment and occupation."[290]

Domestic Workers Recommendation (No.201) states that "in taking measures for the elimination of discrimination in respect of employment and occupation, Members should, consistent with international labor standards, among other things: (a) make sure that arrangements for work-related medical testing respect the principle of confidentiality of personal data and the privacy of domestic workers, and are consistent with the ILO code of practice "Protection of Workers' personal data" 1997 and other relevant international data protection standards (b) prevent any discrimination related to such testing, and (c) ensure that no domestic workers is required to undertake HIV or pregnancy testing or to disclose HIV or pregnancy status."[291] This provision is stemmed from the Maternity Protection Convention (No.183) and the ILO Recommendation concerning HIV and AIDS and the World of Work (200). The former expressly obliges Member States to adopt appropriate measures to ensure that maternity does not constitute a source of discrimination in employment, including access to employment.[292] The latter prohibits mandatory HIV testing or other forms of screening for HIV required for employment and migration purposes.[293]

3.3.2.3. Processing of Personal Data

Under Article 6 of the ILO Convention (No.181), the processing of personal data of workers by private employment agencies shall be done in a manner that protects this data and ensures respect for workers' privacy in accordance with national law and practice, as well as limited to matters related to the

[288] Discrimination (Employment and Occupation) Convention, 1958, (No.111), Article 1(3).
[289] Private Employment Agencies Convention, 1997, (No.181), Article 5.
[290] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs, 2019, Principle 1.
[291] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), para 3(c).
[292] Maternity Protection Convention, 2000, (No.183), Article 9 (1) and (2).
[293] Recommendation concerning HIV and AIDS and the World of Work, 2010 (No. 200) 2010 para 25.

qualifications and professional experience of the workers concerned and any other directly relevant information.[294]

3.3.3. Recruitment Fees and Related Recruitment Costs

The terms *"recruitment fees"* or *"related recruitment costs"* are not formally defined in most ILO Conventions.[295] However, both key terms are defined in the ILO's General Principles and Operational Guidelines for Fair Recruitment. Briefly speaking, both terms cover any fees or costs incurred in the recruitment process so that a worker can secure his employment or placement, irrespective of the manner, timing, or location of their imposition or collection.[296] "*Recruitment fees"* specifically entail (1) payments for recruitment services offered by labor recruiters, whether public or private, matching offer of employment applications, (2) payments required to recover recruitment fees from workers, (3) payments made in the case of direct recruitment by the employer, or (4) payments made in the case of recruitment of a worker a view to employing him to perform work for a third party.[297] Fees may be one-time or recurring, and incorporate recruiting, referral, and placement services that include advertising, disseminating information, arranging interviews, submitting documents for government clearances, confirming credentials, organizing travel and transportation, and placement into employment.[298] The term *"related costs"* are expenses integral to recruitment and placement within or across national borders, taking into account that widest set of related costs are incurred for international recruitment. When initiated by an employer, labor recruiter or an agent acting on behalf of those parties; required to secure access to employment or placement; or imposed during the recruitment process, the following costs should be considered related to the recruitment:

(a) **Medical costs**: payments for medical examinations, tests or vaccinations

(b) **Insurance costs**: costs to insure the lives, health, and safety of workers, including enrollment in migrant welfare funds

(c) **Costs for skills and qualification tests**: costs to verify workers' language proficiency and levels of skills and qualifications, as well as for location-specific credentialing, certification or licensing

---

[294] Private Employment Agencies Convention, 1997, (No.181), Article 6.
[295] Asian Development Bank Institute and International Labor Organization (n 114) p.26.
[296] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II.
[297] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, para 9.
[298] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, para 10.

(d) **Costs for training and orientation**: expenses for required training, including on-site job orientation and pre-departure or post-arrival orientation of newly recruited workers;

(e) **Equipment costs**: costs for tools, uniforms, safety gear, and other equipment needed to perform assigned work safely and effectively;

(f) **Travel and lodging costs**: expenses incurred for travel, lodging and subsistence within or across national borders in the recruitment process, including for training, interviews, consular appointments, relocation and return or repatriation; and

(g) **Administrative costs**: application and service fees that are required for the sole purpose of fulfilling the recruitment process. These could include fees for representation and services aimed at preparing, obtaining, and legalizing workers' employment contracts, identity documents, passports, visas, background checks, security and exit clearance, banking services, and work and residence permit. [299]

The ILO's General Principles and Operating Guidelines for Fair Recruitment establishes that *"no recruitment fees or related costs should be charge to, or otherwise borne by workers, or jobseekers."*[300] This general principle is derived from International Human Rights Law that is applicable to MDWs as discussed in Chapter 2. Article 15(1) of the ILO Convention (No.189) obliges Members States to take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers, in order to effectively protect domestic workers, including MDWs, recruited or placed by private employment agencies, against abusive practices. Article 7(2) of the ILO Convention (No.97) enunciates that "services rendered by its public employment service to migrants for employment shall be rendered free."[301] Article 7(1) of the ILO Convention (No.181) stipulates that "private employment agencies are prohibited from charging, directly or indirectly, in whole or in part, any fees or costs to workers." However, Article 7(2) states that "in the interest of the workers concerned, and after consulting with the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provision of Article 7(1) above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies."[302]

[299] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, para 12.
[300] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, General Principle 7.
[301] Migration for Employment Convention (Revised) 1949 (No.97).
[302] Private Employment Agencies Convention, 1997, (No.181).

3.4. General Discussion and Analysis

3.4.1. The Implications of the MOU on Cambodian Migrant Domestic Workers

The MOU-based admission procedures and recruitment practices are burdensome and lengthy. The entire process takes roughly 20 separate administrative steps and three to six months to complete. It involves various Ministries and Departments in both countries, including the Malaysian MOHR, the Malaysian Immigration Department, the Malaysian MOHA, the Cambodian Embassy, the Cambodian MOLVT, the Cambodian Ministry of Justice, and the Cambodian Ministry of Interior. These findings mirror theme set out in the World Bank's study on Indonesian Migration to Malaysia in 2017, which found the process of becoming a documented MDWs in Malaysia entails 22 separate administrative steps and can take up to three months.[303] Furthermore, the recruitment fees and related costs, ranging from USD 810 to USD 1,300, are exceptionally high for the impoverished Cambodian MDWs whose estimated GDP per capita was USD 1,510 in 2018.[304] The Cambodian Development Resources Institute (CDRI) has compared the costs and time involved in legal and irregular migration. It found that the irregular migration costs Cambodian migrant workers USD 100 and takes a few days to complete.[305] In a similar vein, according to the World Bank's study, the average total cost of documented migration to Malaysia is 52 percent higher than undocumented migration.[306]

Besides that, Cambodian MDWs are obliged to undertake mandatory pregnancy and HIV/AIDS examinations by the Malaysian Immigration Department. The MOU does not specify minimum standards and conditions to ensure voluntariness, informed consent, confidentiality, and referral for post-testing counseling and care, particularly for HIV testing. Such examinations are not consistent with the Cambodian Law on Prevention and Control of HIV/AIDS (2002). The medical examinations, which allegedly take place inside the CRAs, severely breach Article 23 of the legislation concerned.[307] The provision requires all mandated testing centers offering HIV/AIDS testing to seek accreditation from the Cambodian Ministry of Health.[308] Article 20 strictly prohibits compulsory HIV testing to indicate pre or postconditions for

---

[303] The World Bank, 'Indonesia's Global Workers: Juggling Opportunities and Risks' (The World Bank 2017) p.5 <http://pubdocs.worldbank.org/en/357131511778676366/Indonesias-Global-Workers-Juggling-Opportunities-Risks.pdf>.
[304] 'GDP per Capita (Current US$) - Cambodia' (*The World Bank*, 2020) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KH> accessed 20 June 2020.
[305] OECD and Cambodia Development Resource Institute (n 25) p.39.
[306] The World Bank (n 303) p.40.
[307] Poudyal (n 33), p.41.
[308] Law on the Prevention and Control of HIV/AIDS 2002 Article 23.

employment, and the testing is only allowed in case of a court order.[309] This major drawback can be explained by the fact that the country's current legislative frameworks struggle to keep up with the rapid evolution of labor migration trends and local needs, thereby leaving migrant workers without critical protections that robust monitoring and regulation should provide.[310] The frameworks also contain loopholes that can be easily exploited by opportunistic recruiters and brokers.[311] It is further compounded by most CRAs have a close familial connection to high-ranking government officials. Ung Seang Rithy, who owns the Ung Rithy Group, has a close familial connection to General Sok Phal, the Supreme Director of the Supreme Directorate for Immigration of Cambodian Ministry of Interior.[312] Sok Leap Metrey is owned by Seng Toussita, who is the daughter of Seng Sakada, the Director of the MOLVT's Labor Department.[313] Both have been blasted for its drastic recruitment and training practices, as stated by Phil Robertson, the Human Rights Watch Deputy Director for Asia.[314] The close tie between national government and ownership of CRAs make it less likely for there to be the political will to make change to the MOU. However, this does not negate the application of Cambodian national law on medical testing or the importance of highlighting the rights deficit that these workers face.

Therefore, high costs, long duration, complex administrative requirements, and restrictive immigration provisions inherent to the MOU-based admission procedures and recruitment practices drive the majority of Cambodian MDWs to pursue informal or irregular migration. Although these costs can be quickly recovered after a few months of working abroad, a psychological effect known as "loss aversion" exists, whereby people display a strong preference for avoiding to suffer a short-term loss than acquire a longer-term gain.[315] Their vulnerability is further exacerbated by independent brokers, who allegedly give incomplete, false, or misleading information concerning the terms and conditions of employment. This practice is not addressed in the Article 22 of the Cambodian Sub-Decree (No.190).[316] It stipulates that

---

[309] Law on the Prevention and Control of HIV/AIDS 2002 Article 20.
[310] OECD and Cambodia Development Resource Institute (n 25), at p.35.
[311] Chen Chen Lee, 'Exploitative Labour Brokerage Practices in Cambodia: The Role and Practices of Private Recruitment Agencies1'.
[312] Human Rights Watch (Organization) (ed), *Cambodia's Dirty Dozen: A Long History of Rights Abuses by Hun Sen's Generals* (Human Rights Watch 2018) p.174.
[313] Peter (n 277).
[314] Matt Blomberg, 'Concern Over Migration Chief's Family Connections' *The Cambodia Daily* (24 April 2014) <https://english.cambodiadaily.com/news/concern-over-migration-chiefs-family-connections-57202/> accessed 16 July 2020.
[315] Daniel Kahneman and Amos Tversky, 'Choices, Values, and Frames', *Handbook of the fundamentals of financial decision making: Part I* (World Scientific 2013) p.342.
[316] Natalie Drolet, 'Domestic Workers and Sub Decree No.190: Time to Protect Cambodia's Migrants' (LSCW 2013) p.9.

"advertisement of recruitment agencies shall be appropriate and comprehensive according to facts regarding selection requirement, working conditions, and benefits to be entitled during the employment without lying or cover-up."[317] This assertion is confirmed by the Government of Cambodia in its 2020 Decent Work Country Program: "Due to high demand for cheap labor and high costs, long duration, and complexity of formal migration channels, many Cambodian migrant workers are forced to migrate through irregular channels."[318] There is no recent and reliable figures of irregular Cambodian migrants to support this assertion because the latest figures were issued in 2009.[319] However, the incident of that 250,000 irregular Cambodian emigrants returning to Cambodia in 2014, prompted by fear of arrest by Thai authorities as a result of a crackdown after *coup d'etat,* justifies the claim.[320]

Irregular migration can expose MDWs to forced labor, including trafficking in persons (TIPs).[321] This is confirmed by the United Nations Special Rapporteur on TIPs, especially Women and Children's 2015 report on her country visit to Malaysia, which stated that *"a large number of women and girls are trafficked in the domestic servitude in Malaysia by employment agencies in their home country or in Malaysia or employers in Malaysia, at times with the alleged complicity of state officials. They are trapped into various forms of abuses and exploitation, which further contribute to the trafficking situations including breaches of contract, excessive recruitment fees, non-payment of salary, deductions from low wages, excessive working hours, a lack of rest days and the withholding passports. Many domestic workers have also experienced unimaginable physical and mental abuses at the hand of their employers, from being deprived of food to beating with electrical wires, scalding with hot water, harassment, psychological abuse and sexual assault."*[322] Likewise, the Committee on the Elimination of Discrimination against Women (CEDAW), in its recent concluding observation, has identified Malaysia as a destination country for

---

[317] Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies 2011, Article 22.

[318] International Labour Organization, *Kingdom of Cambodia Decent Work Country Programme (DWCP) 2019-2023* (2019) p. 21 <http://www.ilo.org/asia/publications/WCMS_710183/lang--en/index.htm> accessed 17 August 2020.

[319] For further information read Srawooth Paitoonpong and Yongyuth Chalamwong, 'Managing International Labor Migration in ASEAN: A Case of Thailand'.

[320] Deutsche Welle (www.dw.com), 'Mass Exodus of Cambodian Workers Continues Following Thai Military Coup | DW | 17.06.2014' *DW.COM* (10 August 2020) <https://www.dw.com/en/mass-exodus-of-cambodian-workers-continues-following-thai-military-coup/a-17711665> accessed 10 August 2020.

[321] International Labor Conference (ed), *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution): International Labour Conference, 105th Session, 2016* (first edition 2016, International Labor Office 2016), at para 255.

[322] Giammarinaro (n 15) para 12.

trafficking of women and girls, including asylum seeking and refugee women and girls, for purpose of sexual exploitation, begging, forced marriage, and especially forced labor.[323]

High recruitment costs also lead to indebtedness and wage deductions. Francois Crepeau, the United Nations Special Rapporteur on the Human Rights of Migrants, explained that *"migrant workers do not have spare resources to pay recruitment fees, which can amount to more than two years' worth of wages. They therefore are forced to take out high compound interest loans, with rates reported to range between five (5) percent to eighty (80) percent, to pay recruitment fees. Migrants need to sign over the deeds of their property to secure these loans. As these fees and the commonly resulting debt further increase the precariousness of the migration situation, they can trap migrants in situations of bondage and forced labor."*[324] The United Nations Special Rapporteur on TIPs, especially Women and Children, Maria Grazia Giammarinaro, similarly noted that a large number of MDWs in Malaysia are trapped in situations akin to debt bondage, trying to repay exorbitant debts owed to traffickers and recruitment agencies from their journey.[325] Indeed, women migrant workers, who are heavily burdened by debt from recruitment fees, like Cambodian MDWs, are unable to leave abusive situations and have no other way to repay those debts, as asserted by the CEDAW.[326] Asha D'Souza also claimed that excessive fees, together with arbitrary deductions from salary imposed by the employer, can be responsible for trapping MDWs in situations of debt bondage, a widespread of forced labor.[327]

3.4.2. An Analysis of How the MOU differs from International Human Rights Law

3.4.2.1. Admission Procedures

The recruitment of Cambodian MDWs under the MOU are burdensome and lengthy documentation procedures, taking approximately 20 administrative steps and three to six months to complete. In its preamble, the MOU recognizes the need to establish a framework to facilitate the recruitment and employment of Cambodian MDWs. However, this bilateral agreement contains no provision regarding taking measures together to accelerate and simplify the carrying out of administrative formalities relating to the departure, travel, entry, residence, and settlement of Cambodian MDWs. It rather preserves the

---

[323] *Concluding observation on the combined third to fifth periodic reports of Malaysia* [2018] CEDAW CEDAW/C/MYS/CO/3-5 [25].
[324] Francois Crepeau, 'Report of the Special Rapporteur on the Human Rights of Migrants' (United Nations General Assembly 2015) A/70/310 para 22.
[325] Giammarinaro (n 15) para 12.
[326] General Recommendation (No.26) on Women Migrant Workers 2008 para 15.
[327] Asha D'Souza, *Moving towards Decent Work for Domestic Workers: An Overview of the ILO's Work* (ILO 2010) p.32.

sovereign right of each contracting party to independently regulate the admission and recruitment of Cambodia MDWs, according to Article 3 of the MOU.[328] The Migration for Employment Convention (Revised) (No.97) echoes the need for each Members State to take appropriate measures, within its jurisdiction, to facilitate the departure, journey, reception of migrants for employment. This provision is construed together with the Migration for Employment Recommendation (Revised) (No.86). It converts into an international obligation that "it should be the general policy of Members to develop and utilizes all possibilities of employment and for this purpose to facilitate the international distribution of manpower and in particular the movement of manpower from countries which have a surplus of manpower to those countries that have a deficiency."[329] This provision is further guided by the Model Agreement on Temporary and Permanent Migration for Employment of the ILO Recommendation (No.86). It stipulates that "the parties agree to take measures with a view to accelerating and simplifying the carryout of administrative formalities relating to departure, travel, entry, residence and settlement of migrations and as far as possible for the members of their families."[330] Thus, admission procedures entailed in the Malaysian immigration provisions and the MOU are not in line with the ILO Convention (No.97).

3.4.2.2. Recruitment Machinery

As discussed above, Article 3 of Annex I, together with Articles 3 and 4 of Annex II, to Convention (No.97) establishes that the right to engage in the operation of recruitment, introduction, and placing shall be restricted to official recruitment bodies, or by other bodies or individuals authorized to do by the State. This provision must be construed with Article 3(1) of Convention (No.97) that echoes the need for appropriate steps against, so far as national laws and regulations permit, misleading propaganda relating to emigration and immigration. The CEACR explains that this provision applies for the protection of workers from misleading information which stems from intermediaries, who have an interest in encouraging migration in any form to take place, regardless of the consequences for the workers involved.[331] Although the MOU

---

[328] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 3. It stipulates that "the recruitment of Cambodian MDWs is conducted in accordance with and subject to the terms of the MOU, together with domestic laws, rules, regulations, national policies and directive of each country.

[329] Migration for Employment Recommendation (Revised), 1949, (No.86) para 4(1).

[330] Migration for Employment Recommendation (Revised), 1949, (No.86), the Model Agreeement on Temporary and Permanent Migration for Employment, Article 3.

[331] International Labor Conference (ed), *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution): International Labour Conference, 105th Session, 2016* (first edition 2016, International Labor Office 2016), at para262.

establishes that CRAs are responsible for providing a potential Cambodian MDW to the employer's specification for selection,[332] it is known that the first point of contact between a CRA and the potential Cambodian MDWs is through independent brokers, who are not necessarily authorized by the Cambodian Government to engage in the operation of recruitment.[333] These brokers often target impoverished families and give them with incomplete, false, or misleading information concerning the terms and conditions of employment. MDWs' vulnerability is further aggravated by the fact that the Cambodian Sub Decree (No.190), the main instrument that regulates the recruitment of Cambodian migrant workers by private employment agencies, fails to address this common practice. Therefore, on this account, the MOU's framework for the recruitment of Cambodian MDWs is incompatible with the Migration for Employment Convention (Revised) (No.97).

Cambodia is not a party to the ILO Convention (No.97).[334] By contrast, the Sabah State of Malaysia ratified the ILO Convention (No.97) in 1964, during the period of British colonization.[335] The Sabah State is the only state in Malaysia which is bound by Convention No.97 and therefore the only region in which migrant workers, including MDWs, who reside and are employed there, are protected by the rights and obligations entailed in the Convention. However, it is not always the case. In 1994, the Malaysian Federal Government transferred the coverage of foreign workers from the Employees' Social Security Scheme (ESSS) to the Workmen Compensation Scheme (WCS). This initiative applies to foreign workers who reside in the entire Federation, but recently excluded foreign workers who permanently reside in Sabah State. The CEACR has long observed differences in treatment between nationals and temporary foreign workers with respect to payment of social security benefits in the case of industrial injuries. In its observation of the Equality of Treatment (Accident Compensation) Convention (No.19), the committee once asserted that such initiative was not in conformity with Article 6 paragraph 1(b) of the Convention (No.97) and expressed its expectation that the Government would take the necessary steps to place foreign workers back under ESSS under the same conditions as nationals, thereby providing them equal treatment under the law as far as

[332] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appedix A, clause C (i).
[333] Carol Strickler and Khun Sophea (n 46), 2015, p.25.
[334] 'Ratifications for Cambodia' (*International Labor Organization*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103055> accessed 20 August 2020.
[335] 'Ratifications for Malaysia - Sabah' (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103586> accessed 20 August 2020.

compensation for the industrial accident is concerned.[336] The CEACR has recently requested to the Government to provide information on the steps taken, including the conclusion of bilateral or multilateral agreements, to ensure that migrant workers, who are in the country temporarily, do not receive treatment which is less favorable than that applied to nationals or foreign workers permanently residing in the country with respect to all social security benefits.[337] Here, one may observe that the CEACR does not restrict its jurisdiction to national and migrant workers who are employed in Sabah State when examining the Convention. The Committee preferably coined the phrase "migrant workers in the country" instead of "migrant workers in Sabah State." In addition, its comments have sought to improve federal legislation and policies, which have a spill-over effect on foreign workers in the entire Federation rather than just migrant workers in Sabah State, or to address matters that are subject to the control of the federal administrative authorities. It can be then argued that the ILO Convention (No.97) covers foreign workers, including MDWs, in the entirety of Malaysia, not just the Sabah State.

Besides, Article 6(2) of the ILO Convention (No.97) provides that "in the case of a federal State the provision of this Article (6) shall apply in so far as the matters dealt with are regulated by federal law or regulations or are subject to the control of federal administrative authorities…In respect of matters which are regulated by the law or regulations of the constituent States, provinces, or cantons, or are subject to the control of the administrative authorities thereof, the Member shall take the steps provided in paragraph 7(b) of Article 19 of the ILO Constitution." The provision applies in a situation where a Federal Government regards any ILO Conventions and recommendations as appropriate under its constitutional system, in whole or in part, for action by the constituent states, rather than federal action. Article 19(7) of the ILO Constitution; thus, imposes various obligations on the Federal Government concerned, notably to: (i) make effective arrangements for the reference of such Conventions and Recommendations not later than 18 months from the closing of the session of the Conference to the appropriate federal, state, provincial or cantonal authorities for the enactment of legislation (ii) arrange, subject to the concurrence of the state governments concerned, for periodical consultation between the federal and the state, provincial or cantonal authorities with a view to promoting within the federal State coordinated action to give effect to the provision of such Conventions and Recommendations; (iii) inform the Director-General of the International Labor Office of the measures taken in accordance with this article to bring such Conventions and

[336] *Observation (CEACR) - adopted 1995, published 83rd ILC Session (1996): Equality of Treatment (Accident Compensation) Convention (No.19) - Malaysia*.
[337] *Observation (CEACR) - adopted 2017, published 107th ILC Session (2018): Migration for Employment Convention (Revised), 1949 (No.97) - Malaysia - Sabah (Ratification: 1964)*.

Recommendations before the appropriate federal state, provincial or cantonal authorities with particulars of the authorities regarded as appropriate and of the action taken by them. This obligation expects the Federal Government of Malaysia to make progress toward coordinated actions within the Federal State that give effect to the Convention (No.97). This obligation also enables the ILO to be informed of progress made by the country.

3.4.2.3. Medical Examination

The recruitment practices allegedly involve the mandatory pregnancy and HIV/AIDS examinations. The CEACR has repeatedly asserted that pregnancy testing and HIV/AIDS screening for domestic work are tantamount to discrimination within the context of Discrimination (Employment and Occupation) Convention (No.111).[338] The Convention is one of the fundamental Conventions and important source of interpretation for the Maternity Protection Convention (No.183) and Domestic Workers Convention (No.189). Notwithstanding that Malaysia is not a contracting party to Conventions (No.111), (No.183), and (No.189), the country still has the obligation, that is derived from being a member of the ILO, to respect, to promote, and to realize, in good faith and in accordance with the ILO Constitution, fundamental principles and rights at work concerning the elimination of discrimination in respect of employment and occupation.[339] By the same token, Cambodia has the obligation to comply with the ILO Convention (No.111) because it ratified the instrument.[340] Therefore, the Malaysian Immigration Department's provision that requires Cambodian MDWs to undertake the pregnancy and HIV/AIDS examinations are tantamount to discrimination within the context of the ILO Convention (No.111). Both countries have failed to observe and adequately fulfil their international human rights obligations to respect, promote, and realize Cambodian MDWs' fundamental rights relating to the elimination of discrimination in respect of employment and occupation.

3.4.2.4. Recruitment Fees and Related Recruitment Costs

The MOU also requires Cambodian MDWs to be responsible for administrative fees charged by the Government of Cambodia to secure their employment in Malaysia (see table 2). There are no ILO

---

[338] International Labour Conference, 'Fourth Item on the Agenda: Decent Work for Domestic Workers' (n 17) para 190.
[339] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, Article 2.
[340] 'Ratifications of C111 - Discrimination (Employment and Occupation Convention), 1958 (No.111)' (*International Labor Organization (ILO)*) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312256> accessed 16 September 2020.

pronouncements on this matter. However, in 1993, the Sri Lankan Government asked the ILO for an informal opinion on its regulation to charge prospective migrants for a tax covering certain costs of medical examinations, insurance, vocational training, information and other social services.[341] The International Labor Office first explained that Article 7(2) of the ILO Convention (No.97), which states that services rendered by its public employment services of migrants for employment shall be rendered free, must be ensured, without specifying whether this service is to be provided by the public employment service or another service. The Office subsequently, referring to Article 2 of the same Convention, explained that the Government's initiative is an example of the types of services that should be provided free to migrant workers. The Office then asserted that charging migrant workers for purely administrative costs of recruitment, introduction, and placement is forbidden for both public and private recruitment agencies. It finally concluded that the Government's initiative is not consistent with the ILO Convention (No.97).[342] On this account, the MOU's provision that requires Cambodian MDWs to be responsible for administrative fees (see table 2) is incompatible with the ILO Convention (No.97).

The MOU's provisions also oblige Cambodian MDWs to be responsible for the payment of incidental expenses charged by the CRAs in Cambodia before departure. That evidently includes recruitment fees and related costs charged by CRAs. This is inconsistent with Article 7(1) of the ILO Convention (No.181), which prohibits private employment agencies from charging, directly or indirectly, in whole or in part, any fees or costs to workers. This can be construed in accordance with the "no recruitment fees or related costs should be charged to, or otherwise borne by workers or jobseekers" principle of the ILO's General Principles and Operational Guidelines for Fair Recruitment. The principle means workers should not be charged any recruitment fees or related costs by an enterprise, its business partners, or public employment service for recruitment or placement, nor should workers have to pay for additional costs related to recruitment.[343] If charged, fees and related recruitment costs should be regulated in accordance with the

---

[341] International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Internat Labour Off 1999) para 168.

[342] International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Internat Labour Off 1999) para 169.

[343] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, Operational Guideline 17.

principle of equality of treatment for both national and foreign workers.[344] Either way, prospective employers, public or private agencies, or their intermediaries, should bear the cost of recruitment. The full extent and nature of costs should be transparent to those who pay them.[345] As discussed above, the Malaysian Private Employment Agencies Act limits the placement fees to no more than 25 percent of the first month's pay, but this provision does not cover foreign workers, including Cambodian MDWs. Therefore, it can be argued that Cambodia and Malaysia, when drafting the MOU, have failed to observe Article 7(1) of the ILO Convention (No.181).

Although both countries are not the parties to the Convention (No.181), they still carry the obligation of Article 19(5)(e) of the ILO Constitution, which stipulates that *"if the Member does not obtain the consent of the authority or authorities within whose competence the matter lies, no further obligation shall rest upon the Member except that it shall report to the Director-General of the International Labor Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention, showing the extent to which effect has been given, or is proposed to be given, to any of the provisions of the Convention by legislation, administrative action, collective agreement or otherwise and stating the difficulties which prevent or delay the ratification of such Convention."*[346] Ebere Osieke, in his book, explains that this obligation enables the ILO to take stock of the progress made by Governments towards the application of the unratified Conventions and serves as a useful reminder to Governments of the existence of the standards in question. It additionally clarifies doubts that may exist concerning the scope and requirements of the instruments, thereby paving the way for further ratifications or at least fuller implementations.[347] In 2009, the Governing Body requested a review of the ILO Convention (No.181). Malaysia and Cambodia communicated their national policies and legislative frameworks to the CEACR, thereby allowing the Committee to examine the progress made by both countries towards the application of the unratified Convention and to remind both countries of the existence of the standards in question.[348]

---

[344] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Part II, para 14.

[345] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019, Operational Guideline 6.2.

[346] ILO Constitution 1948.

[347] Osieke (n 88) p.160.

[348] *General Survey Concerning Employment Instruments in Light of the 2008 Daclaration on Social Justice for a Fair Globalization ; Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; Report of the Committee of Experts on the Application of Conventions and Recommendations*

Article 7(2) permits exemptions from Article 7(1) of the ILO Convention (No.181), but the making use of this provision is subject to consultation with the most representative organizations of workers and employers, transparency, and reporting obligations under Article 22 of the ILO Constitution.[349] As a case in point, CEACR assessed Section 10(2) of the Ethiopian Employment Exchange Service Proclamation No.632/2009, which requires workers to be responsible for passport issuance fees; costs associated with the authentication of the contract of employment received from overseas and the certificate of clearance from crime; medical examination fees; vaccination fees; birth certificate issuance fees, and expenses related to the certificate of occupational competence. The Committee concluded that the Proclamation would not affect in any way the application of Article 7(2) of the Convention, but the Ethiopian Government were required to provide information on the reasons for authorizing such exemptions, in the interest of the worker concerned, as contemplated in Article 7(2) of the Convention.[350] Cambodia and Malaysia have not explained how the MOU's provision on payment of recruitments fees would benefit Cambodian MDWs. Instead, evidence has been found that such high recruitment fees can adversely erode the benefits of migration for Cambodian MDWs. The ILO/KNOMAD surveys on migration costs have shown that worker-paid migration costs and recruitment fees absorb a high share of workers earning, especially for low-skilled and semi-skilled migrant workers.[351] Piyasiri Wickramasekara, in his recent study about the high recruitment fees on Indonesian MDWs in Malaysia, presented that 60 percent of Indonesian MDWs experienced three months of salary deductions. The most commonly reported amount of salary deducted was MYR 3,710 (USD 744), while the median amount reported was MYR 2,742 (USD 656). The survey found that the mean monthly salary was MYR 1,070 (USD256), which translates into about two-three months' worth of salary deducted.[352] Thus, the national practice of charging the worker recruitment and administrative fees is inconsistent Article 7(1) and (2) of the ILO Convention (No.181).

(Articles 19, 22 and 35 of the Constitution) ; International Labour Conference, 99th Session, 2010 ; Report III (Part 1 B) (1. ed, Internat Labour Off 2010).

[349] International Labor Conference, *General Survey Concerning the Migrant Workers Instruments* (n 208) para 230.

[350] *Observation (CEACR) - adopted 2019, published 109th ILC Session (2020) - Private Employment Agencies Convention, 1997 (No181) - Ethiopia (Ratification: 1999)*.

[351] 'Statistics for SDG Indicator 10.7.1: Guidelines for Their Collection' (2019) Working paper p.1-5 <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_670175/lang--en/index.htm> accessed 27 August 2020.

[352] Wickramasekara (n 61) p.17.

3.4.2.5 Processing of Personal Data

Lastly, the MOU does not regulate the processing of personal data of Cambodian MDWs by MRAs, and the current practices of MRAs in sharing Cambodian MDWs' personal data with the employers and the public is disturbing. Therefore, the MOU does not reach the standard of Article 6 of the ILO Convention (No.181), which requires the processing of workers' personal data by private employment agencies to be done in a manner that protects this data and ensures respect for workers' privacy in accordance with national laws and practices, and limited to matters related to the qualification and personal experiences of the workers concerned and any other directly relevant information. In addition, the MOU does not include any measures, suggested by the Private Employment Agencies Recommendation (No.188), to ensure that workers have access to all their personal data as processed by automated or electronic system, or kept in a manual file. These measures may include the right of workers to obtain and examine a copy of any such data and the right to correct and delete incorrect or incomplete data.[353] Neither does the MOU stipulate a provision that prohibits MDWs' biodata to be communicated to any third party without prior written approval of the worker, in order to respect workers' confidentiality and ensure protection of data pertaining to them.[354]

[353] Private Employment Agencies Recommendation, 1997, (No.188), para 12(2).

[354] General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs Guideline 19.

Chapter 4 Terms and Conditions of Employment

> *"I used to take care of the children, feed them, clean the house and the garden, wash two cars and help another maid in the kitchen. I would wake up at 5 a.m. in the morning and sleep at 11 p.m. and I never got any rest during the day. I dared not to ask for rest. I was scared," said a Cambodian migrant domestic worker.*[355]

4.1. Introduction

The Malaysian Employment Act provides a statutory minimum protection for workers that are enforceable in the courts, but it does not legally recognize domestic workers as "workers," rather as "domestic servants." The Act does not differentiate between migrant and non-migrant domestic workers. The first Schedule of the Malaysian Employment Act excludes domestic workers, including MDWs, from vital labor provisions, including sections 12, 14, 16, 22, 61, and 64, and Parts IX, XII, XIIA, which regulate (i) notice of termination of contract,[356] (ii) termination of contract for special reasons,[357] (iii) minimum days of work per month,[358] (iv) maternity protection,[359] (v) hours of work and days off,[360] (vi) termination, lay off and retirement benefits.[361] Simultaneously, the Malaysian Regulation (Terms and Conditions of Employment) on Domestic Servants has yet to be adopted.[362] As a consequence, the employment of migrant domestic workers (MDWs) relies predominately on the establishment of a bilateral agreement between Malaysia and each sending country. Conditions of employment can be varied from one agreement to another.[363]

This chapter shines light on Cambodian MDWs terms and conditions of employment that cover (1) the contract of employment, (2) wages, (3) hours of work, and (4) the termination of employment. This chapter will be divided into three sub-chapters. The first sub-chapter examines how the MOU's provisions, together with national laws and practices, govern Cambodian MDW's terms and conditions of employment. The second sub-chapter addresses how MDWs terms and conditions of employment are regulated under International Human Rights Law. The last sub-chapter first analyzes the implications of the MOU on the human rights of Cambodian MDWs and then assesses the consistency of the MOU's provisions with

---

[355] Poudyal (n 33), 2011, p.60.
[356] Laws of Malaysia: Employment Act, 1955, Section 12.
[357] Laws of Malaysia: Employment Act, 1955, Section14.
[358] Laws of Malaysia: Employment Act, 1955, Part XVI.
[359] Laws of Malaysia: Employment Act, 1955, Part IX.
[360] Laws of Malaysia: Employment Act, 1955, Part XII.
[361] Laws of Malaysia: Employment Act, 1955, Part XIIA.
[362] The Star, 'Case Calls for Domestic Workers' Act' *The Star* (20 May 2020) <https://www.thestar.com.my/opinion/letters/2020/05/20/case-calls-for-domestic-workers-act> accessed 25 August 2020.
[363] Anderson (n 8), p.57.

International Human Rights Law. The central argument is that the MOU exposes Cambodian MDWs to working conditions that resemble forced labor and are less favorable than those experienced by MDWs from other countries and workers in general. In addition, the MOU's provisions have no consistency with the international labor standards, particularly the Convention concerning Decent Work for Domestic Workers (No.189), that are applicable to MDWs.

4.2. Terms and Conditions of Employment under the MOU

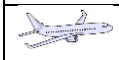
Under Article 8 of the Memorandum of Understanding (MOU) between Malaysia and Cambodia, Cambodian MDWs are subject to the terms and conditions of the standard contract of employment embedded in the MOU. This contract of employment is governed by and shall be construed under Malaysian legislation.[364] This reflects the essence of Malaysian legislation in comprehending the employment of Cambodian MDWs under the MOU-issued contract.

4.2.1. The Contract of Employment

The standard contract contains (1) Name and Address of the Employer and Cambodian MDW, (2) Duration of the Contract of Employment, (3) Place of Work or Residence of the Domestic Worker, (4) Duties and Responsibilities of the Domestic Worker, (5) Duties and Responsibilities of the Employer, (6) Payment of Wages, (7) Rest Day, (8) Termination of the Contract of Employment by the Employer and Domestic Worker, (9) General Provisions (mostly about conditions of repatriation), and (10) Extension of the Contract of Employment.[365] It does not describe the type of work to be performed by Cambodian MDWs. Clause 3(c) of the Contract vaguely states that "*the domestic workers shall perform diligently, faithfully, responsibly and sincerely all household duties and/or assigned responsibilities toward children, young persons and persons under their care assigned by the employer which shall not include commercial activities*." Neither does it establish provisions on the period of probation, normal hours of work, and paid annual leave.[366]

[364] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 12.
[365] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B.
[366] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clauses 3(a) and 6.

Table 3: MOU-issued Contract of Employment for Cambodian Domestic Workers

	Clauses			Clauses	
	Name and Address of Workers/Employer	☑		Maternity Leave	X
	Address of Workplace	☑		Medical Insurance	☑
	Start Date and Duration	☑		Occupational Safety and Health	☑
	Type of Work to be Performed	☑		Terms of Termination	☑
	Remuneration: Rate, Regularity, Method	☑		Food and Accommodation	☑
	Overtime Provisions	X		Environment Free from Abuse and Violence	X
	Permitted Deductions	X		Right to Join Trade Unions	X
	Normal Hours of Work and Rest	X		Freedom of Movement	X
	Weekly Rest	☑		Communication with Family	☑
	Annual Leave and Public Holidays	X		Right to Keep Passport and Documentation	☑
	Repatriation	☑		Complaint Mechanism	☑

(Notes: ☑ = clause is present in the contract, X = clause is not present in the contract)

Under the MOU, recruitment agencies shall be responsible to ensure that the terms and conditions of the contract of employment are fully explained to and understood by parties, especially Cambodian MDWs during the selection exercise.[367] Cambodia's *Prakas* on the Minimum Standards of Job Placement Services Abroad Contract (No.253) specifically obliges recruitment agencies to ensure that workers understand the terms and conditions of employment during pre-departure orientation.[368] The contract is prepared in six original texts, two each in Malay, Khmer, and English. All texts are equally authentic. In the event of any divergence of interpretation between any of the texts, the English text shall prevail.[369] Malaysian employers are obliged to sign six original texts of the contract of employment in Malaysia before the time of commencement of employment, and provide all six original texts to Cambodian MDWs in Cambodia for his/her signature. Thereafter, the employer shall be provided with three original texts, one in each language.[370] On the contrary, Cambodian MDWs shall sign, in Cambodia before departure to Malaysia, six original texts of the contract of employment provided by the employer. Thereafter, they shall keep three original signed texts, also one in each language.[371] Once the contract is signed, it shall be forwarded to the Cambodian Embassy in Malaysia through the Cambodian Ministry of Foreign Affairs and International Cooperation (MOFAIC).[372] In addition, upon signing the contract, Cambodian MDWs, together with the Malaysian recruitment agencies (MRAs), are forbidden from changing employer without the permission of the Malaysian Immigration Department.[373]

4.2.2. Wages

The term "wages" means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include: (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or any approved amenity or approved service, (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other

[367] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause B(viii) and clause C(v).
[368] Prakas on Promulgation of Minimum Standards of Job Placement Services Abroad Contract pt Annex, Article 4.
[369] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 12.
[370] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause A(iv).
[371] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause D(ii).
[372] Sub Decree (No.190), 2011, Article 17.
[373] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause B(xii), and Appendix B, clause 3(a).

fund or scheme established for the benefit or welfare of the employees; (c) any travelling allowance or the value of any traveling concession, (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment, (e) any gratuity payable on discharge or retirement; or (f) any annual bonus or any part of annual bonus.[374] This sub-chapter will examine (1) minimum wages (2) the payment of wages, and (3) in kind payments.

4.2.2.1. Minimum Wages

The term "minimum wages" means the basic wages to be or as determined by the Minimum Wages Order.[375] The Minimum Wage Order in 2020 guarantees a monthly minimum wage of MYR 1,200 (USD 286) for workers in the city council or municipal areas and MYR 1,100 (USD 257) for workers in areas other than the city council and municipal council areas.[376] However, the 2020 Minimum Wage Order does not apply to domestic workers (also called domestic servants).[377] This is based on the Recommendation from the Malaysian National Wages Consultative Council that is a tripartite body established by the Malaysian National Wages Consultative Council Act. It has the responsibility to conduct studies on all matters concerning minimum wages and to make recommendations to the Government to make minimum wage orders according to sectors, types of employment and regional areas, and to provide for related matters. This legislation likewise excludes domestic workers from its scope.[378] The Government explained that domestic workers are excluded from the Minimum Wage Order due to the informal nature of their employment, as compared to those working in the formal sector. Another reason is that domestic workers' accommodation cost (at the residence of the employer) and other costs, including food and other amenities, are also borne by the employer.[379]

Under the MOU's contract, the employer shall pay the domestic worker a monthly wage as agreed by the employer and domestic worker, in accordance with the market forces in Malaysia.[380] However, the contract does not specify the amount of monthly wages to be received by Cambodian MDWs. This particular clause implies that each Cambodian MDWs monthly wage is determined through negotiations between each

[374] Laws of Malaysia: Employment Act, 1955, Section 2.
[375] Laws of Malaysia: National Wages Consultative Council Act, 2011, Section 2.
[376] Minimum Wages Order 2020 (P.U. (A) 5). 2020, Articles 4 & 6.
[377] Minimum Wages Order 2020 (P.U. (A) 5). 2020, Article 2.
[378] Laws of Malaysia: National Wages Consultative Council Act, 2011, Section 2.
[379] *Direct Request (CEACR) - adopted 2019, published 109th ILC Session (2021): Equal Remuneration Convention, 1951 (No100) - Malaysia (Ratification: 1997)*.
[380] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 5(a).

domestic worker and his or her employer. The Cambodian Sub Decree on the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies (No.190) requires recruitment agencies to negotiate, on behalf of migrant workers, working and living conditions with the employers.[381] In 2017, the Cambodian Government appointed the Association of Employment Agencies (PAPA) to look into the welfare of Cambodian MDWs in Malaysia.[382] In his meeting with PAPA, the Cambodian Minister of Labor and Vocational Training, Ith Samheng, was informed that MDWs receive a minimum wage of MYR 1,100 (USD 257).[383] However, according to the Malaysian Chief Executive Officer of the National Association of Employment, Datuk Raja Zulkepley, MDWs who have not received "proper training" or "have at least four years (work) experience," may only receive a minimum wage of MYR 900 (USD 218).[384] In addition, scholars such as Bridget Anderson have noted that Cambodian MDWs receive total wages that are lower than the rate set by the MOU parties.[385]

4.2.2.2. The Payment of Wage

Under the MOU-issued contract, the employer shall pay Cambodian MDWs the monthly wage regularly and not later than the seventh day after the last day of each wage period.[386] Given the legal fact that the MOU shall be construed in accordance with the laws of Malaysia, the key term *"regularly"* can be interpreted in the language of the Malaysian Employment Act.[387] Section 18(1) of the Malaysian Employment Act establishes that "a contract of service shall specify a wage period not exceeding one month."[388] If the wage period is not specified in any contract of service, the wage period for the purpose of the contract shall be deemed to be one month.[389] Subject to this provision, the employer is obliged to pay the wage, less lawful deductions earned by such employee during such wage period, to his employee, not

---

[381] Sub Decree (No.190), 2011, Article 21.
[382] Hwn Yaul Len, 'Malaysian Association of Foreign Maid Agencies Denies Monopoly of Cambodian Maids' *Asia News Network* (7 December 2017) <https://annx.asianews.network/content/malaysian-association-foreign-maid-agencies-denies-monopoly-cambodian-maids-62665> accessed 27 August 2020.
[383] 'Malaysia: More Khmer Workers Wanted' *Khmer Times* (30 November 2018) <https://www.khmertimeskh.com/554848/malaysia-more-khmer-workers-wanted/> accessed 18 June 2020.
[384] Anith Adilah, 2015, 'Group Wants RM1,200 Salary for Only Experienced Maids | Malay Mail' *Malay Mail* <https://www.malaymail.com/news/malaysia/2015/06/01/group-wants-rm1200-salary-for-only-experienced-maids/907035> accessed 18 June 2020.
[385] Anderson (n 8) p.70.
[386] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 5(b).
[387] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 12.
[388] Laws of Malaysia: Employment Act, 1955, Section 18(1).
[389] Laws of Malaysia: Employment Act, 1955, Section 18(2).

later than the seventh day after the last day of any wage period.[390] The term "wage period" means the period in respect of which wages earned by an employee are payable.[391] In this sense, the regular wage period under MOU-issued contract can be construed to mean one month. The employer is obliged to pay Cambodian MDWs not later than the seventh day after the last day of this one month's wage period. The payment of the monthly wage shall be made to a bank account in the name of the Cambodian MDW concerned.[392] Under the Cambodian Sub Decree (No.190), private recruitment agencies are required to assist Cambodian migrant workers in opening and using a personal account in any safe bank.[393] The Cambodian MOLVT has an underlying obligation to help facilitate the opening of a bank account in any bank for the transfer of money from foreign countries.[394] In Malaysia, before migrant workers repatriate, they need to have a certified letter from the Embassy to say that they have checked the migrant workers' bank book and that have been paid regularly. Malaysia will not issue a "check-out visa" until everything is clear.[395]

4.2.2.3. Payments in Kind

Clause 5(c) of the standard contract states that "no deduction of the wage of the domestic worker can be made unless allowed by the Malaysian laws."[396] The Malaysian Employment Act permits wage deductions concerning rental for accommodation provided by the employer to the employee at the employee's request or under the terms of the employee's contract of service.[397] The total of any amounts deducted from the wages of an employee in respect of any one month shall not exceed 50 percent of the wages earned by the employee in that month.[398] The Malaysian Government explained that such deductions would not be allowed if it is agreed that the employer had an obligation to provide free accommodation to the employees.[399] Under the MOU-issued contract, the employer is obliged to provide the domestic worker with a safe and secure accommodation with basic amenities, but this does not necessarily constitute the

---

[390] Laws of Malaysia: Employment Act, 1955, Section 19(1).
[391] Laws of Malaysia: Employment Act, 1955, Section 2.
[392] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 5(b).
[393] Sub Decree (No.190), 2011, Article 35.
[394] Sub Decree (No.190), 2011, Article 36.
[395] ILO, 'Analysis of the Implementation of the Policy on Labor Migration 2016-2017' (2017) p.39.
[396] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause 5(c).
[397] Laws of Malaysia: Employment Act, 1955, Section 24(4)(d).
[398] Laws of Malaysia: Employment Act, 1955, Section 24(8).
[399] *Observation (CEACR) - adopted 2018, published 108th ILC (2019) Migration for Employment Convention (Revised), 1949 (No.97) - Malaysian -Sabah (Ratification:1964)*.

employer's obligation to provide Cambodian MDWs free accommodation.[400] This is confirmed by the study from the Malaysian Federation of Employees (MFE) that found 58 percent of Malaysian employers and companies have made deductions from the salary of migrant workers for accommodation.[401] The United Nations Inter-Agency Project on Human Trafficking (UNIAP)'s study also found that 79.2 percent of surveyed Cambodian MDWs had 25 percent of their wages deducted for accommodation.[402] The subject is differently regulated by Section 113(4) of the Sabah Labor Ordinance (CAP 67), which states that "no deductions of accommodation costs are allowed, except at the request in writing of the employee and with prior permission by the competent authority."[403]

4.2.3. Hours of Work

4.2.3.1. Normal Hours of Work

The MOU does not specify the regular daily and weekly hours of work for Cambodian MDWs. The Malaysian Employment Act also excludes domestic workers (or domestic servants) from key provisions of Parts VIII and XII that regulate the employment of women, as well as hours of work, rest days, holidays and other conditions of service.[404]

4.2.3.2. Daily and Weekly Rest

The MOU-issued contract provides that Cambodian MDWs are entitled to one (1) day rest every week, and the employers are obliged to provide them with sufficient rest every day.[405] The Guidelines and Tips for Employers of Foreign Domestic Workers, prepared by the Malaysian Ministry of Human Resources (MOHR), calls for Malaysian employers to allow adequate rest periods and sleep of a minimum of eight hours for MDWs.[406]

---

[400] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 4(a).
[401] Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia, 2014, at p.59.
[402] UNIAP (n 73) p.42.
[403] *Observation (CEACR) - adopted 2018, published 108th ILC (2019)Migration for Employment Convention (Revised), 1949 (No.97) - Malaysian -Sabah (Ratification:1964)* (n 399).
[404] Laws of Malaysia: Employment Act, 1955, Parts VIII and XII.
[405] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 6.
[406] Guidelines and Tips for Employers of Foreign Domestic Workers, p.20.

4.2.3.3. Overtime Payment

In the event that Cambodian MDWs waive their entitlement to one rest day every week, Cambodian MDWs shall be paid a certain amount of money to be calculated on *"pro-rate basis"* in lieu of the rest day or as agreed upon by the employer and the domestic worker.[407] It remains uncertain how the provision is implemented in practice because there is no case law or guidelines clarifying the term *"pro-rate basis."*

4.2.4. Termination of Employment

Section 57 of the Malaysian Employment Act provides that "a contract to employ and serve as a domestic servant may be terminated either by the person employing the domestic servant or by the domestic servant giving the other party fourteen days' notice of his intention to terminate the contract, or by paying of an indemnity equivalent to the wages which the domestic servant would have earned in fourteen days." This provision is not included in the MOU-issued contract. However, it is applicable to Cambodian MDWs because the contract of employment is governed by and construed in accordance with the law of Malaysia.[408]

Clause 7 of the contract provides that "the employer may terminate the service of the domestic worker without notice if the domestic worker commits any act of misconduct inconsistent with the fulfilment of the domestic worker's duties or if the domestic worker breaches any of the terms and conditions of this contract of employment."[409] The term "misconduct" is strictly defined as: "(i) working with another employer, (ii) disobeying lawful and reasonable order of the employer, (iii) neglecting the household duties and/or assigned responsibilities toward children, young persons and persons under their care and habitually late for work, (iv) is found guilty of fraud and dishonesty; (v) is involved in illegal and unlawful activities, (vi) permitting outsiders to enter the employer's premises or to use the employer's possessions without employer's permission, and (vii) using the employer's possessions without the employer's permission." The employer is obliged to provide proof of existence of such situation upon request of the domestic worker.[410]

---

[407] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 6.
[408] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 12.
[409] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 7.
[410] *ibid.*

The standard contract also includes a provision that regulates the termination of the contract of employment by Cambodian MDWs. Clause 8 establishes that the domestic worker may terminate this contract of employment without notice if: (i) the domestic worker has a reasonable ground to fear for his or her life or is threatened by violence or disease, (ii) the domestic worker is subject to abuse or ill-treatment by the employer, and (iii) the employer has failed to fulfill his obligation in the contract of employment. The Cambodian MDW concerned shall provide proof of the existence of such a situation upon request of the employer.[411] Any disputes arising between the employer and Cambodian MDW concerning the grounds for termination of the contract of employment pursuant to the aforementioned clauses shall be dealt with in accordance with the applicable laws in Malaysia.[412]

In the event that a Cambodian MDW absconds, the Visit Pass (Temporary Employment) shall be revoked and the domestic worker shall not be allowed to enter Malaysia for employment purposes in accordance with and subject to the applicable Malaysian laws, rules, regulations, national policies, and directives.[413] The term "abscond" means a voluntary conduct by the domestic worker to leave the place of work as stipulated in the contract of employment, within the duration of the contract of employment, without the consent of the employer, but does not include a conduct due to personal safety, abuse or ill-treatment by the employer.[414]

4.3. Terms and Conditions of Employment under International Human Rights Standards

4.3.1. The Contract of Employment

The Convention concerning Decent Work for Domestic Workers (No.190) establishes that "each member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, in particular: (a) the name and address of the employer of the worker, (b) the address of the usual workplace or workplaces, (c) the starting date and, where the contract is for a specified period of time, its duration, (d) the type of worker to be performed, (e) the remuneration, method of calculation and periodicity of

[411] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 8.
[412] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(f).
[413] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(b).
[414] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 1.

payments, (f) the normal hours of work, (g) paid annual leave, and daily and weekly rest periods, (h) the provision of food and accommodation, if applicable, (i) the period of probation of trial period, if applicable, (j) terms of repatriation, if applicable, and (k) terms and conditions relating to the termination of employment, including any period of notice by either the domestic worker or the employer."[415] Its accompanying Recommendation (No.201) further adds: (a) a job description, (b) sick leave, (c) the rate of pay or compensation for overtime and standby, (d) any other payments to which the domestic worker is entitled, (e) any payments in kind and their monetary value; (f) details of any accommodation provided; and (g) any authorized deductions from the workers' remuneration.[416]

Article 8 of the ILO Convention (No.189) establishes that "national laws and regulations shall require that MDWs, who are recruited in one country for domestic work in another, receive a written job offer, or the contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to Article 7, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies."[417] This provision can be supplemented by Article 5 of Annex I, that applies to migrants for employment recruited otherwise than under Government-sponsored arrangement for group transfer, and Article 6 of Annex II, that applies to migrants for employment recruited under Government-sponsored arrangements for group transfer, of the Migration for Employment Convention (No.97). Both provisions similarly oblige members, which maintain a system of supervision of contracts of employment between an employer and a migrant for employment, to require that a copy of the contract of employment shall be delivered to the migrant before departure or, if the governments concerned so agree, in a reception center on arrival in the territory of immigration.[418]

4.3.2. Wages

In International Labor Standards, the term "wages" means remuneration or earnings, however designated or calculated, capable of being expressed in terms of money and fixed by mutual agreement or by national laws or regulations, which are payable in virtue of a written or unwritten contract of employment by an employer to an employed person for work done or to be done or for services rendered or to be rendered.[419] The term "remuneration" includes the ordinary, basic or minimum wage or salary and any additional

[415] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 7.
[416] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), para 6(2).
[417] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 8.
[418] Migration for Employment Convention (Revised), 1949, (No.97), Article 5(1) of Annex I & Article 6(1) of Annex II.
[419] Protection of Wages Convention, 1949, (No.95), Article 1.

emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.[420]

4.3.2.1. Minimum Wages

Article 11 of the ILO Convention (No.189) obliges ratifying states to ensure that "domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex." This provision expressly refers to the principle of *"equal remuneration for men and women workers for work of equal value"* as set out in the Equal Remuneration Convention (No.100), the International Covenant on Economic, Social, and Cultural Rights (ICESCR),[421] and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).[422] This principle stipulates that remunerations are determined on the grounds of the content of work performed, considering skills, efforts, responsibilities, and working conditions.[423] The CEACR clarifies the meaning of "work of equal value" as follows: *"the concept of work of equal value lies at the heart of the fundamental right of equal remuneration for men and women for work of equal value, and the promotion of equality. Due to historical attitudes and stereotypes regarding women's aspiration, preferences, and capabilities, certain jobs are held predominately or exclusively by women (such as in caring professions) and others by men (such as in construction). Often "female jobs" are undervalued in comparison with work of equal value performed by men when determining wage rates. The concept of "work of equal value" is fundamental to tackling occupational sex segregation in the labor market, which exists in almost every country, as it permits a broad scope of comparison, including, but going beyond equal remuneration for "equal," "the same" or "similar" work, and also encompasses work that is of an entirely different nature, which nevertheless of equal value."*[424]

Under Article 4 of the Minimum Wage Fixing Convention (No.131), "ratifying countries shall create and maintain machinery adapted to national conditions and requirements whereby minimum wages for groups of wage earners covered by the Convention can be fixed and adjusted from time to time." The minimum

---

[420] Equal Remuneration Convention, 1951, (No.100), Article 1.
[421] International Covenant on Economic, Social and Cultural Rights, 1966, Article 7(a)(i).
[422] Convention on the Elimination of All Forms of Discrimination against Women, 1979, Article 11(1)(d).
[423] General Observation on the Equal Remuneration Convention, 1951 (No.100), in Report of the Committee of Experts on the Application of Conventions and Recommendations' (International Labour Conference 2007) Report III (Part 1A) para 271.
[424] International Labor Standards Department, *Conference Committee on the Application of Standards: Record of Proceedings (ILC 2018)* (2018) p.25 <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/WCMS_643937/lang--en/index.htm> accessed 22 June 2020.

wage fixing machinery may take a variety of forms, such as the fixing of minimum wages by (a) statue, (b) decisions of the competent authority, with or without formal provisions for taking account of recommendations from other bodies, (c) decisions of wages boards or councils, (d) industrial or labor courts or tribunals, or (e) giving the force of law to provisions of collective agreements.[425] The elements taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include (a) the need of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups, and (b) economic factors, including the requirement of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.[426] As discussed in section (2.4.3), the CEACR repeatedly requested the ratifying Governments to make every effort to extend to domestic workers the protection afforded by the minimum wage system.[427] This implies that the process and criteria used to set a minimum wage for domestic workers should be the same as that used for all other workers.

4.3.2.2. The Payment of Wage

Article 12(1) of the ILO Convention (No. 189) establishes that domestic workers shall be paid in cash at regular intervals at least once a month. The payment may be made by bank transfer, bank cheque, postal cheque, or money order, or other lawful means of monetary payment, with the consent of the worker concerned, unless provided for by national laws, regulations or collective agreements.[428] Domestic workers should be given at the time of each payment an easily understandable written account of the total remuneration due to them and the specific amount and purpose of any deductions which may have been made.[429]

4.3.2.3. Payment in Kind

Article 12(2) of ILO Convention (No.189) states that "national laws, regulations, collective agreements or arbitration awards may provide for the payment of a limited proportion of the remuneration of domestic workers in the form of payments in kind that are not less favorable than those generally applicable to other categories of workers, provided that measures are taken to ensure that such payments in kind are agreed to

[425] Minimum Wage Fixing Recommendation, 1970, (No.135), at para 6.
[426] Minimum Wage Fixing Convention, 1970, (No.131), Article 3.
[427] *Direct Request (CEACR) -adopted 2019, published 109th ILC Session (2020) - Sri Lanka - Minimum Wage Fixing Convention, 1970 (No131)(Ratification:1975)*.
[428] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 12.
[429] ILO Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), para 15(1).

by the worker, are for the personal use and benefit of the worker, and that the monetary value attributed to them is fair and reasonable."[430] When provision is made for the payment in kind of a limited proportion of remuneration, Members States should consider: (a) establishing an overall limit on the proportion of the remuneration that may be paid in kind so as not to diminish unduly the remuneration necessary for the maintenance of domestic workers and their families, (b) calculating the monetary value of payments in kind by reference to objective criteria such as market value, cost price or prices fixed by public authorities, as appropriate, (c) limiting payments in kind to those clearly appropriate for the personal use and benefits of the domestic worker, such as food and accommodation**,** and (d) ensuring that, when a domestic worker is required to live in accommodation provided by the household, no deduction may be made from the remuneration with respect to that accommodation, unless otherwise agreed to by the worker, and (e) ensuring that items directly related to the performance of domestic work, such as uniform, tools or protective equipment, and their cleaning and maintenance, are not considered as payment in kind and their cost is not deducted from the remuneration of the domestic worker.[431]

4.3.3. Hours of Work

For the purpose of this research paper, the term "hours of work" means the time during which the persons employed are at the disposal of the employer. It does not include rest periods during which the persons employed are not at the disposal of the employer.[432] However, the period during which domestic workers are not free to dispose of their time as they please and remain at the disposal of the household in order to respond to possible calls shall be regarded as hours of work to the extent determined by national laws, regulations or collective agreements, or any other means consistent with national practice. This is commonly known as "standby" or "on-call."[433]

4.3.3.1. Equal Treatment in relation to Normal Hours of Work

Article 10(1) of the ILO Convention (No.189) obliges each ratifying member to take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristic of domestic work.

---

[430] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 12(2).
[431] ILO Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), para 14.
[432] Hours of Work (Commerce and Offices) Convention (No.30), 1930, Article 2.
[433] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 10(3).

4.3.3.2. Standby

Paragraph 9 of the Domestic Workers Recommendation (No. 201) calls for "members States to regulate (1) the maximum number of hours per week, month or year that a domestic worker may be required to be on standby, and the ways they might be measured; (2) the compensatory rest period to which a domestic worker is entitled if the normal period of rest is interrupted by standby; (3) and the rate at which the standby hours should be remunerated."[434] The provision is applicable to MDWs, who reside in the employer's house or premises in which they work.[435]

4.3.3.3. Daily and Weekly Rest

Under Article 10(2) of the Domestic Workers Convention (No.189), "Weekly rest shall be at least 24 consecutive hours."[436] The fixed day of weekly rest should be determined by an agreement of the parties, in accordance with national laws, regulations or collective agreement, taking into account work exigencies and the cultural, religious and social requirement of the domestic workers.[437] The provision recognizes the presence of minority religious groups in the domestic labor force by ensuring that, where domestic workers would prefer to take the weekly rest period to coincide with a day recognized by their religious traditions, they are entitled to do so.[438] Furthermore, Members should take measures to ensure that domestic workers are entitled to suitable periods of rest during the working day, which allow for meals and breaks to be taken.[439]

4.3.3.4. Overtime Compensation

Paragraph 12 of the Recommendation (No.201) provides that "national laws, regulations or collective agreements should define the grounds on which domestic workers may be required to work during the period of daily or weekly rest and provide for adequate compensatory rest, irrespective of any financial compensation." Keeping track of domestic workers' overtime hours is critical to the effective implementation of overtime limitations established by law and ensuring that domestic workers are fairly

---

[434] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), at para 9(1).
[435] *Direct Request (CEACR) - adopted 2018, published 108th ILC Session (2019): Domestic Workers Convention, 2011 (No189) - Chile (Ratification 2015)* (CEACR).
[436] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 10(2).
[437] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), at para 11(2).
[438] J Murray D. McCann, 'The Legal Regulation of Working Time in Domestic Work' (2011) Working paper, at p27 <http://www.ilo.org/travail/whatwedo/publications/WCMS_150650/lang--en/index.htm> accessed 24 June 2020.
[439] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201), at para 10.

compensated for any extra hours worked.[440] Paragraph 8 of ILO Recommendation (No.201) suggests that "hours of work, including overtime and periods of standby, to be accurately recorded. The information should be freely accessible to domestic workers."

4.3.4. Termination of Employment

The Termination of Employment Convention (No.158) regulates the procedure prior to or at the time of termination. As discussed in chapter 2, the CEACR has repeatedly requested the ratifying Governments to take all possible steps to ensure that domestic workers enjoy adequate protection in the spheres covered by the Termination of Employment Convention.[441] This statement justifies the relevance of the ILO Convention (No.158) to all domestic workers, including MDWs. Under Article 7 of the Convention (No.158), "the employment of a worker shall not be terminated for reasons related to worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity."[442] This provision allows a worker to be heard by his employer and to ensure that any decision to terminate the employment is preceded by dialogue and reflection amongst parties.[443] In addition, Article 8 of the ILO Convention (No.158) establishes that "a worker who considers that his employment has been unjustifiably terminated, shall be entitled to appeal against that termination to an impartial body, such as court, labor tribunal, arbitration committee or arbitrator." In accordance with Article 11 of the ILO Convention (No.158), "a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period."[444]

The interpretation of the ILO Convention (No.158)'s provisions should be read together with Migrant Workers (Supplementary Provisions) Convention (No.143). Article 8 of the ILO Convention (No.143) establishes that "on condition that migrants has resided legally in the territory for the purpose of

---

[440] ILO, *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws* (2012) pp.53-54 <http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_173365/lang--en/index.htm> accessed 25 March 2020.

[441] *Observation (CEACR) - adopted 2017, published 107th ILC Session (2018) Termination of Employment Convention, 1982 (No.158) - Cameroon (Ratification 1988)* (n 185).

[442] Termination of Employment Convention, 1982, (No.158), Article 7.

[443] The Employment Analysis and Research Unit (Sector II) and the Social Dialogue International Labour Standards Department (Sector I), 'Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment' (9 March 2009) p.8 <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/employment-security/WCMS_171404/lang--en/index.htm> accessed 13 April 2020.

[444] Termination of Employment Convention, 1982, (No.158), Article 11.

employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit. Accordingly, he shall enjoy equality of treatment with nationals in respect to particular guarantees of security of employment, the provision of alternative employment, relief work and retraining." Article 9(1) of the Convention (No.143) states that "without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant workers shall, in case in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits." Article 9(2) further adds that "in case of dispute about the right referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through representative."[445]

4.4. General Discussion and Analysis

This section will examine the implications of the MOU's provisions on the human rights of Cambodian MDWs, and assess the consistency of the MOU's provisions with International Human Rights Law Standards.

4.4.1. The Implications of the MOU on Cambodian Migrant Domestic Workers

4.4.1.1. The Contract of Employment

Cambodian MDWs are excluded from many of the basic labor protections under the Malaysian Employment Act. This includes articles within the law related to hours of work, rest days, public holidays, annual leave, sick leave, maternity leave and severance benefits. The same treatment holds for minimum wages orders, social security coverage, mandatory medical insurance, and workers' compensation benefits. Despite this, the MOU's contract includes some provisions that are not guaranteed to MDWs by the Malaysian legislation (see table 3). This raises the prospect that the contract appears to include terms that meet more of the international and normative standards than the Malaysian standards. However, this does not necessarily equate to better conditions for those MDWs, as asserted by scholars. Jenna Holliday, in her ILO-commissioned study examining the standard contract for MDWs in Malaysia, perceived such employment contract itself as an immigration requirement. It must be provided in order for the Malaysian

[445] Migrant Workers (Supplementary Provisions) Convention, 1975, (No.143).

Immigration Department to issue the Visit Pass (Temporary Employment). She argued that the contract bears little on the ultimate labor conditions of workers, or the expectations of employers.[446] Another scholar, Bridget Anderson, further explained that the contract is simply a mechanism to limit the possibilities of changing employer.[447] Holliday's assertion is in line with the ILO study in the Greater Mekong Subregion, which has found that MOUs have "limited success in reaching their objectives" and do not result in fundamental changes to working conditions for migrant workers.[448] Malte Luebker, in an ILO report, likewise asserted that such contracts are not adequate to legally protect domestic workers. He believed that the exclusion of domestic workers, including MDWs, from the scope of labor legislation considerably weakens their position relative to other workers and consequently constitutes a different treatment between domestic workers and workers in general.[449]

The MOU also obliges recruitment agencies to ensure that terms and conditions of the contract are fully explained to and understood by Cambodian MDWs during the selection exercise or the pre-departure training as required by the Cambodian MOLVT's *Prakas*. A study from Danchurchaid/Christian Aid Cambodia **(**DCA/CA) found that 95 percent of surveyed Cambodian MDWs were explained the terms and conditions of the contract before they signed the contract.[450] However, it was limited to the length of contract and renewal of contract after two years, salary, benefits and payments, and job responsibilities. Only five percent of surveyed MDWs knew the name and contact details of their employers, and no one reported that they had acquired information and details about working hours, accommodation, food, and health care.[451] This is confirmed by the study from the United Nations Inter-Agency Programme (UNIAP), which discovered that Cambodian MDWs received less information about overtime payment and policy, legal consequences of not completing the agreed terms of employment, place of work, and information about employers.[452] Cambodian MDWs vulnerability is further aggravated by the fact that they have difficulties in understanding the complexity of the contract because of illiteracy.[453] One may observe that

---

[446] Jenna Holliday, 'Enhancing Standard Employment Contracts for Migrant Workers in the Plantation and Domestic Work Sectors in Malaysia' (2020) Report p.12 <http://www.ilo.org/asia/publications/WCMS_749704/lang--en/index.htm> accessed 17 September 2020.
[447] Anderson (n 8), 2016, p.51.
[448] Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion (GMS TRIANGLE project), *Review of the Effectiveness of the MOUs in Managing Labour Migration between Thailand and Neighbouring Countries* (2015), pp.8-22, <http://www.ilo.org/asia/publications/WCMS_356542/lang--en/index.htm> accessed 18 September 2020.
[449] Luebker and Conditions of Work and Employment Branch (n 105) p.50.
[450] Carol Strickler and Khun Sophea (n 46), 2015, p.27.
[451] *ibid*, at p.37.
[452] UNIAP (n 73), at p.34.
[453] Carol Strickler and Khun Sophea (n 46), 2015, p.25.

the large majority of Cambodian migrant workers are uneducated, according to a report from the Cambodian Ministry of Planning in 2012.[454]

Where MDWs do not know the contents of the contract that they have signed, this leaves the employer in position of being able to dictate terms. In other words, it exposes MDWs to a high risk of contract substitution, an indicator of forced labor, with some employers insisting on the worker signing on a new contract on arrival, which can be on the basis of standards lower than Malaysian law and those agreed under the MOU-compliant contract.[455] This assertion is confirmed by Benjamin Harkins and Meri Åhlberg in the ILO-commissioned study entitled "Access to Justice for Migrant Workers in Southeast Asia." It indicated that most complaints handled by the Migrant Resources Centers in Malaysia involves severe and compounded labor rights violations, including the contract substitution (64 percent).[456] Asha D' Souza, a labor expert from the ILO Bureau for Gender Equality, explained that contract substitution on arrival in the country of destination, together with false information or the complete lack of information about the terms and conditions of employment, is a common form of abuse to which migrant workers are subjected and is tantamount to trafficking for labor exploitation.[457]

The MOU provides that "Cambodian MDWs shall sign and keep the contract of employment in Cambodia before departure to Malaysia." This provision is difficult to implement in practice. There is no reported action towards realizing the provision concerned taken by the MOU's Joint Working Group (JWG) that has a mandate to monitor the implementation of the MOU. It is further compounded by the absence of institutional frameworks in the country of origin to monitor and supervise the issuance of the contract before the departure. Cambodia, in its 2014 national policy on labor migration, proposed to establish a monitoring system to review the contract before migrant workers are sent abroad.[458] Nevertheless, the country has only made progress on the enforcement of job placement service contract between Cambodian MDWs and private employment agencies.[459] The job placement service contract is different from the employment contract because the former mainly concerns the finding of full-time employment in other countries for migrant workers, rather than addressing terms and conditions of employment.[460] Besides, the MOU's

---

[454] Ministry of Planning, 'Migration in Cambodia: Report of the Cambodian Rural Urban Migration Project (CRUMP)' (Ministry of Planning 2012) pp.55-56.
[455] Holliday (n 446) p.15.
[456] Benjamin Harkins and Meri Åhlberg, *Access to Justice for Migrant Workers in South-East Asia* (First published, ILO Regional Office for Asia and the Pacific 2017) p.25.
[457] D'Souza (n 327) p.32.
[458] Ministry of Labor and Vocational Training, 'Policy on Labor Migration for Cambodia' (n 39) p.37.
[459] ILO, 'Analysis of the Implementation of the Policy on Labor Migration 2016-2017' (n 395) p.24.
[460] Sub Decree (No.190), 2011, Article 21.

provision concerned is not tied to administrative process in Malaysia such as securing a Visa with Direct Reference (VDR) by employers and Visit Pass (Temporary Employment) for the workers (see section 3.2.1.). It implies the Malaysian Immigration Department authorities have no mandate to review and approve the contract of employment prior to the arrival of Cambodian MDWs in the country, to ensure that the contract contains no abusive clauses and in full conformity with the MOU-issued contract.[461]

4.4.1.2. Wages

Cambodian MDWs are excluded from the Malaysian Minimum Wage Order that guarantees a monthly minimum wage of MYR 1,200 (USD 286) for workers in the city council or municipal areas and MYR 1,100 (USD 257) for workers in areas other than the city council and municipal council areas.[462] Instead, they are given a monthly wage of MYR 1,100 (USD 257). However, this amount may be applicable to MDWs, who have received proper training or have at least four years (work) experience. In most cases, Cambodian MDWs would receive total wages that are lower than the rate set by the Cambodian government and PAPA.[463] This creates a different treatment in terms of minimum wages between Cambodian MDWs and workers in general. It is in line with the ILO's statistical data prepared by the Conditions of Work and Employment Branch of the ILO Social Protection Sector (TRAVAIL). The data indicated that domestic workers typically earn around 40 percent of average wages – and sometimes no more than about 20 percent of average wages.[464]

It subsequently infers gender pay discrimination in domestic work because this occupation is female-dominated. This assertion is confirmed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR). The Committee, in its 2019 direct request of Malaysia regarding the implementation of the Equal Remuneration Convention (No.100), first observed that more than 95 percent of domestic workers in Malaysia are women. It then explained that the exclusion of domestic workers from the Malaysian Minimum Wage Order created a possibility of indirect discrimination where female-dominated groups of workers are excluded from the application of minimum wage legislation, in particular those most vulnerable to wage discrimination like domestic workers themselves.[465] The Committee on the

---

[461] ILO, 'Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol' (2019) Document p.29 <http://www.ilo.org/asia/projects/WCMS_650658/lang--en/index.htm> accessed 25 March 2020.
[462] Minimum Wages Order 2020 (P.U. (A) 5). Articles 4 & 6.
[463] Anderson (n 8) p.70.
[464] Malte Luebker and Conditions of Work and Employment Branch, *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (International Labour Office 2013), at p.67.
[465] *Direct Request (CEACR) - adopted 2019, published 109th ILC Session (2021): Equal Remuneration Convention, 1951 (No.100) - Malaysia (Ratification: 1997)* (n 379).

Elimination of Discrimination against Women (CEDAW), in its 2018 concluding observation of Malaysia, likewise expressed its "concern regarding the situation of women MDWs, who are denied equal rights under the State party's labor law vis-à-vis other migrant workers, including minimum wages. It asserted that such lack of legal guarantees of their rights leaves women MDWs vulnerable to exploitation and abuse."[466]

Such amount of wages is even lower than monthly wages received by Filipino and Indonesian MDWs. Such differences are in part a result of the differential rates set by different MOUs or the regulations of sending countries concerning migrant workers' wages.[467] The Philippines Oversea Labor Office sets the minimum wage for Filipino MDWs at USD 400 (MYR 1,680).[468] On the contrary, the Indonesian Government has just proposed a minimum wage of 1,200 MYR (USD286) for all Indonesian MDWs.[469] Thus, gender pay discrimination in domestic work is further compounded with other forms of discrimination, like nationality, that may determine the level of remuneration as opposed to legitimate criteria, such as the type of work performed or actual hours of work.

It would appear as though Cambodian MDWs earn a decent wage, almost equal to the generally applicable minimum wage. However, when one carefully observes the working and living conditions of Cambodian MDWs, such assertion is no longer valid. One should consider the fact that Cambodian MDWs are excluded from Malaysian social security benefits. Although Malaysian employers have to a duty to provide Cambodian MDWs with an insurance scheme of MYR 120 (USD 34) and total coverage of MYR 10,000 (USD 2,778) for medical treatment expenses and risk compensation,[470] most insurance companies provide the liability that cannot exceed MYR 2000 (USD 468) for one incident and in the aggregate.[471] This is further aggravated by the Malaysian Medical Act, which introduced a higher deposit rate on any foreigner,

---

[466] *Concluding Observation on the Combined Third and Fith periodic reports of Malaysia* [2018] Committee on the Elimination of Discrimination against Women CEDAW/C/MYS/CO/3-5 [para 43].
[467] Anderson (n 8), 2016, p.69.
[468] 'Filipino Maids Must Be Paid Minimum US$400' (*Malaysian Trades Union Congress*, 2015) <http://www.mtuc.org.my/filipino-maids-must-be-paid-minimum-us400/> accessed 18 June 2020.
[469] Adilah (n 384).
[470] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause A(vii). Also read 'Foreign Worker Medical Insurance' (*Federation of Malaysia Manufacturers: Making Malaysia Industries Globally Competitive*) <https://www.fmm.org.my/Industry-@-Foreign_Worker_Medical_Insurance.aspx> accessed 25 August 2020.
[471] 'Maids Insurance | Kurnia Insurance' <https://www.kurnia.com/products-and-services/home-insurance/kurnia-maids-insurance> accessed 2 July 2020.

who seek medical treatment at public health facilities, in 2017.[472] It raises a prospect that Cambodian MDWs' monthly wages are inadequate to sustain themselves and their families.

The MOU-compliant contract, together with the Malaysian legislation, stipulates that the wage period shall not exceed one month and not later than the seventh day after the last day of each wage period. The payment shall be made through a bank account under the name of domestic worker. The aim is to ensure that Cambodian MDWs will receive regular salary payments so that they can effectively deposit money and remit to their families back in Cambodia through the banking system.[473] Such standards are incoherent with the Malaysian standards; however. Section 25 of the Malaysian Employment Act requires "the entire amount of wages to be paid through an account, in the name of the employee or of the employee jointly with one or more other persons as stipulated by the employee, at a bank, finance company, financial institution or other institutions, that is licensed or established under the Banking and Financial Institutions Act (Act 372), in any part of Malaysia."[474] Regardless of this provision, an employer, upon an employee's written request (other than a domestic worker), may make payment of his employee's wages in a legal tender or by cheque.[475] However, if a domestic worker insists, the employer shall, upon the request of his domestic worker, obtain approval from the Director-General for the payment of wages of the domestic worker to be paid in legal tender or by cheque.[476] The last provision is not integrated into the MOU's standard contract.

In addition, this MOU's provision is not effectively implemented in practice. The study from DCA/CA found that 77 percent of surveyed Cambodian MDWs got paid with lump sum remunerations, which ranged from USD 1,500 to USD 6,000 at the end of the two-year contract, while only 12 percent experienced the monthly payment of wages.[477] This is confirmed in Jane Hodge's ILO-commissioned study about Cambodian migrant workers, which found that the majority of complaints (40 percent) received by the Malaysian Labor Department, the Cambodian Embassy, and NGOs in Cambodia and Malaysia, are overwhelmingly about wage-related abuses (non-payment or incomplete payment of wages by

[472] Vi-Jean Khoo, 'Foreign Patients to Pay Higher Deposit Rates in Malaysian Public Hospitals' *MIMS News* (12 April 2017) <https://today.mims.com/foreign-patients-to-pay-higher-deposit-rates-in-malaysian-public-hospitals> accessed 2 July 2020. Also read Malaysiakini, 'Proposing a Non-Citizens Health Act for Malaysia' *Malaysiakini* (10 January 2020) <https://www.malaysiakini.com/news/506622> accessed 2 July 2020.
[473] Carol Strickler and Khun Sophea (n 46), 2015, p.47.
[474] Laws of Malaysia: Employment Act, 1955, Section 25(1).
[475] Laws of Malaysia: Employment Act, 1955, Section 25A(1).
[476] Laws of Malaysia: Employment Act, 1955, Section 25A(2).
[477] Carol Strickler and Khun Sophea (n 46), 2015, p.48.

employers).[478] The communication from the International Trade Union Confederation (ITUC) to the CEACR in the observation of Forced Labor Convention (No.29) also reiterated that domestic workers, including MDWs, in Malaysia have faced difficult situations, including the non-payment of three to six months wages.[479] Killias reiterated that the Malaysian employers uphold a perspective that MDWs are incapable of sensibly dealing with their remunerations. Even though such explanation might sound strange given the minimal mobility that MDWs can enjoy while in employment, it does legitimize an employer's withholding of wages for an extended period, sometimes two entire years.[480] Such forced saving mechanism for those who are unable to deal with money sensibly contributes to labor arrangements that involve minimal risk and investment for employers, while binding workers for more extended periods, as asserted by Annuska Derks.[481]

According to the ILO's indicators of Forced Labor, the fact of irregular or delayed payment of wages does not necessarily imply a forced labor situation, but when wages are systematically and deliberately withheld as a mean to compel the worker to remain, and deny him or her of the opportunity to change employer, this points to forced labor.[482] In 2006, the ILO referred to the non-payment of wages experienced by domestic workers, as well as workers in mining and agriculture, as one of the indicators to confirm the existence of forced labor in Zambia.[483] While non-payment of wages alone does not necessarily constitute forced labor, it does indicate that exploitative practices are occurring that may amount to forced labor. Thus, it can be argued that the non-payment of wages experienced by Cambodian MDWs reiterates exploitative working conditions that can amount to forced labor situations.

4.4.1.3. Hours of Work

The MOU-compliant contract does not contain any provision that regulates Cambodian MDWs' normal daily and weekly hours of work. However, the MOU requires the employer to provide the Cambodian MDWs with a safe and secure accommodation, and this provision implies the legal requirement of

---

[478] Hodge (n 64), pp. 5–7.
[479] *Observation (CEACR) - adopted 2012, published 102nd ILC session (2013): Forced Labor Convention, 1930 (No29) - Malaysia (Ratification: 1957)*.
[480] Killias (n 70) p.164.
[481] Annuska Derks, 'Migrant Labour and the Politics of Immobilisation: Cambodian Fishermen in Thailand' (2010) 38 Asian Journal of Social Science 915, p.930.
[482] International Labour Organization, 'ILO Indicators of Forced Labor' (n 122).
[483] International Labor Office (ed), *The Cost of Coercion: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work ; International Labour Conference, 98th Session 2009, Report I (B)* (Internat Labour Off 2009), at p 16.

Cambodian MDWs to live in the employer's house or premises.[484] Amelita King Dejardin, the Chief Technical Adviser from the ILO, asserts that live-in domestic workers' working schedule and hours are closely associated with the requirement of employers and their employment arrangements.[485] By the same token, the study of MDWs from Myanmar working in Thailand found that the live-in arrangements contributed to excessively long working hours.[486] Labor experts such as Malte Luebker from Conditions of Work and Employment Branch of the ILO explains that long working hours are common among live-in domestic workers, because they usually work on a full-time basis and are, in many cases, expected to be available at all times.[487] Bridget Anderson's ILO-commissioned study highlighted how Malaysian employers' attitudes significantly shape MDWs' hours of work in Malaysia. In her study, the majority of Malaysian employers upheld a view that the legal working day for workers in general (eight hours a day) is not appropriate for domestic workers.[488] One Malaysian employer in her interview said that *"she comes with me and sits here, if someone comes, there is work; if not, she is just sitting only."* Anderson explained that such view effectively justifies a trade-off between the lack of intensity – taking it easy – and longer hours of work experienced by MDWs.[489]

Besides that, the MOU requires Cambodian MDWs to "(1) perform – diligently, faithfully, responsibly, and sincerely – all household duties and assigned responsibilities,[490] (2) comply with reasonable instructions of the employer in the performance of their household duties and assigned responsibilities,[491] and (3) be polite, respectful, and courteous toward the employer and his family members."[492] These provisions produce a series of dichotomies that characterize Cambodian MDWs on the one hand, and even if implicitly – Malaysian employers on the other: *inferior vs. superior*. These provisions consequently put Cambodian MDWs in a position, where they cannot oppose long and unpredictable working hours and schedule set by

---

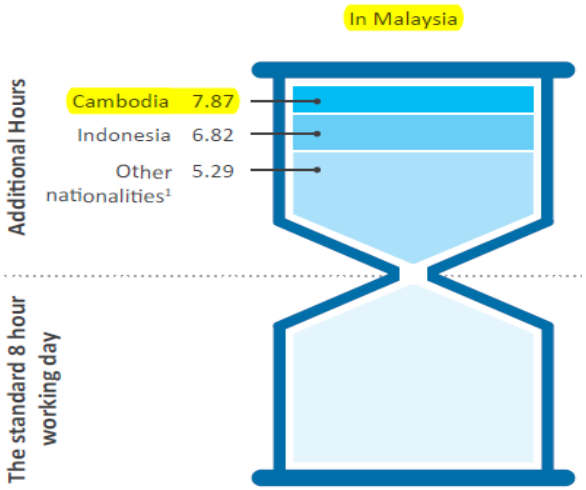
[484] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 4(b).
[485] Conditions of work & Employment programme (TRAVAIL) Ms. Amelita King Dejardin Chief Technical Adviser, 'Working Hours in Domestic Work' (19 May 2011) <http://www.ilo.org/travail/whatwedo/publications/WCMS_156070/lang--en/index.htm> accessed 24 June 2020.
[486] Punpuing, Sureeporn, Therese Caouette, Awatsaya Panam, Khaing Mar Kyaw Zaw, and S. Suksinchai. "Migrant domestic workers: from Burma to Thailand." (2005), at p.15.
[487] Luebker and Conditions of Work and Employment Branch (n 105) p.58.
[488] Anderson (n 8), 2016, p.58.
[489] *ibid*, at p. 60.
[490] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause D(ix).
[491] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 3(b).
[492] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 3(e).

the employer. It is further compounded by another MOU provision that permits the employer to terminate the contract of employment, without notice, on the ground of disobeying lawful and reasonable orders.[493] These MOU's provisions, together with the exclusion of MDWs from key labor provisions concerning hours of work and the absence of clauses concerning the normal hours of work in the MOU-issued contract, exposes Cambodian MDWs to excessively long working hours.

This implication is in line with the ILO findings that domestic workers in Malaysia worked the longest hours and days, roughly 14 hours per day and 65.7 hours per week.[494] DCA/CA specifically found that **77** percent of the surveyed Cambodian MDWs had worked 15 hours or more per day, with 42 percent working 18-21 hours and 35 percent working 15-17 hours.[495] Bridget Anderson's ILO-commissioned study discovered the same findings that Cambodian MDWs work for 16 hours per day. However, she observed that Cambodian MDWs' hours of work are longer, in comparison with Indonesian and Filipino MDWs' (see figures 2).[496] Just like differences in terms of monthly wage between MDWs in Malaysia, these differences are in part result of the differential hours of work set by different agreements between Malaysia and each supplying country. For instance, unlike the MOU-issued contract, the standard contract for Filipino MDWs in Malaysia states that "the worker shall not work more than ten (10) hours and shall be given at least a continuous period of eight (8) hours of sleep."[497]

[493] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 7(ii).
[494] Luebker and Conditions of Work and Employment Branch (n 105) p.56.
[495] Carol Strickler and Khun Sophea (n 46), 2015, at p.41.
[496] Anderson (n 8), 2016, p.58.
[497] Standard Employment Contract for Filipino Domestic Workers: Appendix D Standard Contract for Filipina Domestic Workers in Malaysia, Section 3.

Figure 2: Average number of hours worked by MDWs in excess to the standard eight hour working day, by country of origin



Such implication further suggests the different treatment between Cambodian MDWs and workers generally in relation to normal hours of work. Section 34 of the Malaysian Employment Act strictly prohibits "the employer to require any female employee to work in any industrial or agricultural undertaking between the hours of ten o'clock in the evening and five o'clock in the morning, or commence work for the day without having had a period of eleven consecutive hours free from such work."[498] Section 60A establishes that "an employee shall not be required under his contract of service to work (a) more than eight hours in one day, (b) in excess of spread over a period of ten (10) hours in one day, and (c) more than forty eight (48) hours in one week."[499]

Under the MOU-issued contract, "the domestic worker is entitled to one (1) rest day every week. In the event that the domestic worker waives such entitlement, the domestic worker shall be paid a certain amount of money to be calculated on pro-rate basis in lieu of the rest day or as agreed upon by the employer and the domestic worker."[500] The phrase that *"in the event that the domestic worker waives the entitlement"* seems to give Cambodian MDWs and the employers the choice of whether or not to implement a weekly rest. Bridget Anderson observed that MDWs, including Cambodian MDWs, working in Malaysia did not

[498] Laws of Malaysia: Employment Act, 1955, Section 34.
[499] Laws of Malaysia: Employment Act, 1955, Section 60A.
[500] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 6.

enjoy the right to a weekly rest, and this was the result of the regulatory framework that gives workers the choice of whether or not to implement a weekly rest day.[501] The study from DCA/CA about Cambodian MDWs, which found that 95 percent of surveyed Cambodian MDWs had no regular day off per week, while the remaining five percent said they had a half-day off per week, justifies Anderson's claim.[502]

In addition, the MOU provision concerned seems to be inconsistent with the Malaysian Employment Act. The MOU does not define the grounds on which a Cambodian MDW is required by his or her employer to work beyond the limit of legal working hours and to work on a rest day. Section 60A(2); by contrast, stipulates that "an employee may be required by his employer to exceed the limit of hours prescribed in subsection (1) and to work on a rest day, in the case of (a) accident, actual or threatened, in or with respect to his place of work, (b) work, the performance of which is essential to the life of the community, (c) work essential for the defence or security of Malaysia, (d) urgent work to be done to machinery or plant, (e) an interruption of work which it was impossible to foresee, or (f) work to be performed by employees in any industrial undertaking essential to the economy of Malaysia or any essential service as defined in the Industrial Relations Act."[503] This provision is regrettably not applicable to domestic workers, including MDWs.[504]

Regarding the overtime compensation, the phrase that "domestic workers shall be paid a certain amount of money to be calculated on pro-rate basis in lieu of the rest days or as agreed upon by the employer and the domestic worker." It remains uncertain how the provision is implemented in practice because there is no case law or guidelines clarifying the term *"pro-rate basis."* This provision also reiterates that the rate of overtime compensation can be determined through the negotiation between Cambodian MDWs and their respective employers. Here, one can argue that the MOU is incompatible with the Malaysian Employment Act. Section 60 (1)(b) requires "the worker to be paid with wages at a rate which is not less than two times of his hourly rate of pay for any work carried out in excess of the normal hours of work on a rest day." The interesting aspect is that the provision sets a fixed rate for workers. It consequently infers another different treatment between Cambodian MDWs and workers in general.

---

[501] Anderson (n 8), 2016, p.63.
[502] Carol Strickler and Khun Sophea (n 46), 2015, at p.42.
[503] Laws of Malaysia: Employment Act, 1955, Section 60A(2).
[504] Laws of Malaysia: Employment Act, 1955, the First Schedule.

Furthermore, the phrase *"domestic workers shall be paid a certain amount of money in lieu of the rest days"* does not necessarily recognize the right to adequately compensatory rest for Cambodian MDWs. In this sense, the MOU's provision is incoherent with the Malaysian MOHR's Guidelines and Tips for Employers of Foreign Domestic Helpers (or called MDWs), which provides as follows: *"If your foreign domestic helper is required to work beyond agreed hours, he/she should be compensated accordingly for the additional work carried out if he or she is required to work beyond agreed hours. If the additional hours of work are not a daily occurrence, then these work hours can be offset with additional rest time at a later point, or some other form of compensation. However, should you require your foreign domestic helper to regularly perform additional work hours, then you are advised to replace the extra work hours with additional rest days and/or with monetary compensation."*[505] Here, the Guideline acknowledges the importance of adequately compensatory rest in ensuring that MDWs would stay healthy both physically and mentally, and are able to carry out all the tasks assigned productively and efficiently.[506]

The determination of whether or not excessive hours of work experienced by Cambodian MDWs constitutes a forced labor offence is quite complex. According to the ILO's forced labor indicators, if an employee has to work more overtime than is allowed under national law or collective agreement, under some form of threat, like dismissal or in order to earn at least the minimum wage, this amounts forced labor.[507] As discussed above, the MOU's provisions expose Cambodian MDWs to long working hours, without additional remuneration and adequately compensatory rest, and denial of weekly rest days. The MOU's provisions also put Cambodian MDWs in a weak bargaining position against long and unpredictable working hours and schedules, by permitting the employer to terminate the contract of employment, without notice, if MDWs challenge any lawful and reasonable order. Long hours of work, together with the high prevalence of contract substitution (see section 4.4.1.1.) and delayed-payment of wages (see section 4.4.1.2.), are exacted to forced labor-liked situations.

This assertion is confirmed by the CEACR's observations of the Forced Labor Convention (No.29) for Malaysia the *"vulnerable situation of migrant workers with regard to the exaction of forced labor, including trafficking in persons."* The CEACR noted the observations submitted by the ITUC in 2013, concerning the situation and treatment of migrant workers in the country which exposes them to abuse and forced labor practice, including working for long hours; underpayment or late payment of wages; false

[505] Guidelines and Tips for Employers of Foreign Domestic Workers, at p.20.
[506] *ibid.*
[507] International Labour Organization, 'ILO Indicators of Forced Labor' (n 122).

documentation or contract substitution on arrival; and retention of passports by the employer. The Committee also observed that according to the Mission Report to Malaysia by the United Nations Special Rapporteur on Trafficking in Persons (TIPs), especially Women and Children, of 15 June 2015, *"migrant workers, including MDWs, encountered forced labor at the hand of employers and informal labor recruiters carrying out abusive practices. Migrant workers, including MDWs, are exposed to high recruitment fees, wage arrears and contract substitution, long working hours without additional remuneration, denial of rest days and leave, housed in unsanitary accommodation, and have their personal identification documents taken from them, exposing them to harassment and arrest by authorities."*[508] The Committee also took reference from various reports which commonly found the average migrants in Malaysia work long hours (ten hours per day), nearly every day for pay that is below the minimum wages (USD 286). These reports also underlined that Cambodian MDWs have been banned to return home and forced to sign contract extension under the threat of not receiving their salary. While taking note of the measures taken by the Government to protect migrant workers, the CEACR expressed its deep concern the continued abusive practices and working conditions of migrant workers that may amount to forced labor, such as passport confiscation by employers, high recruitment fees, wage arrears, and the problem of contract substitution. It consequently requested the Government of Malaysia to continue taking measures to ensure that migrant workers, including MDWs, are fully protected from abusive practice and conditions that amount to forced labor.[509]

4.4.1.4. Termination of Employment

Given the fact that the MOU's standard contract is construed in accordance with the laws of Malaysia, the employer is obliged to give Cambodian MDWs fourteen (14) days' notice of his intention to terminate the contract of employment, or by paying of an indemnity equivalent to the wages which Cambodian MDWs would have earned in fourteen days. This provision aims to protect domestic workers, including MDWs, from arbitrary termination of the contract of employment. However, it is less favorable than the Malaysian Employment Act. Section 12(2) states that "the length of such notice shall be the same for both employer and employee and shall be determined by a provision made in writing for such notice in terms of the contract of service, or, in the absence of such provisions in writing, shall not be less than (a) four weeks' notice if the employee has been so employed for less than two years on the date on which the notice is given; (b)

[508] *Observation (CEACR) - adopted 2016, published 106th ILC session (2017): Forced Labor Convention, 1930 (No29) Malaysia (Ratification: 1957).*
[509] *Observation (CEACR) - adopted 2018, published 108th ILC session (2019): Forced Labor Convention, 1930 (No29) - Malaysia (Ratification: 1957).*

six weeks' notice if he has been so employed for two years or more but less than five years on such date; (c) eight weeks' notice if he has been so employed for five years or more on such date."[510] Domestic workers, including MDWs, are excluded from benefiting this provision, thereby indicating a different treatment between MDWs and workers in general, in terms of notice of termination of contract.

In addition, Clause 9 (c) of the MOU's standard contract states that "in the event that this contract of employment is terminated by the employer on the ground that the domestic worker has committed proven misconduct, the domestic worker shall bear the cost of repatriation." The same standard applies to the termination of employment, without notice, on the ground that Cambodian MDWs breach any of the terms and conditions of the contract.[511] These provisions imply Cambodian MDWs are restricted to continue residing and looking for another employment in Malaysia, and immediately repatriated back to Cambodia, in the event that their contracts of employment are terminated on any of these grounds. This interpretation is supported by other MOU provisions that prohibit Cambodian MDWs to seek employment or be employed elsewhere when they have signed the contract,[512] and restrict the recruitment agencies to change the employer of Cambodian MDWs, without permission from the Malaysian Immigration Department.[513] Having perceived such situation as a loss, most Cambodian MDWs decide to leave their employers for another employment to support their families in Cambodia. In the instance that a Cambodian MDW absconds from his or her employment situation, particularly before the termination of contract, and without the consent of the employer, his or her status in Malaysia become precarious as the MOU permits Malaysian authorities to revoke his or her Visit Pass (Temporary Employment) in the case of abscondment.[514] This leaves them vulnerable and into potential further situations of forced labor and trafficking, as well as detention and conviction for an immigration offence.

The International Labor Conference (ILC) explains migrant workers in domestic work, who lose their immigration status upon being terminated arbitrarily, especially those who leave an abusive employer, can

[510] Laws of Malaysia: Employment Act, 1955.
[511] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(e)(iii).
[512] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 3(a).
[513] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause B(xii).
[514] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(b).

risk deportation and end up in situations of forced labor.[515] In other words, they become undocumented migrant workers the minute they leave the job, and that increases their risk or becoming victims of trafficking in persons (TIPs), as asserted by the UN Special Rapporteur on TIPs, especially Women and Children.[516] CEDAW additionally states that *"undocumented women migrant workers are particularly vulnerable to exploitation and abuse because of their irregular immigration status, which exacerbates their exclusion and the risk of exploitation. They may be exploited as forced labor, and their access to minimum labor rights may be limited by fear of denouncement. They may also face harassment by the police. If they are apprehended, they are usually prosecuted for violations of immigration laws and placed in detention centers, where they are vulnerable to sexual abuse, and then deported."*[517] Indeed, it is known that undocumented migrants in Malaysia are arrested and held up to 14 days before being brought to a magistrate.[518] The Malaysian Immigration Act also envisages severe penalties; including a fine of MYR 10,000, five years' imprisonment, and deportation, for convicted undocumented workers.[519] Such provisions impose unreasonably high penalties, forcing MDWs to endure and stay in the job even in situations of abuse or fall into human trafficking situations, as asserted by Asha D' Souza.[520]

Their vulnerability is further compounded by the lack of mechanisms, through which they can contest against any unfair dismissal initiated by their employers. The MOU establishes that "any dispute arising between the employer and the domestic worker concerning the grounds for the termination of the contract of employment shall be dealt with per the applicable Malaysian laws."[521] However, the provision is infeasible in practice. Under the Malaysian Employment Act, the mandate of the Director-General of Labor Department of the Malaysian MOHR is restricted to any dispute in relation to the payment of indemnity due to the worker, in the case the employer terminates the contract of service without notice or if notice was given, without waiting for the expiry of that notice.[522] By contrast, the General-Director of Department of Industrial Relations' jurisdiction, established under the Malaysian Industrial Relations Act, is extended to disputes regarding unfair dismissal claims.[523] However, it does not cover domestic workers, including

---

[515] International Labor Conference, 'Fourth Item on the Agenda: Decent Work for Domestic Workers' (n 17), Fourth item on the agenda: Decent work for domestic workers, 2010, at para 203.
[516] Giammarinaro (n 15) para 6.
[517] General Recommendation (No.26) on Women Migrant Workers, 2008, para 22.
[518] Giammarinaro (n 15) para 24.
[519] Laws of Malaysia: Immigration Act, 1959 (Act 155), Section 15(4).
[520] D'Souza (n 327) p.37.
[521] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(f).
[522] Laws of Malaysia: Employment Act, 1955, Section 69C(1).
[523] Laws of Malaysia: Industrial Relations Act, 1967, Section 20(1).

MDWs, because this legislation is intended to provide for the regulation of relations between employers, workmen and their trade unions, as well as the prevention and settlement of any difference of dispute arising from their relationship and generally to deal with trade disputes and matters arising therefrom, in industrial undertakings.[524]

4.4.2. An Analysis of How the MOU differs from International Human Rights Law

4.4.2.1. The Contract of Employment

The MOU's standard contract contains (1) Name and Address of the Employer and Cambodian MDW, (2) Duration of the Contract of Employment, (3) Place of Work or Residence of the Domestic Worker, (4) Duties and Responsibilities of the Domestic Worker, (5) Duties and Responsibilities of the Employer, (6) the Payment of Wages, (7) Rest Day, (8) Termination of the Contract of Employment by the Employer and Domestic Worker, (9) General Provisions (mostly about conditions of the repatriation), and (10) Extension of the Contract of Employment.[525] It does include, but not describe, the type of work to be performed by Cambodian MDWs.[526] The following table (Table 4) compares issues covered under the MOU-issued contract with what is required under Article 7 of the Domestic Workers Convention (No.189).

[524] Laws of Malaysia: Industrial Relations Act, 1967, Section 2.
[525] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B.
[526] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clauses 3(a) and 6.

Table 4: The MOU-issued contract as compared to the requirement in the ILO Convention (No.189)

	Clause	The MOU-issued contract
	Name and address of the employer and the worker	☑
	Address of the usual workplace	☑
	Start and duration	☑
	Type of work to be performed	☑
	Remuneration, method of calculation, and periodicity of payments	☑
	Normal hours of work	X
	Paid annual leave and daily and weekly rest periods	X
	Provisions of food and accommodation	☑
	The period of probation	X
	Terms of repatriation, if applicable	☑
	Terms and conditions relating to termination of employment	☑

The MOU-compliant contract does not address (1) the normal hours of work, (2) paid annual leave, (3) the period of probation of trial period, all of which are essential terms and conditions of employment and must be informed to domestic workers in appropriate, verifiable, and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, as required by Article 7 of the ILO Convention (No.189). The standard contract does not include and describe clauses concerning (a) a job description, (b) sick leave, (c) the rate of pay or compensation for overtime and standby, (d) any other payments to which the domestic worker is entitled,

(e) any payments in kind and their monetary value; (f) details of any accommodation provided; and (g) any authorized deductions from the workers' remuneration, as suggested by the ILO Recommendation (No.201).[527] Even worse, recruitment agencies have failed to ensure that terms and conditions of the contract are fully explained and understood by Cambodian MDWs (read section 4.4.1.1).

The MOU also requires Cambodian MDWs to sign, in Cambodia before departure to Malaysia, six original texts of the contract of employment. Thereafter, MDWs shall keep three original signed texts, one each in the Malay, Khmer, and English. This provision seems to reconcile with Article 8 of the ILO Convention (No.189), which stipulates that "national laws and regulations shall require that MDWs, who are recruited in one country for domestic work in another, receive a written job offer, or the contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment required by the Convention, prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies." This raises a prospect that these MOU's provisions meet International Human Rights Law Standards.

However, in practice, as discussed in section 4.4.1.1., such provision has not been effectively implemented by the MOU's parties. Neither the Cambodian MOLVT nor the Malaysian Immigration Department, two key institutions that are involved the most in Cambodian MDWs' migration, are given the mandate to review and approve Cambodian MDWs' contracts of employment prior to their arrival in the country, to ensure that the contracts contain no abusive clauses and are in full conformity with the MOU-issued contract. Together with Annexes I and II to the Migration for Employment Convention (Revised) (No.97), the essence of Article 8 rests upon the obligation to maintain a system of supervision of contracts of employment between an employer and a migrant for employment to require a copy of the contract of employment to be delivered to migrants before the departure or, if the governments concerned so agree, at least in a reception center on arrival in the territory of immigration.[528] As a case in point, in South Africa, a signatory of the ILO Convention (No.189), the contract of employment of a migrant worker is subject to review and approval by the Department of Home Affairs of the South African Immigration Services, prior to the migrant worker's arrival in the country, to ensure that the contract contains no abusive clauses and is in full compliance with the country's 2014 Employment Service Act and 2002 Immigration Act.[529]

---

[527] Recommendation concerning Decent Work for Domestic Workers, 2011, (No.201) para 6(2).
[528] Migration for Employment Convention (Revised), 1949, (No.97) Article 5(1) of Annex I & Article 6(1) of Annex II.
[529] *Direct Request (CEACR) - adopted 2018, published 108th ILC session (2019) Domestic Workers Convention, 2011 (No.189) - South Africa (Ratification: 2013).*

Therefore, it can be argued that the content of the standard contract has yet to reach the expectation of Article 7 of the ILO Convention (No.189), while both MOU parties failed to take measures to ensure that Cambodian MDWs would sign and keep the contract of employment before the departure to Malaysia. This failure not only justifies findings of the ILO study in the Greater Mekong Subregion, which asserted that "MOUs have limited success in reaching their objectives and do not result in fundamental changes to working conditions for migrant workers."[530] The failure to ensure that Cambodian MDWs would sign and keep the contract of employment before departure to Malaysia has constituted a gap with Article 8 of the ILO Convention (No.189). Even though both countries are not parties to the ILO Convention (No.189), they will be expected to carry out the obligation of Article 19(5)(e) of the ILO Constitution, by which both countries will have to report to the Director-General of the International Labor Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in this regard. As discussed in chapter 3, this obligation will enable the ILO to take stock of the progress made by Governments towards the application of the unratified Conventions and serves as a useful reminder to Governments of the existence of the standards in question. It additionally clarifies doubts that may exist concerning the scope and requirements of the instruments, thereby paving the way for further ratifications or at least fuller implementations.[531]

4.4.2.2. Wages

Article 11 of the ILO Convention (No.189) obliges ratifying States to ensure that domestic workers enjoy minimum wage coverage, where such coverage exists, and that remuneration is established without discrimination based on sex. This provision explicitly refers to the principle of *"equal remuneration for men and women workers for work of equal value"* as set out in the Equal Remuneration Convention (No.100) that are ratified by Cambodia and Malaysia. The CEACR, in its direct requests of the ILO Convention (No.100) for Malaysia, asserted that the exclusion of domestic workers, including MDWs, from Minimum Wage Orders constituted a possibility of indirect discrimination against domestic workers, 95 percent of whom were women. The CEACR informed the Government of Malaysia that the principle of *"equal remuneration for work of equal value"* is to apply to domestic workers, whether nationals or non-nationals. The CEACR then explained that where certain categories of workers are excluded from general labor or employment law, it needs to be determined whether specific laws or regulations apply to such

[530] Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion (GMS TRIANGLE project), *Review of the Effectiveness of the MOUs in Managing Labour Migration between Thailand and Neighbouring Countries* (2015), pp.8-22, <http://www.ilo.org/asia/publications/WCMS_356542/lang--en/index.htm> accessed 18 September 2020.
[531] Osieke (n 88), p.160.

groups, and whether they provide the same level of rights and protection as the general provision. The CEACR then requested the Malaysian Government to provide specific information on the manner in which it is ensured that in determining wages (including minimum wages) for domestic workers, including MDWs, who are mostly women, their work is not being undervalued as compared to work done by predominately male groups and to keep the Committee informed of the outcome of its deliberations with the Malaysian National Wage Consultative Council.[532] Likewise, the Committee on CEDAW, in its concluding observation of Malaysia, also recommended Malaysia to reduce the existing gender pay gap by regularly reviewing wages in sectors in which women are concentrated, to ensure that the principle of *"equal pay for work of equal value"* is guaranteed in national legislation and adhered to in all sectors.[533]

Section 4.1.2.2. identified the existence of gender pay discrimination in domestic work experienced by Cambodian MDWs, who are all female workers, as required by the MOU. It is further aggravated with another ground of discrimination, such as nationality, which may determine the level of remuneration as opposed to legitimate criteria, such as the type of work performed or actual hours of work. Therefore, it can be argued that the determination of monthly wages received by Cambodian MDWs is not in full compliance with the principle of *"equal remuneration for men and women for work of equal value"* as set out in the ILO Convention (No.100) even though the country has not ratified the ILO Convention (No.189).

In addition, the exclusion of Cambodian MDWs from the Malaysian Minimum Wage Order and the Malaysian National Wages Consultative Council Act, seems to contradict the Minimum Wage Fixing Convention (No.131). Malaysia has ratified the ILO Convention (No.131) in 2016, so the ILO's pronouncements on the implementation of the Convention by Malaysia have yet to occur.[534] However, the CEACR once examined the adoption of Sri Lanka's National Minimum Wage of Workers Act (No.3) of 2016 that establishes a national minimum wage for all workers. Section 14 of the National Minimum Wage of Workers Act (No.3) excludes domestic workers from the definition of *"Workers."* Consequently, Sri Lanka's national minimum wage does not apply to this category of workers. Domestic workers are also excluded from the Sri Lankan Wages Boards Ordinance and the Shop and Office Employees (Regulation

---

[532] *Direct Request (CEACR) - adopted 2019, published 109th ILC Session (2021): Equal Remuneration Convention, 1951 (No.100) - Malaysia (Ratification: 1997)* (n 379).
[533] *Concluding Observation on the Combined Third and Fith periodic reports of Malaysia* [2018] Committee on the Elimination of Discrimination against Women CEDAW/C/MYS/CO/3-5 [para 38].
[534] 'Ratifications of C131 - Minimum Wage Fixing Convention, 1970 (No.131)' (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312276> accessed 20 August 2020.

of Employment and Remuneration) Act; both of which establish the minimum-fixing machinery. Having reviewed measures taken by Sri Lankan Government to give effect on the ILO Convention (No.131), the CEACR consequently requested the Government to take every effort to extend the protection afforded by the minimum wage system to domestic workers, and requested the Government concerned to provide information on any measures taken or envisaged in this regard.[535] Malaysia is at the exact same stage, in which domestic workers, including MDWs, are not covered by the country's Minimum Wage Orders and the National Wages Consultative Council Act. The ILO's pronouncement for Sri Lanka implies that Malaysian minimum wage systems are not in full compliance with the ILO Convention (No.131), and the country will be soon requested to carry out the obligation to extend the protection afforded by the country's minimum wage system to domestic workers.

Even though Article 1(2) of the Convention (No.131) permits ratifying States, like Malaysia, to determine the groups of wage earners covered by the Convention, such determination shall be done in the agreement or after full consultation with the representative of employers and workers concerned.[536] The country is still required to list in the first report on the application of the Convention any groups of wage earners which may not have been covered, with reasons for not covering them, in accordance with Article 3 of the ILO Convention (No.131). The country must state in subsequent reports the positions of its law and practice in respect of the groups not covered, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such group.[537]

Clause 5(c) of the MOU-issued contract states that "no deduction of the wage of the domestic worker can be made unless allowed by the Malaysian laws."[538] The Malaysian Employment Act permits wage deductions concerning rental for accommodation provided by the employer to the employee at the employee's request or under the terms of the employee's contract of service.[539] Such deductions would not be allowed if it is agreed that the employer has an obligation to provide free accommodation to the employees.[540] The MOU contains no provisions, which require the employers to provide free accommodation to Cambodian MDWs, but provisions that require Cambodian MDWs to reside with the

---

[535] *Direct Request (CEACR) -adopted 2019, published 109th ILC Session (2020) - Sri Lanka - Minimum Wage Fixing Convention, 1970 (No.131)(Ratification:1975)*.
[536] Minimum Wage Fixing Convention, 1970, (No.131), Article 1(2).
[537] *ibid*.
[538] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix A, clause 5(c).
[539] Laws of Malaysia: Employment Act, 1955, Section 24(4)(d).
[540] *Observation (CEACR) - adopted 2018, published 108th ILC (2019) Migration for Employment Convention (Revised), 1949 (No.97) - Malaysian -Sabah (Ratification:1964)*.

employers' house and premises, so the MOU inexplicitly permits wage deductions with respect to the accommodation.

There are no ILO comments on these MOU's provisions, but the CEACR once examined Ireland's Code of Practice for Protecting Persons Employed in Other People's Homes in relation to the payment in kind. Section 5.7. of the Code establishes the maximum daily and weekly deductions from wages where the employee is provided with meals and/or lives in the place of employment in amounts specified in the National Minimum Wage Act 2000. The Committee recalled paragraph 14 (d) of the Domestic Workers Recommendation (No.201), which provides that "when provision is made for the payment in kind of a limited proportion of remunerations, Members States should consider ensuring that there is no deduction made from the remunerations concerning that accommodation, when a domestic worker is required to live in accommodation provided by the household, unless otherwise agreed to by the worker." It subsequently encouraged the Irish Government to adopt the necessary measures to guarantee that "when a domestic workers resides in accommodation provided by the household, no deduction is made from the worker's remuneration with respect to the accommodation, unless otherwise agreed to by the domestic workers."[541] Therefore, the MOU's provisions that permits wage deductions with respect to accommodation, together with the Malaysian Employment Act's provisions concerned, are inconsistent with the ILO Convention (No.189) and Paragraph 14(d) of the ILO Recommendation (No.201).

4.4.2.3. Hours of Work

As discussed above section 4.4.1.3, the absence of clause addressing the normal working hours in the MOU-issued contract, together with the exclusion of domestic workers from key labor provisions, have consequently exposed Cambodian MDWs to excessive daily hours of work, between 15 and 16 hours, or 65.7 weekly hours of work. This loophole also constitutes an unequal treatment, in terms of normal hours of work, between domestic workers; particularly Cambodian MDWs, and workers in general, as the Malaysian Employment Act establishes that workers shall not be required under his contract of service to work more than eight hours in one day and 48 hours in one week.[542]

Article 10(1) of the ILO Convention (No.189) reiterates that "equal treatment between domestic workers and workers generally, in relation to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave in accordance with national laws, regulations or collective agreements,

---

[541] *Direct Request (CEACR) - adopted 2017, published 107th ILC session (2018): Domestic Workers Convention, 2011 (No.189) - Ireland (Ratification: 2014)*.
[542] Laws of Malaysia: Employment Act, 1955, Section 60A.

taking into account the special characteristic of domestic work." The CEACR once examined Section 231(2) of Panama's Labor Code, which stipulates that "domestic workers shall not be subject to a schedule of hours of work, but benefit from a minimum absolute rest period between 9 p.m. and 6 a.m." Panama's Supreme Court, in its ruling of 10 August 1994, asserted that this provision can be interpreted to mean that the maximum working day for domestic workers is 15 hours, as compared to the maximum working day of eight hours established for other categories of workers. The Committee also observed the study, entitled *"The Socio-cultural and juridical institutionalization of inequality: Paid domestic work in Panama,"* which indicated that the majority of live-in and full-time domestic workers (51.30 percent) have experienced excessive hours of work (between 49 and 84 hours). The CEACR finally requested the Panamanian Government to take the necessary measures to amend section 231(2) of the Labor code with a view to establishing a maximum working day of eight hours for all domestic workers.[543]

Furthermore, the MOU provides that "the domestic workers shall be entitled to one (1) rest day every week and in the event that the domestic worker waives the entitlement, domestic workers shall be paid a certain amount of money to be calculated on pro-rate basis in lieu of the rest days or as agreed upon by the employer and the domestic worker." As discussed above, this provision does not necessarily suggest the right to adequately compensatory rest for Cambodian MDWs. Neither does it define the grounds on which Cambodian MDWs are required to work during the period of daily and weekly rest, like the Malaysian Employment Act. In Section 4.4.1.3, different treatments between domestic workers, including Cambodian MDWs, and workers generally in respect of overtime compensation is also discovered. Article 10(1) of Domestic Workers Convention reiterates aspects of equal treatment between domestic workers and workers generally, in relation to overtime compensations and periods of daily and weekly rest. This provision must be read together with the Domestic Workers Recommendation (No.201). Paragraph 12 of the ILO Recommendation (No.201) provides that "national laws, regulations, collective agreements should define the grounds on which domestic workers may be required to work during the period of daily or weekly rest and provide for adequate compensatory rest, irrespective of any financial compensation."

These examinations reasonably justify the legal argument that the MOU's provisions contradict Article 10 (1) of the Domestic Workers Convention. In addition, the MOU does not define the periods during which Cambodian MDWs are not free to dispose of their times as they please and remain at the disposal of the household in order to respond to possible calls as hours of work. Thus, the MOU does not reflect Article

[543] *Direct Request (CEACR) - adopted 2018, published 108th ILO Session (2019): Domestic Workers Convention, 2011 (No.189) - Panama (Ratification 2015).*

10 (3) of Domestic Workers Convention. One may argue that Malaysia and Cambodia are not bound by the ILO Convention (No.189). However, the Sabah State, Malaysia, is a party to the ILO Convention (No.97). Article 6 of the Convention (No.97) obliges Member to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully with its territory, treatment no less favorable than that which it applies to its own nationals in respect of matters, in so far as such matters, are regulated by law or regulation, or subject to the control of administrative authorities, including hours of work and overtime arrangements. The preamble of the Domestic Workers Convention also recognizes the relevance of the ILO Convention (No.97) to MDWs. In its General Comment, the Committee of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) asserted that any distinction made to exclude MDWs from protection of the Convention would constitute a prima facie violation of the Convention.[544] This creates a sense that any distinction made to exclude MDWs from protection of the ILO Convention (No.97) would also constitute a contradiction to the spirit of the Convention. In this sense, at least, regular Cambodian MDWs shall enjoy the benefits of the ILO Convention (No.97). As discussed in chapter 3, the Convention applies to foreign workers in the entirety of Malaysia, not just the Sabah State. The Federal Government are under the obligation of Article 19 of the ILO Constitution to make progress toward coordinated actions within Federal State that give effect to the Convention and report the progress to the Director-General of the International Labor Office.

4.4.2.4. Termination of Employment

Article 11 of the Termination of Employment Convention (No.158) states that "a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period." This provision should be read together with the Domestic Workers Convention (No.189). Paragraph 18 of its accompanying Recommendation (No.201) supplements that "in the event of termination of employment at the initiative of the employer, for reasons other than serious misconduct, live-in domestic workers should be given a reasonable period of notice and time off during that period to enable them to seek new employment and accommodation." In its observation of the ILO Convention (No.189) for Ecuador, the CEACR once noted that the country's Labor Code does not stipulate any measures with a view to ensure that the employer provides reasonable notice for domestic workers in respect of the termination of employment for faults that are not serious. The Committee then requested the Government to initiate

[544] General Comment (No.1) on Migrant Domestic Workers, 2011, para 6.

measures to ensure that domestic workers, whose employment relationship is terminated for faults that are not serious, have reasonable notice to seek new employment and accommodation.[545]

Here, it can be observed that International Human Rights Law reiterates the requirement of *"serious fault"* or *"serious misconduct"* committed by domestic workers, including MDWs, to justify the termination of employment initiated by the employers, without notice. Clause 7 of the MOU-issued contract permits the employers to terminate the contract of employment, without notice, if the domestic worker commits any act of misconduct that is inconsistent with the fulfilment of the domestic workers' duties, or if the domestic worker breaches any of the terms and conditions of the contract of employment. The term "misconduct" is strictly defined to include various grounds, but the MOU does not explain why these grounds are *"serious"* in nature that it would be unreasonable to require an employer to continue his employment with a Cambodian worker during the notice period. Besides that, the International Labor Office once asserted that a reasonable period of notice for a live-in domestic worker, who is dismissed on the grounds of grave misconduct, may justifiably be longer than that for many other categories of workers. The goal is to prevent MDWs from falling into human trafficking situations.[546]

In addition, the MOU-issued contract does not oblige employers to give Cambodian MDWs appropriate written warning before terminating the contract of employment, without notice, on the ground of misconduct. In other words, the MOU allegedly entitles the employers to terminate the employment, without notice, on the ground of misconduct, even though Cambodian MDWs may have committed their mistake for the very first occasion. Article 7 of the ILO Convention (No.158) provides that "the employment of a worker shall not be terminated for reasons related to the workers' conduct or performance before he is provided an opportunity to defend himself against the allegation made, unless the employer cannot reasonably be expected to provide this opportunity." This provision is read in conjunction with its accompanying Recommendation (No.158). Paragraph 7 of the Recommendation stipulates that *"the employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions unless the employer has given the worker appropriate written warning."*[547]

---

[545] *Direct Request (CEACR) - adopted 2019, published 109th Session: Domestic Workers Convention, 2011 (No.189) - Ecuador (Ratification: 2013)*.
[546] International Labor Conference, 'Fourth Item on the Agenda: Decent Work for Domestic Workers' (n 17), Fourth item on the agenda: Decent work for domestic workers, 2010, at para 203.
[547] Termination of Employment Recommendation, 1982, (No.166), para 7.

The MOU also permits the employers to terminate the employment of Cambodian MDWs, without notice, specifically on the ground that Cambodian MDWs have neglected their assigned household duties and responsibilities, as well as disobeying lawful and reasonable orders of the employer. The MOU does not establish on the requirements of employers to give appropriate instructions and written warning, and the rights of Cambodian MDWs to have an opportunity to improve their performance in a reasonable period of time, before the termination of employment. Article 7 of the ILO Convention (No.158) must be read together with paragraph 8 of the ILO Recommendation (No.166), which stipulates that *"the employment of a worker should not be terminated for unsatisfactory performance unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactory after a reasonable period of time for improvement has elapsed."*[548]

As discussed above, Cambodian MDWs, whose contract of employment is terminated on aforementioned grounds, are restricted to continue residing and looking for another employment in Malaysia until the deadline stated on the Visit Pass (Temporary Employment). They shall be immediately repatriated back to Cambodia. Furthermore, the MOU also permits the Malaysian authorities to revoke Cambodian MDWs' Visit Pass (Temporary Employment) in the event of abscondment. These bilateral standards contradict International Human Rights Law. Article 8(1) of the Migrant Workers (Supplementary Provisions) Convention (No.143) states that *"on conditions that a migrant worker has resided legally in the territory for the purpose of employment, he shall not be regarded as in an illegal or irregular situation by the mere fact of the loss his employment, which shall not in itself imply the withdrawal of his authorization of residence or, as the case may be, work permit."* According to the CEACR, this provision implies that a migrant worker concerned shall enjoy the right to equality of treatment with nationals for the remainder of the duration of their work permit, particularly with regard to security of employment, the provision of alternative employment and retraining.[549] It is read together with paragraph 31 of the Migrant Workers Recommendation (No.151), which stipulates that "a migrant who has lost his employment should be allowed sufficient time to find alternative employment, at least for period corresponding to that during which he may be entitled to unemployment benefits; the authorization of residence should be extended accordingly."

[548] Termination of Employment Recommendation, 1982, (No.166), para 8.
[549] *Direct Request (CEACR) - adopted 2019, published 109th ILC session (2021) - Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143) - Cyprus (Ratification: 1977)*.

Furthermore, Cambodian MDWs are not entitled to the right to appeal against any unjustifiable termination of employment to impartial bodies in Malaysia, let alone contesting against the repatriation order issued by the Malaysian Immigration Department (read section 4.4.1.4). Article 8 of the ILO Convention (No.158) states that "a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as court, labor tribunal, arbitration committee or arbitrator."

This provision should be read in conjunction with the ILO Convention (No.143). Article 9(1) of the Convention (No.143) states that *"Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant workers shall, in case in which these laws and regulations have not been respected and in which his position cannot be regularized, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits."* Article 9(2) further adds that *"in case of dispute about the right referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through representative."*[550] The CEACR construed both provisions to mean that irregular migrant workers can claim their rights and have access to courts, in the contexts of expulsion orders.[551] It means expulsion orders should not have the effect of denying migrant workers the right to appeal those orders and to file complaints concerning violations of other rights.[552] The CEACR also requested governments to consider amending legislation to permit migrant workers, who contest an expulsion order to reside in the country for the duration of the case.[553]

Here, it can be argued that the termination of employment, without notice, under the MOU, is not in full compliance with the Termination of Employment Convention (No.158). It also adversely implicates protection and benefits afforded to domestic workers, including MDWs, under the ILO Convention (No.143) and its accompanying Recommendation (No.151). Both Cambodia and Malaysia are not parties

[550] Migrant Workers (Supplementary Provisions) Convention, 1975, (No.143).
[551] *Direct Request (CEACR) - Migrant Workers (Supplementary Provision) Convention, 1975 (No.143) - Albania (Ratification 2006)*.
[552] International Labor Conference (ed), *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution): International Labor Conference, 105th Session, 2016* (first edition 2016, International Labor Office 2016) para 499. Also read paragraph 33 of ILO Convention (No.151)
[553] *Direct Request (CEACR) - Migrant Workers (Supplementary Provisions) Convention, 1975(No.143) - Italy (Ratification 1981)*.

to the discussed ILO Conventions.[554] However, they are under the obligation of Article 19(5)(e) of the ILO Constitution to report the Director-General of the International Labor Office, at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt within both Conventions.[555] There is no pattern for reviewing unratified Conventions, but the choice depends on the current importance of the subject and the extent to which circumstances may have changed since the previous review.[556] The ILO Convention (No.143) have been constantly requested for review. It was first selected in 1979, four years after its adoption in 1975. In 1998, both the ILO Conventions (No.97) and (No.143) were once again requested by the Governing Body for a review.[557] The latest review of both Conventions took place in 2015.[558]

Likewise, the ILO Convention (No.158) has been once reviewed in 1994, since its adoption in 1982.[559] Irrespective of the fact that the Convention (No.158) is not constantly reviewed like the ILO Convention (No.143), it is noteworthy the practice of having regard to the ILO Convention (No.158) has not been merely confined to the judiciary of those countries that have ratified the Conventions, but has also been observed in judgments delivered by the judiciary and industrial courts of members States that have not ratified the Conventions. Evidently, the ILO Convention (No.158) has been invoked by national courts, often in light of the manner by which the Convention, or the principles contained therein, have been incorporated within the national legal system. In this regard, the Convention (No.158) has served as an aid to the court in arriving at its judgements, in that it represents (i) norms of direct application in the legal systems, (ii) an aid to interpretation of national legislation, (iii) an instrument to strengthen the application of national law, and (iv) as a source of equity.[560]

---

[554] 'Ratifications of C158 - Termination of Employment Convention, 1982 (No.158) - Date of Entry into Force: 23 November 1985' <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303:NO> accessed 29 September 2020.

[555] ILO Constitution, 1919.

[556] Osieke (n 88), at p.161.

[557] 'Form for Report on Unratified Conventions (Article 19 of the Constitution): Migration for Employment (Revised) Convention (No.97) and Recommendation (No.86),1949; Migrant Workers (Supplementary Provisions) Convention (No.143) and Migrant Workers Recommendation (No.151), 1975' (1997) <https://www.ilo.org/public/english/standards/relm/gb/docs/gb268/lils10-1.htm> accessed 20 August 2020.

[558] 'Choice of Conventions and Recommendations on Which Reports Should Be Requested under Article 19, Paragraph 5(e)a and 6(d) of the Constitution in 2019' (2017).

[559] *ibid*.

[560] International Labour Standards Department (Sector I) (n 149) p.20.

Chapter 5 Access to Justice

> *"I have been in the shelter for one year and five months now, and I don't know how much longer, just because of this case. I have not called my family in all of this time because the perpetrator threw away my phone when it happened so I could not call for help, and now I don't have their number. It has been too long."*[561]

5.1. Introduction

Access to justice has developed from a moral imperative to a legal right, under the ambit of international law, constitutional law, and national laws. Implicit in the rule of law, which is the cornerstone of every modern democracy, is the principle of equal access to justice. Ayesha Kadwani Dias and Gita Honwana Welch, asserted that perceptions of injustice and lack of access to redress for perceived wrongs, through formal processes, have been a factor that is a recurring decimal in various parts of the world where there is internal conflict.[562] In this regard, as noted by then Secretary-General of the United Nations, Kofi Annan, "the United Nations has learned that the rule of law is not a luxury and that justice is not a side issue. We have seen that without credible machinery to enforce the law and resolve the dispute, people resorted to violence and illegal means. We have learned that the rule of law delayed is lasting peace denied and that justice is a handmaiden of true peace."[563]

As discussed in chapter 3 and 4, there is a high prevalence of forced labor, including trafficking in persons (TIPs), and discrimination experienced by Cambodian migrant domestic workers (MDWs). Thus, the right of access to justice is crucial in such a context. This chapter centers on the right of access to justice in the country of employment, Malaysia. This chapter will be divided into three sub-chapters. The first sub-chapter examines the right of access to justice under the Memorandum of Understanding (MOU) between Malaysia and Cambodia on the Recruitment and Employment of Domestic Workers. By contrast, the second sub-chapter illustrates how the rights of access to justice is protected under International Human Rights Law. The last sub-chapter will assess the implications of the MOU on the human rights of Cambodian MDWs and examines its compatibility with International Human Rights Law.

---

[561] Bar Council Malaysia (n 78) p.174.

[562] Ayesha Kadwani Dias, Gita Honwana Welch and United Nations Development Programme (eds), *Justice for the Poor: Perspectives on Accelerating Access* (Oxford University Press 2009) p.3.

[563] 'Secretary-General's Remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role' (*United Nations Secretary-General*, 24 September 2003) <https://www.un.org/sg/en/content/sg/statement/2003-09-24/secretary-generals-remarks-ministerial-meeting-security-council> accessed 20 July 2020.

5.2. Access to Justice under the MOU

Article 10 of the MOU on the Recruitment and Employment of Domestic Workers established the Joint Working Group (JWG). The JWG shall comprises of appropriate government authorities, including the Embassy of Malaysia in Cambodia and the Embassy of Cambodia in Malaysia. Each Member State shall determine the relevant government authorities respectively to be members of the JWG; particularly government authorities to be designated as the focal point for each Party.[564] The JWG's mandate is to (i) monitor the implementation of the MOU, (ii) monitor the implementation of any programs regarding the recruitment, employment, and repatriation of Cambodian MDWs, (iii) monitor and obtain information with regard to employment issues faced by Cambodian MDWs and employers, (iv) provide advisory services and technical assistance on the employment of domestic workers, (v) perform any other tasks as may be assigned to it by both parties, (vi) deliberate on issues consequential to the exercise of Article 14 of the MOU prior, during, and after the suspension of the MOU and to propose both parties to discuss alternative solutions or remedial actions due to the suspension of the MOU, and (vi) propose an amendment, variation, or modification to the terms and conditions of the MOU-issued contract of employment and any items listed in the attached appendices to the MOU.[565]

It may raise the prospect that the JWG is mandated to accept labor complaints in relation to forced labor, including TIPs, and discrimination from Cambodian MDWs. However, this is challenged by Article 16 of the MOU, which states that "any difference or dispute between the parties concerning the interpretation and/or implementation and/or application of any of the provisions of this MOU shall be settled amicably through mutual consultation and/or negotiations between the parties through diplomatic channels without reference to any third party or international tribunals." It gives rise to another point of view that the JWG is not mandated to hear and decide on labor disputes presented by MDWs or employers in relation to violations of the MOU's provisions, the contract of employment, or any legislation. The provision also restricts Cambodian MDWs from referring their grievances to any regional and international tribunals for a decision. Therefore, Cambodian MDWs have to rely on Malaysian legislation and authorities, in the determination of their legal rights, obligations, and criminal charged against them, in particular when they are employed or have been employed in Malaysia. This implication is supported by the MOU's provisions that "the contract of employment is governed by and shall be construed in accordance with the laws of

[564] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appendix C, clause VI.
[565] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appendix C.

Malaysia;" "the employer shall comply with all Malaysian laws, rules, regulations, national policies and directives;" "the domestic workers under employment in Malaysia shall comply with all the Malaysian laws, rules, regulations, national policies, and directive;" and "any dispute arising between the employer and the domestic worker concerning the grounds for termination of this contract of employment shall be dealt with in accordance with the applicable laws in Malaysia."[566] Malaysia does not have a specific forced labor law, but related laws do exist. This research focuses on the Federal Constitution of Malaysia, the Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM), and the Malaysian Employment Act.

5.2.1. Federal Constitution of Malaysia

Article 6 of Malaysia's Federal Constitution establishes that "no person shall be held in slavery and all forms of forced labor are prohibited with the exception of compulsory national service and work or service carried out by persons as a consequence of a court conviction."[567] One may ask if this fundamental provision covers migrant workers, including Cambodian MDWs. In the *Taj Mahal* case, the Malaysian Industrial Court examined the coverage of Article 8(1) of the Constitution, which provides that "all persons are equal before the law and entitled to its equal protection." The Malaysian Industrial Court held that Article 8 uses the word "persons" and not "citizens" and the rights guaranteed by its equality is extended to documented and undocumented migrants. The term "undocumented migrants" entails migrant workers, who work without a work permit or work pass.[568] Therefore, the term "no persons" in Article 6 of the Federal Constitution indicates an inclusion of all persons, and that means citizens and non-citizens, including migrant workers, documented and otherwise.[569] In this sense, Cambodian MDWs, documented or otherwise, are included in the protections under Article 6 of Malaysia's Federal Constitution.

5.2.2. Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM)

In 2007, Malaysia introduced the Anti-Trafficking in Persons Act that criminalized trafficking for purposes of labor exploitation. The Act was subsequently amended into the Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) in 2010.[570] Section 3 provides that "the offence under

---

[566] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Article 6, and Appendix B, clauses 9(f) and 12.
[567] Federal Constitution, 1957, Section 6.
[568] *Ali Saleh Khalaf v Taj Mahal Hotel* (2014) Case No.22-27-/4-1580/12 (Industrial Court of Malaysia), unpublished.
[569] ILO, 'Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol' (n 461) p.11.
[570] Giammarinaro (n 15), at para 32.

this Act apply, regardless of whether the conduct constituting the offence took place inside or outside Malaysia and whatever the nationality or citizenship of the offender, in the following circumstances: (a) if Malaysia is the receiving country or transit country or the exploitation occurs in Malaysia, or (b) if the receiving country or transit country is a foreign country, but the trafficking in persons or smuggling of migrants starts in Malaysia or transits Malaysia." Section 4 establishes that "any offence under this Act, committed by citizens or any permanent resident in any place outside and beyond the limits of Malaysia, may be dealt with as if it had been committed at any place within Malaysia."[571] With both provisions, it can be argued that the Malaysian ATIPSOM covers trafficking offences committed by corporate bodies, employers, or their agents. The jurisdiction is extended to offences committed by Malaysian citizens and permanent residents outside Malaysia. Notwithstanding this, the jurisdiction is diminished by the fact that every MDW is required to sign on the Declaration Form for Employing Muslim Foreign Domestic Helpers in which they give consent not to make any claim against the Government of Malaysia and its representatives.[572]

5.2.2.1. The Right to Make a Report to Malaysian Authorities

In the language of Article 8 of the Federal Constitution, all persons are entitled to report a crime to the police, regardless of their nationality, immigration status, or other identifiers.[573] Reports are usually made at police stations, but informants can also report to a police officer outside of a station, who is then required to take down that person's details and forward the report to the relevant persons at the station.[574] Police officers do not have the discretion to refuse to take a police report. They indeed are duty-bound to receive any information concerning any offence committed anywhere in Malaysia.[575]

5.2.2.2. The Duty to Investigate

As far as human trafficking cases are concerned, the mandate of investigation is vested in the Enforcement Committee of the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants. The Committee is composed of officers from the Anti-Trafficking Unit of the Royal Malaysian Police, the Immigration Department, the Royal Malaysian Customs, the Maritime agencies, and the Department of Labor (DOL) of the Malaysian Ministry of Human Resources (MOHR). They also apprehend suspects and testify in

[571] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Sections 3 & 4.
[572] Immigration Department of Malaysia and Ministry of Home Affairs (n 22).
[573] Federal Constitution,1957, Article 8.
[574] Laws of Malaysia: Criminal Procedure Code, 1935, Section 107(3).
[575] Laws of Malaysia: Criminal Procedure Code, 1935, Section 107(4).

courts.[576] The formation of an Anti-Trafficking Unit of the DOL within the MOHR and provision of training to inspectors on the labor dimension of trafficking indicates the government's efforts to combat trafficking in a multi-disciplinary approach to law enforcement.[577] There are two categories of labor officers within DOL: Generalists, who conduct inspections to identify forced labor in workplaces, and Specialists, who are empowered to identify and investigate cases of trafficking, as well as rescue victims.[578]

How does the Enforcement Committee carry the mandate of investigation? In November 2013, the Malaysian Government put into place standard operating procedures (SOPs) for the investigation and prosecution of trafficking offenses and a follow-up Action Plan for the period of 2016-2020.[579] SOPs are not available to the public. Despite this, one should observe that the Malaysian ATIPSOM depends on the Malaysian Criminal Procedure Code (CPC). This is confirmed in Section 29(2) of the Malaysian ATIPSOM, which establishes that "an enforcement officer making an arrest under subsection (1) shall, without unnecessary delay, bring the person arrested to the nearest police station, and thereafter (arrested) person shall be dealt with in accordance with the law relating to criminal procedure for the time being in force."[580] This is given the fact that the ATIPSOM supplements – but not derogates – the provisions of any other written law relating to trafficking in persons and smuggling of migrants.[581]

An interesting characteristic of the investigation is that, for the purpose of carrying the investigation and inquiry, ATIPSOM requires the government to place victims under a court-ordered of 21-day interim protection at a place of refuge (or commonly known as custody) that is designated by the Malaysian Ministry of Home Affairs (MOHA).[582] The Malaysian Ministry of Women, Family, and Community Development has helped funding and operating eight (8) shelters for trafficking victims.[583]

5.2.2.3. The Right to a Trial

According to Section 29(2) of the Malaysian ATIPSOM, criminal procedure is the framework for public prosecutors to institute a criminal prosecution against any person for an offence under the Malaysian

[576] Giammarinaro (n 15), para 46.
[577] ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project) (n 14) p.7.
[578] Giammarinaro (n 15) para 52.
[579] ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labor Migration to Growth and Development in ASEAN (TRIANGLE II Project) (n 14) p.7.
[580] Laws of Malaysia: Criminal Procedure Code, 1935, Section 29(2).
[581] Laws of Malaysia: Criminal Procedure Code, 1935, Section 5.
[582] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 44(1) and (2).
[583] U.S. Department of State (n 80), p.330.

ATIPSOM.[584] There are two prosecution officers, serving as specialist prosecutors for TIPs, in every state. They are under the supervision of the Director of Public Prosecutions of the Attorney-General's Office of Malaysia.[585] A special court in Kuala Lumpur was established with the intention to expedite trials of trafficking cases. Five more special trafficking courts were established in 2018 in (i) Ipoh, Perak; (ii) Balik Pulau, Penang; (iii) Melaka, (iv) Muar, Johor; and (v) Kota Kinabalu, Sabah.[586] By the same token, these special trafficking courts rely on the Malaysian CPC to try trafficking-related offences, in accordance with Section 29(2) of the Malaysian ATIPSOM. Under the Malaysian CPC, all criminal cases are heard and decided by a single judge. Before the trial, pre-trial and case management hearings are held to reduce delays. A pre-trial conference shall commence within thirty days from the date the accused was charged in court or any reasonable time before the commencement of the case management.[587] A case management process shall commence within sixty days from the date of the accused being charged and claims to be tried.[588] It is then followed by a plea bargaining in the Court in which the offence is tried.[589] Where a satisfactory disposition of the case has been agreed upon by the accused and the prosecutor, the satisfactory disposition shall be put into writing and signed by the accused – his advocate if the accused is represented, and the prosecutor.[590]

The Malaysian ATIPSOM obliges the government to place victims, who are certified as victims of TIPs, under a 90-day protection order at the place of refuge. The government typically renew protection orders for certified victims after the completion of the trial associated with their case.[591] The 2015 amended ATIPSOM further includes the possibility for trafficked persons to move freely in and out of the shelter, or to obtain the employment. However, victims are required to undergo security risk assessment, medical screening, and mental health evaluation, by the end of their 21-day interim protection order, to obtain such special immigration pass.[592]

---

[584] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Sections 41 and 52.
[585] ILO, 'Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol' (n 461) p.34.
[586] *ibid*.
[587] Laws of Malaysia: Criminal Procedure Code, 1935, Section 172A(2).
[588] Laws of Malaysia: Criminal Procedure Code, 1935, Section 172(B)(1).
[589] Laws of Malaysia: Criminal Procedure Code, 1935, Section 172C(1).
[590] Laws of Malaysia: Criminal Procedure Code, 1935, Section 172C(7).
[591] U.S. Department of State (n 80) p.330.
[592] Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act, 2015, Section 51A.

5.2.2.4. The Right to Effective Remedy

Conviction of Perpetrator

The term "trafficking in persons" (TIPs) means "all actions involved in acquiring or maintaining the labor or service of a person through coercion, and includes the act of recruiting, conveying, transferring, harboring, providing or receiving a person for the purposes of this Act." The element of coercion is central to making a case of trafficking or forced labor under the ATIPSOM. The term "coercion" is defined as: (a) threats of serious harm to or physical restraint against any person; (b) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (c) the abuse or threatened abuse of the legal process.[593] Therefore, this adopted definition of TIPs criminalizes all aspects of TIPs, including labor trafficking.

TIPs for exploitation carries a penalty of up to fifteen years imprisonment and a fine.[594] The term "exploitation" here means all forms of sexual exploitation, force labor and services, slavery or practices similar to slavery, servitude, any illegal activity, or the removal of human organs.[595] The offence of TIPs by means of threat; use of force or other forms of coercion; abduction; fraud; deception; abuse of power; abuse of the position of vulnerability; or payments/benefits to obtain the consent of a person having control over a trafficked person is punishable by between three and twenty years imprisonment and a fine.[596] Profiting from the exploitation of a trafficked person can lead to up to fifteen years imprisonment, payment of fines, and forfeiture of profits earned from the offence.[597] The offence of transiting a trafficked person through Malaysia or facilitating such an act can result in imprisonment of up to seven years and a fine.[598] Trafficking in children is punishable with imprisonment ranging from three to twenty years and a fine.[599] When the trafficking offence involves children, it is irrelevant whether the consent of the trafficked child was obtained.[600] Section 25 provides for the non-criminalization of identified trafficked persons, but the provision does not cover smuggled migrants for offences related to irregular entry and unlawful residence in Malaysia.

---

[593] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 2.
[594] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 12.
[595] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 2.
[596] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 13.
[597] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 15.
[598] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 15A.
[599] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 14.
[600] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 16.

Compensation

In addition, courts can make an order for the payment of a sum fixed by way of compensation paid by the convicted person to the trafficked person. The Act also introduced steps for a worker to claim wages in arrears if the trafficker is not successfully convicted.[601] Under the Malaysian CPC, victims are given the opportunity to present the "Victim Impact Statement" (VIS), during the sentence deliberation, so that they can explain personal costs and trauma resulted from the defendant's actions.[602] This provision also permits a member of his family to express how a particular crime has affected them.[603] A 2014 directive required prosecutors to meet with victims at least two weeks before the start of the trial to prepare victims to record the VIS.[604]

The payment of compensation under the criminal procedures does not preclude any civil action by the victims against traffickers.[605] Trafficked migrants have the same rights as citizens to bring the civil claim at one of the Civil Courts.[606] There are a variety of torts, but the most relevant is the claim of negligence.[607] By way of example, in *Sumarni v Yow Bing Kwong & Anor*, an Indonesian MDW lost her employment because of a car accident in which she suffered severe injuries. Her employer subsequently did not renew her work permit. The Trial Judge awarded the plaintiff special damages, general damages for pain and suffering, and compensation for the earnings she lost before her work permit expired.[608] On appeal, the Court of Appeal upheld the decision and awarded her damages for lost earning capacity because her physical shortcoming would expose her to receiving less in the future.[609]

---

[601] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act, 2015, Sections 66A and 66B.
[602] Laws of Malaysia: Criminal Procedure Code, 1935, Section 183A(1).
[603] Baljit Singh Sidhu, Shair Mohamed and Mohd Akram, 'Third Voice in a Criminal Justice System: The Voice of the Victim through Victim Impact Statement' (2015) 6 Current Law Journal, at p.i.
[604] U.S. Department of State (n 80) p.329.
[605] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act, 2015, Section 66A (4).
[606] Also Read Laws of Malaysia: Civil Law Act, 1956, Section 3.
[607] Bar Council Malaysia (n 78), p.100. The notion of negligence is perceived as a breach of statutory duty or other act or omission which gives rise to a liability in tort or would give rise to the defense of contributory negligence.
[608] *Sumarni v Yow Bing Kwong & Anor* [2008].
[609] *ibid*, para 23.

5.2.3. The Malaysian Employment Act

5.2.3.1. The Right to Lodge a Complaint

The Director-General of the DOL can inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under (i) the employment contract, (ii) the Malaysian Employment Act, or (iii) the Malaysian Minimum Wage Order.[610] The mandate shall include the power to hear and decide, in accordance with the procedure laid down in the Act, any claim by (i) an employee against a contractor for labor,[611] (ii) a contractor for labor against a contractor or sub-contractor for any sum which the contract for labor claims to be due to him in respect of any labor provided by him under his contract with the contractor or sub-contractor,[612] or (iii) an employer against his employee in respect of indemnity due to such employer.

In Malaysia, the term "contractor for labor" commonly refers to the "sponsoring employer" or "outsourcing agency" who provides labor or service to various individual(s) or companies. The contractor for labor acts as both a recruitment agency, responsible for selecting and hiring workers from abroad, and a management company responsible for managing the workers in Malaysia and the payment of wages.[613] It means an employee is entitled to lodge a complaint against recruitment agencies to the Director-General, in respect of wages or any other payments in cash due to such employee under (i) the employment contract, (ii) the Malaysian Employment Act, or (iii) the Malaysian Minimum Wage Order. It also has the mandate to accept complaints relating to violations of the Workers' Minimum Standard of Housing and Amenities Act, the Workmen's Compensation Act, and the Malaysian ATIPSOM.[614] This administrative mechanism is commonly called the "Labor Court" (*Mahkamah Buruh* in Bahasa Malaysia).[615]

The procedure is set out in Section 70 of the Malaysian Employment Act. However, the instrument only prescribes the forms but not provide further procedural detail. The researcher has been informed by the DOL of MOHR that it has an internal standard of procedure for receiving and handling cases, but it could

---

[610] Laws of Malaysia: Employment Act, 1959, Section 69(1).
[611] The term "contractor for labor" means a person who contracts with a principal, contractor or sub-contractor to supply the labor required for the execution of the whole or any part of any work which a contractor or sub-contractor has contracted to carry out for a principal or contractor, as the case maybe.
[612] The term "contractor" means any person who contracts with a principal to carry out the whole or any part of any work undertaken by the principal in the course of or for the purpose of the principal's trade or business. The term "sub contractor" means any person who contracts with a contractor for the execution by or under the sub-contractor of the whole or any part of any work undertaken by the contractor for his principal, and includes any person who contracts with a sub-contractor to carry out the whole or any part of any work undertaken by the sub-contractor for a contractor.
[613] Bar Council Malaysia (n 78), p.43.
[614] Harkins and Åhlberg (n 456) p.14.
[615] Bar Council Malaysia (n 78), p.122.

share with the researcher on the basis that it is an internal document. According to Section 70(a), "the person complaining shall present to the Director-General a written statement of complaint and of the remedy which he seeks."[616] The complaint is submitted free of charge at the DOL offices in any State of the Federation. A written complaint can be submitted by letter or email, and in person-complaints can be made by visiting a DOL office or making a telephone call to the Department hotline, called "Telekerja."[617] The DOL, in practice, further requires several other supporting documents to file a complaint: (1) the worker's passport; (2) copy of the employment contract; (3) a payment slip; (4) arrival card; (5) employment termination letter (if applicable); and (6) any other contract-related documents.[618]

5.2.3.2. The Duty to Investigate

Thereafter, the Director-General shall examine the complaint on oath or affirmation and record the substance of the complainant's statement in his case book.[619] "The Director-General may make such inquiry as he deems necessary to satisfy himself that the complaint discloses matters in which his opinion ought to be inquired into and may summon in the prescribed form the person complained against, or if it appears to him without any inquiry that the complaint discloses matters which ought to be inquired into he may forthwith summon the person complained against: provided that if the persons complained against attends in person before the Director-General it shall not be necessary to serve a summons upon him," in accordance with Section 70(c). This provision means that the Director-General has a discretionary power whether to investigate and order a hearing.

5.2.3.3. The Right to a Hearing

When a summons is issued against the complained individual, the Director-General shall give such person notice of the nature of the complaint, together with the date, time, and place at which he is required to attend. The person concerned shall be informed that he may bring with him any witnesses he may wish to call on his behalf, and that he may apply to the Director-General for summonses to such persons to appear as witnesses on his behalf.[620] Simultaneously, the Director-General shall inform the complainant of the date, time, and place mentioned therein and shall instruct the complainant to bring with him any witnesses he may wish to call on his behalf. The Director-General, on the request of the complainant and subject to any conditions as he may deem fit to impose, issue summonses to such witnesses to appear on behalf of the

[616] Laws of Malaysia: Employment Act, 1955, Section 70.
[617] Bar Council Malaysia (n 78), p.125.
[618] Bar Council Malaysia (n 78), p.126.
[619] Laws of Malaysia: Employment Act, 1955, Section 70(b).
[620] Laws of Malaysia: Employment Act, 1955, Section 70(d).

complainant.[621] If the persons complained against fails to attend a scheduled hearing, the Director-General may hear and decide the complaint in the absence of such person, like a default judgement, notwithstanding that the interests of such person may be prejudicially affected by his decision.[622] However, if a complainant does not attend a scheduled hearing, the Director-General will likely deem the complaint withdrawn.[623]

In order to enable a court to enforce the decision of the Director-General, he shall embody his decision in "a consequential order" in such form as may be prescribed for the payment by the employer or the recruitment agency of such sum of money as he deems just without limitation of the amount thereof.[624] His order can be then enforced by the Court of First-Class Magistrate.[625] No reasons are given for a decision unless a party later files an appeal. If any persons, whose financial interests are affected, are dissatisfied with the decision or order of the Director-General, they may appeal to the High Court.[626]

However, according to the Malaysian Bar Council, the Director-General, before referring to the procedures of Section 70, first seeks to resolve the disputes informally by discussing the matter with the parties by telephone or holding procedural hearings, called "a mention." At a mention, the parties have the opportunity to resolve the dispute in the presence of the Director-General. However, each party is not allowed to be legally represented by a lawyer, but can be assisted by trade unions and NGOs.[627] The role of Director-General at a mention is not defined under the Malaysian Employment Act. According to the Malaysian Bar Council, the Director-General refrains from intervening except to clarify the requirements of the Employment Act to the parties. Where the Director-General approves a negotiated settlement, he makes "a consequential order" in those terms, which can be enforced in the same way as a decision.[628]

5.2.3.4. The Right to Effective Remedy

Workers can request a claim of financial compensation. There is no minimum or maximum amount of compensatory claim established by law, rather it depends on the discretion of the Director-General.[629] The payment ought to carry interest at the rate of eight percent per annum.[630] An employer, who fails to comply

[621] Laws of Malaysia: Employment Act, 1955, Section 70(e).
[622] Laws of Malaysia: Employment Act, 1955, Section 70(h).
[623] Bar Council Malaysia (n 78), p.125.
[624] Laws of Malaysia: Employment Act, 1955, Sections 69(1) and 70(i).
[625] Laws of Malaysia: Employment Act, 1955, Section 75.
[626] Laws of Malaysia: Employment Act, 1955, Section 77.
[627] Bar Council Malaysia (n 78), p.126.
[628] Laws of Malaysia: Employment Act, 1955, Section 69(2).
[629] Laws of Malaysia: Employment Act, 1955, Section 69(1).
[630] Laws of Malaysia: Employment Act, 1955, Section 69(3A). The interest rate is calculated commencing on the thirty-first day from the date of the making of the order until the day the order is satisfied.

with such decision or order of the Director-General, is liable, on conviction, to a fine not exceeding ten thousand (10,000) MYR. In the case of a continuing offence, he shall be liable to a daily fine not exceeding one hundred (100) MYR for each day the offence continues after conviction.[631] All monies recovered, minus costs, charges and expenses of enforcing the order, will then be paid to the DOL to pay to the workers.[632]

5.3. Access to Justice in International Human Rights Standards

This sub-chapter is divided into two parts. The first section will thoroughly examine the right of access to justice under International Labor Standards, while the second section addresses the same subject under other International Human Rights Laws.

5.3.1. International Labor Standards

There are three conventions, such as Forced Labor Convention (No.29) and its 2014 Protocol, Labor Inspection Convention (No.81), Migrant Workers (Supplementary Provisions) Convention (No.143), and Domestic Workers Convention (No.189), that are employed for the discussion.

5.3.1.1. The Right of Effective Access to Courts and Tribunals

Article 16 the ILO Convention (No.189) provides that "each member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under the conditions that are not less favorable than those available to workers generally."[633] Under Article 17(1) of the same Convention, members states have an underlying obligation to establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.[634] This provision must be read together with the Protocol to the Forced Labor Convention (No.29). Article 4(1) of the Protocol to the Forced Labor Convention establishes that "each members shall ensure that all victims of forced labor or compulsory labor, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation."

[631] Laws of Malaysia: Employment Act, 1955, Section 69(4).
[632] Bar Council Malaysia (n 78), p.130.
[633] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 16.
[634] Convention concerning Decent Work for Domestic Workers, 2011, (No.189), Article 17(1).

5.3.1.2 The Obligation to Investigate

Article 3(2) of the Labor Inspection Convention (No.81) provides that "any further duties which may be entrusted to labor inspectors shall not be such as to interfere with the effective discharge of their primary duties or to prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers."[635]

5.3.1.3. The Right to Effective Remedy

Sanctions

According to Article 25 of the ILO Convention (No.29), "the illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced." Article 4(2) of Protocol to ILO Convention (No.29) specifically bans States from prosecuting victims of forced or compulsory labor for their involvement in unlawful activities, which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labor.[636]

Article 6 of the Migrant Workers (Supplementary Provisions) Convention (No.143) states that " provisions shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organization of movements of migrants for employment defined as involving the abuses referred to in Article 2 of this Convention, and in respect of knowing assistance to such movements, whether for profit or otherwise."[637] The term "illegal employment" may be considered to mean any employment that is not in conformity with national laws and regulations. This interpretation is confirmed by the Committee of Experts on the Application of Conventions and Recommendations (CEACR)'s examination of legislation. In any case, it is for each state to define the precise scope of the term "illegal employment."[638] The term should be construed in accordance with Article 2 of the Convention (No.143). The term "illegal employment" may cover cases in which lawfully employed migrant workers are in practice subjected to

---

[635] Labor Inspection Convention, 1947, (No.81), Article 3(2).
[636] Protocol of 2014 to the Forced Labor Convention 1930, (No.29).
[637] Migrant Workers (Supplementary Provisions) Convention, 1975, (No.143), Article 6.
[638] International Labor Conference, *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Reports on the Migration for Employment Convention (Revised) (No.97), and Recommendation (Revised) (No.86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151),* para 346.

abusive conditions of work, particularly conditions that are not in conformity with the requirements of national laws or regulations or of international agreement, such as the bilateral agreement under which migrants for employment are recruited.[639] The sanctions also applied to both organizers of the clandestine movement of migrants and persons who knowingly assist such movements. They generally do not draw any distinction between traffickers engaged in exporting or those involved in importing labor.[640]

Compensation

The remedy of compensation, whether for material damages or moral damages, can provide critical support for victims' recovery and also act as a deterrent for would-be offenders.[641] Article 4(1) of Protocol of 2014 to the Forced Labor Convention (No.29) guarantees that all victims of forced and compulsory labor – irrespective of their presence or legal status in the national territory – the right to appropriate and effective remedies, such as compensation.[642]

5.3.2. Other International Human Rights Law Standards

The right of access to justice finds its roots in Articles 8 and 10 of the Universal Declaration of Human Rights (UDHR). Article 8 recognizes that "everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 10 provides that "everyone is entitled in full equality of a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."[643]

5.3.2.1. The Right to a Fair Trial

Article 10 UDHR guarantees the right in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charged against

---

[639] International Labor Conference, *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Reports on the Migration for Employment Convention (Revised) (No.97), and Recommendation (Revised) (No.86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151),* para 348.

[640] International Labor Conference, *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Reports on the Migration for Employment Convention (Revised) (No.97), and Recommendation (Revised) (No.86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151),* para 341.

[641] International Labor Office, 'Eliminating Forced Labor: Handbook for Parliamentarians No. 30' (2019) Publication p.71 <http://www.ilo.org/global/topics/forced-labour/publications/WCMS_723507/lang--en/index.htm> accessed 22 July 2020.

[642] Protocol of 2014 to the Forced Labor Convention 1930, (No.29), Article 4(1).

[643] Universal Declaration of Human Rights, 1948, Articles 8 & 10.

him. Article 11 provides further, more specific, protections applicable when determining a criminal charge.[644] The general and specific criminal protections are merged into one, extremely detailed, provision of Article 14 of the ICCPR.[645] Article 14(1) provides, inter alia, that "all persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunals established by law."[646]

Article 14(3) of the ICCPR recognizes the right to be tried without undue delay for any person subject to any criminal charge. This provision should be read with Article 9(3) of the ICCPR, which stipulates that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement."[647]

5.3.2.2. The Duty to Investigate

The legal basis for the duty to investigate is found in Article 2(3) of ICCPR. According to Article 2(3) of ICCPR, each Members States undertakes to ensure that (a) any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity, and (b) any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and (c) the competent authorities shall enforce such remedies when granted. The Human Rights Committee elaborates this provision in the conjunction of Article 7 of ICCPR, which prohibits torture or cruel, inhuman, or degrading treatment or punishment. It asserts that complaints must be investigated promptly and impartially by competent authorities to make the remedy effective.[648]

---

[644] Universal Declaration of Human Rights, 1948, Article 11.
[645] International Covenant on Civil and Political Rights, 1966, Article 14.
[646] International Covenant on Civil and Political Rights, 1966, Article 14(1).
[647] International Covenant on Civil and Political Rights, 1966, Article 9(3).
[648] General Comment (No.20): Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7), 1992, para 14.

5.3.2.3. The Right to Effective Remedy

The Human Rights Committee asserts that Article 2(3) of ICCPR requires each State Party to make reparations to individuals whose Covenant rights have been violated. Without reparations to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2(3), is not discharged.[649] Thus, this Article has an ancillary character since it refers exclusively to situations where there is an alleged violation of the rights protected by the ICCPR. This cannot be invoked independently, but only in conjunction with some of the substantive Covenant rights.[650] The wording of Article 2(3) of the ICCPR, as well as the *travaux preparatoires* of this provision, also indicates that the institutions entrusted with the power to declare whether a violation has taken place and to offer redress may be of a judicial**,** administrative or legislative nature, as asserted by Valeska David.[651]

5.4. General Discussion and Analysis

5.4.1. The Implications of Malaysian Legislation on Cambodian Migrant Domestic Workers

This section will first assess the implications of the Malaysian ATIPSOM on Cambodian MDWs' right of access to justice. It will be then followed by the Malaysian Employment Act.

5.4.1.1. ATIPSOM

The Right to a Trial

Under Article 8 of the country's Federal Constitution and ATIPSOM, Cambodian MDWs are entitled to report a crime to police officers, regardless of their immigration status, or other identifiers. To successfully make a report, Cambodian MDWs need assistance from the Embassy or recruitment agencies.[652] The Cambodian Sub-Decree on the Sending of Cambodian Workers Abroad through Private Recruitment Agencies (No.190) obliges the Embassy and recruitment agencies to get involved in the dispute resolution process.[653] However, it is known that the Cambodian Embassy usually referred labor disputes to private

[649] General Comment (No.31): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Article 2) 2004, para 16.
[650] *Peter Grant v Jamaica* [1996] The Human Rights Committee CCPR/C/56/D/597/1994 [9&10]. Also General Comment on Article 14: The Right to Equality before Courts and tribunals and to Fair Trial (No.32) para 53.
[651] Valeska David, 'The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court' [2014] Ghent University p.265 24 July 2020.
[652] Bar Council Malaysia (n 78) p.172.
[653] Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies 2011 (190), Article 30.

recruitment agencies, while such agencies advise Cambodian MDWs to be obedient and polite before sending them back to their employers.[654] This is supported by Rebecca Napier-Moore in a study entitled *"Protected or Put in Harm's Way? Bans and Restriction on Women's Migration in ASEAN Countries."* She argued that conflict of interests and corruption hinder efforts of most Southeast Asian governments and their embassies to assist MDWs. Particularly, recruitment agencies are alleged to bribe officials from Embassies not to assist MDWs who come to them for help.[655] Rebecca avoided specifically referring to the Cambodian Embassy in Kuala Lumpur, Malaysia. Nevertheless, the corruption is widespread throughout the nation as Cambodia is ranked 162nd out of 180 countries, according to the 2019 Transparency International Corruption Perceptions Index (CPI).[656]

In addition, Malaysian police officers and competent authorities have arrested or threatened to arrest migrant workers, notably those who go alone to make a complaint, for immigration offences if they persisted with the complaint against Malaysian employers, without documenting or investigating the alleged crime.[657] Their vulnerability is further compounded by the fact that they are excluded from two government-sponsored legal aid schemes, such as the Malaysian Legal Aid Department and the National Legal Aid Foundation (NLAF).[658] In 2012, the Malaysian DOL evidently referred irregular migrant workers to the Immigration Department for repatriation during the investigation, without adequately investigating their statuses as potential victims of forced labor, according to a report from the Malaysian MOHR to the CEACR.[659] These officers and authorities usually rely on Section 25 of the Malaysian Immigration Act. It stipulates that "irregular entry or stay" is an offence and envisages severe penalties of up to five years imprisonment and a fine of MYR 10,000.[660] In this sense, Cambodian MDWs in Malaysia had been afraid of making complaints against their employers in fear of being sent home and losing the significant

[654] Poudyal (n 33), p.12.
[655] Rebecca Napier-Moore (n 36) p.44.
[656] 'Corruption Perceptions Index: Cambodia' (*Transparency International*) <https://www.transparency.org/en/countries/cambodia> accessed 5 October 2020.
[657] Bar Council Malaysia (n 78), p170.
[658] 'Safeguard the Rights of Migrant Workers' *The Star* (Kuala Lumpur, 20 December 2019) <https://www.thestar.com.my/opinion/letters/2019/12/20/safeguard-the-rights-of-migrant-workers> accessed 16 July 2020.
[659] *Observation (CEACR) - adopted 2014, published 104th ILC Session (2015): Labor Inspection Convention, 1947 (No.81) - Malaysia (Ratification: 1963)*.
[660] Laws of Malaysia: Immigration Act, 1959 (Act 155), Section 15(4).

investment they made to obtain work abroad. This is asserted by Benjamin Harkins and Meri Åhlberg, in their study entitled *"Access to Justice for Migrant Workers in Southeast Asia."*[661]

The repatriation of Cambodian MDWs during the investigation also implies that the investigation in TIP-related offences can be dropped or cannot be instituted. One should observe that the Malaysian ATIPSOM requires the government to place victims under a court-ordered of 21-day interim protection at a place of refuge for the purpose of carrying out the investigation and inquiry.[662] With the presence of Cambodian MDWs at the place of refuge, the investigating authorities cannot exercise its mandate to investigate the cases concerned in accordance with the Malaysian ATIPSOM. Authorities also encountered challenges in gathering evidence. This drawback adversely affects Cambodian MDWs' right to a trial because public prosecutors would only institute criminal proceedings if there is a fifty (50) percent likelihood that the case would succeed, based on the evidence gathered during the investigation.[663]

TIP-related cases are tried by special trafficking courts in accordance with Malaysian CPC. According to the Malaysian Bar Council, this procedure normally takes 12 months to conclude a TIPs-related case. Some cases may take 18 months. This does not include the investigation phase.[664] "Justice delayed is justice denied" for MDWs because they face the prospect of having to return home before settlement if a resolution is not reached promptly.[665] For Cambodian MDWs, the period between registering a complaint and obtaining remedy is critical. Remaining in Malaysia for 12 months, together with staying in the shelter for 24 hours without generating any income, is a major blow for Cambodian MDWs. Even though Section 51A of the 2015 (amended) ATIPSOM includes a possibility for trafficked persons to move freely or to obtain employment, the implementation is rare in actuality. According to the U.S. Department of State's 2020 TIPs report, out of the 82 confirmed TIPs victims, the government issued 45 special immigration passes that authorized freedom of movement.[666] These special immigration passes are restricted to chaperoned trips and do not entitle the right to employment.[667]

---

[661] Benjamin Harkins and Meri Åhlberg, *Access to Justice for Migrant Workers in South-East Asia* (First published, ILO Regional Office for Asia and the Pacific 2017) p.33.
[662] Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act, 2010, Section 44(1) and (2). also read Section 51(1).
[663] Bar Council Malaysia (n 78) p.173.
[664] Bar Council Malaysia (n 78) pp.173-174.
[665] Harkins and Åhlberg (n 661), p.28.
[666] U.S. Department of State (n 80), p.330.
[667] U.S Department of State, 'Trafficking in Persons Report 2019' (2019), p.308.

As a result, the complexity, expenses, and duration of hearing within Malaysian criminal procedures have led to a situation in which informal-out-of-court settlement of complaint is the norm. This is agreed by Rebecca Napier-Moore who found that most Cambodian MDWs opt to seek financial remedies (unpaid wages) through a negotiated settlement led by recruitment agents, the Cambodian Embassy, or NGOs, and then return home.[668] Benjamin Harkins and Meri Åhlberg likewise found that recruitment agencies rely on informal mediation to resolve migrant workers' grievances in Malaysia (53 percent) because of slow and ineffective administrative and criminal mechanisms.[669] This is also confirmed by the ILO report; namely *"Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes, and the ILO Forced Labor Convention and Protocol."* The report further asserted that compensation, through such mediation, very rarely, if ever, reflects the loss of earnings, harm done for physical or psychological trauma and expenses incurred.[670] Nitthat Theeravit explained that migrant workers in Thailand were not necessarily guaranteed the full amount of compensation that they sought through informal mechanism.[671]

In its concluding observation, having noted the existence of multiple barriers impeding women and girls from obtaining access to justice and effective remedies for violations of their rights, the Committee on the Elimination of Discrimination against Women (CEDAW) noted such obstacles negatively impacted women who were already in precarious situations, such as migrant women, particularly undocumented migrant women, women held in immigration detention centers, and asylum-seeking and refugee women.[672] Indeed, Cambodian MDWs, particularly those who are undocumented and are dissuaded to report Malaysian authorities of TIPs-related offences, choose to endure abuses, while others run away when facing problems with their employers, or legally called "abscondment." As discussed in chapter 4, in the case of abscondment, the MOU requires the employer to revoke Cambodian MDWs' Visit Pass (Temporary Employment).[673] Without a valid work permit, Cambodian MDWs instantly lose the right to reside in Malaysia lawfully and are perceived as illegal migrants. They can be arrested and detained for up to 14 days before being brought to a magistrate.[674]

---

[668] Rebecca Napier-Moore (n 36), p.43.
[669] Harkins and Åhlberg (n 661), p.27.
[670] ILO, 'Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol' (n 461), p.35.
[671] Nitthat Theeravit and others, *Understanding Recruitment Industry in Thailand* (Asian Research Centre for Migration, Institute of Asian Studies, 2010) p.87.
[672] *Concluding observation on the combined third to fifth periodic reports of Malaysia* (n 323) para 13.
[673] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015, Appendix B, clause 9(b).
[674] Giammarinaro (n 15) para 24.

In addition, Malaysian public prosecutors struggle to prosecute and convict perpetrators of human trafficking. According to the U.S. Department of State's 2020 TIPs Report, the Malaysian government conducted 277 investigations, initiated 20 prosecutions, and successfully convicted 20 individuals, as compared with 281 investigations, 50 prosecutions, and 50 conviction during the previous reporting period.[675] These numbers may have also included convictions for smuggling of migrants. The figures began to decline, yet they might indicate significant improvement since 2014 – 186 investigations, 54 prosecutions, and three convictions.[676] Figures also give the impression that public prosecutors managed to successfully convict offenders in every prosecution. However, it is evidently found that Malaysian courts sentenced some traffickers to fines alone as punishment, but not imprisonment embedded in the Malaysian ATIPSOM.[677] Harkins and Åhlberg explained that no sanctions were applied for the vast majority of complaints (82 percent) resolved within the Southeast Asia.[678] In Malaysia, the most common type of sanction that was ordered for offenders was an administrative penalty in 18 percent of cases, while no sanctions was applied in 72 percent of complaints resolved in the country. Administrative penalties here involve a licensing sanction for recruitment agencies to facilitate recruitment.[679]

According to the U.S. Department of State's TIPs reports, the Malaysian public prosecutors are reluctant to try trafficking cases because the Government does not provide a clear guidance on what approvals are required to proceed with the trafficking charges.[680] By contrast, the Malaysian Bar Council asserted that public prosecutors are ineffective to file charges or follow-up cases with the investigating authorities, particularly if the accused is a Malaysian.[681] The problem is perceived differently by the ATIPSOM enforcement officers, who believe the mentality of the victims rather than the process itself is the challenge.[682]

A review of few court decisions reported in Malaysian legal journals suggests that one reason in which traffickers are not successfully convicted is that Malaysian public prosecutors have experienced difficulty proving human trafficking against smuggling and have failed to prove exploitation of workers. In *Siti*

---

[675] U.S. Department of State (n 80), p.330.
[676] U.S. Department of State, 'Trafficking in Persons Report' (US Department of State 2015), p. 223.
[677] U.S. Department of State (n 80), p.330.
[678] The term "sanction" in their study entails prison sentence, administrative penalty, monetary fine, and warning.
[679] Harkins and Åhlberg (n 661) p.39.
[680] U.S. Department of State (n 80) p.329.
[681] Bar Council Malaysia (n 78) p.173.
[682] *ibid*, p.184.

Rashidah & Ors v PP case,[683] the High Court considered the overlap between trafficking and smuggling of migrants. The case concerns an immigration raid in which ten undocumented migrant workers from Myanmar, including three children, were found living in a house along with evidence that they paid to enter Malaysia illegally. The immigration officers arrested the owner of the house and three others, and they were charged with trafficking of migrants. Victims testified that they had come to Malaysia to find work in the building industry and that their employers had treated them well.[684] The accused pleaded guilty in the Magistrate Court to the trafficking of adults and children, but later appealed. On appeal, the High Court set aside the convictions, finding that trafficking under Sections 12 and 14 required proof of exploitation, and prosecutors had not proved this element of their case. The Court considered factors such as whether the accused had freedom of movement, whether they were provided sufficient food, and whether they were mistreated in their work. The Court finally stated that "these were not trafficked people, but rather people who came to Malaysia to find decent work, such as in construction or goods market and have a better and more comfortable life. If they had legal travel documents, they would be the same as any foreign worker here moving freely and living with their families."[685]

Another case shows that courts are demanding a strict standard of exploitation to consider the case "trafficking" as opposed to violations of labor standards. In *Subramaniam a/l Ramachandran v PP*,[686] the Court held that "labor violations under the Employment Act 1955 were not relevant to finding exploitation under the ATIPSOM." In this case, the two accused had been convicted of trafficking three Indonesian women to work in their catering company. The victims' concrete evidence was that they worked for long hours with no payment for overtime, were paid less than the minimum wage, and sometimes received no payment at all. The employer also confessed to hitting the workers for making mistakes. The High Court overturned the convictions for trafficking under Section 12. It found that the magistrate had not correctly interpreted the term "exploitation" under the ATIPSOM Act by viewing the wage violations as evidence of forced labor.[687] The High Court said wage violations, even non-payment, did not constitute exploitation under the ATIPSOM Act. Instead, they were only considered victims if they had been forced or blackmailed

[683] *Siti Rashidah Razali & Yang Lain v Public Prosecutor* (2011) 6 MLJ 417.
[684] Renuka Jeyabalan and Rohaida Nordin, 'Protection of the Rights of the Victims of Human Trafficking: Has Malaysia Done Enough?' (2019) 3 Journal of Southeast Asian Human Rights 300, p.309.
[685] *Siti Rashidah Razali & Yang Lain v Public Prosecutor* (n 683) para 22. Read the case in detail at Bar Council Malaysia (n 78), pp.185-186.
[686] *Subramaniam a/l Ramachandran v Public Prosecutor* (2012) 10 MLJ 795.
[687] Exploitation means all forms of exploitation, forced labor or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs.

into working by violence. On this point, the Court found that the victims had given conflicting testimony and dismissed the testimony, and the victims were unable to support their claim.[688]

Having observed all mechanisms available for resolving migrant workers grievances in Malaysia, Harkins and Åhlberg reiterate that the most common remedy provided to migrants, including MDWs, was to return to their country of origin. It was an outcome in 63 percent of complaint cases, while compensation or reimbursement was the outcome in 27 percent of cases. Some of these cases involved migrant workers, who were provided with shelter services after enduring forced labor, and repatriation was a high priority.[689] Harkins and Åhlberg also underlined a total amount of compensation, roughly USD 1,619,410, awarded by five Southeast Asia countries to migrant workers, including MDWs, in 2017. Malaysia represented 17.1 percent (USD 276,682), while its counterpart, Thailand, shared 55.8 percent (USD 904,981).[690] It reflects that compensation is not the most common remedy awarded to migrant workers in Malaysia. In an interview with the Malaysian Bar Council, and a lawyer from Tenaganita, a NGO in Malaysia that offers assistance and shelter services to migrant workers experiencing forced labor and TIPs, stated that "once they figure out you are a trafficking victim, you then stay on for three months until the case is over, and then you are sent back home. Within these three months, you go to court, you give your statement, and then the case goes on, and you are sent home so if you work for five years for an employer, you don't get the unpaid salary you do not get any form of compensation, you are just sent back home."[691] Therefore, considering repatriation to be a remedy is a mischaracterization and injustice for Cambodian MDWs due to the loss of income and investment in migration costs, as well as excessive hours of work.

The Malaysian CPC does not preclude any civil action by the victims against traffickers. However, small claims are heard and decided within several months, while more substantial claims may take up to two years from filing to judgment. To exemplify, in *Chin Well Fasteners* case, the migrant worker concerned discovered the contract substitution in October 2002, and issued the claim the same month. It took four years (2006) for the plaintiff to receive a judgment from the High Court.[692] Besides that, the execution of judgments in accordance with Malaysian civil procedure is a technical area that usually requires legal advice and representation.[693] The plaintiff, together with filing fees, is required to pay legal fees and expenses,

[688] For the detail of the case read Bar Council Malaysia (n 78), p.186.
[689] Harkins and Åhlberg (n 661), p.32.
[690] Harkins and Åhlberg (n 661), p.36.
[691] Bar Council Malaysia (n 78), p.183.
[692] *Chin Well Fasterners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors* [2006] High Court 1 MLJ 117.
[693] Bar Council Malaysia (n 78), p.165.

expenses for expert witnesses, and potentially the costs of the defendant. Although some lawyers may provide their services pro bono, they will still need their expenses covered.[694] Besides, fee arrangements, whereby fees are paid only in the event that the case is successful, are prohibited under section 112 of the Legal Profession Act (Act 166).[695]

5.4.1.2. The Malaysian Employment Act

One may argue that establishing an impartial administrative grievance procedure to supplement adjudication in criminal courts would allow for improved access to justice as well as a more unbiased and timely adjudication.[696] Figures presented by the Malaysian MOHR in 2015 suggest that labor cases are handled expeditiously and within the target timeline by the Director-General of DOL. The average length of time from filing to settlement is 34 days. Cases that proceed to hearing take, on average, 84 days to resolve.[697] This is the only advantage that the Malaysian Employment Act has over ATIPPSOM.

The Director-General of the DOL can inquire into complaints regarding wages or other payments due under the employment contract, the Malaysian Employment Act, or the Malaysian Minimum Wage Order.[698] It also has the mandate to accept complaints relating to violations of the Workers' Minimum Standard of Housing and Amenities Act, the Workmen's Compensation Act, and the Malaysian ATIPSOM.[699] However, as discussed in chapter 4, Cambodian MDWs are excluded from the Malaysian Minimum Wage Order and key labor provisions of the Malaysian Employment Act.[700] They are also excluded from the Malaysian Workmen's Compensation Act and the Workers' Minimum Standard of Housing and Amenities Act.[701] Therefore, the Director-General's jurisdiction to hear and decide complaint lodged by Cambodian MDWs is restricted to "payment of indemnity," "notice of termination," and "payments of wages" under

---

[694] Since the early 1980s, funded by members of the Malaysian Bar, lawyers have been mobilized for provision of pro bono representation to clients who cannot afford to pay for these services. Read more 'Malaysia Pro Bono Directory | Rights in Exile Programme' (16 July 2020) <http://www.refugeelegalaidinformation.org/malaysia-pro-bono-directory> accessed 16 July 2020.

[695] Laws of Malaysia: Legal Profession Act, 2012, Section 112(1)(b).

[696] ILO Regional Office for Asia & the Pacific and others, *Regulating Recruitment of Migrant Workers: An Assessment of Complaint Mechanisms in Thailand* (ILO 2013), p.58.

[697] Bar Council Malaysia (n 78), at p.127.

[698] Laws of Malaysia: Employment Act, 1959, Section 69(1).

[699] Harkins and Åhlberg (n 661), p.14.

[700] Domestic workers, including MDWs, are excluded from key articles of the law, including those on fair termination of contract (sects 12 and 14), the minimum number of working days per month (section 16), maternity provisions (part IX), rest days (part XII), hours of work, holidays and other conditions of services (including annual and sick leave) and termination, lay off and retirement (part XIIA). Read First Schedule of the Employment Act of 1955.

[701] ILO, 'Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labour Convention and Protocol' (n 461), pp.16-20.

the contract of employment and the Malaysian Employment Act. The Court has no jurisdiction to hear and decide on issues that can amount to forced labor, including TIPs, such as the confiscation of passports, excessive hours of work, and overtime payment that can lodged by workers generally but not domestic workers.[702] Such exclusion contradicts Section 60L of the Employment Act which reinforces the concept of equality, and the prohibition of discrimination between categories of workers.

The formal requirement of submitting supporting documents to file a complaint, such as (1) the workers' passports, (2) copy of the employment contract, (3) arrival card, (4) employment termination letter, and (5) any other contract-related documents, has the potential to indirectly discriminate against undocumented MDWs or those who have fled their employers in distress. Besides that, Cambodian MDWs are likely to experience the confiscation of personal documents.[703] A study from Danchurchaid/Christian Aid Cambodia (DCA/CA) suggested that 91 percent of surveyed Cambodian MDWs had their passports kept by either their employers or recruitment agencies.[704] This is in line with the survey from the Malaysian Employers Federation (MEF), which found that over two-thirds of Malaysian employers have kept all essential documents belonging to MDWs.[705] This is further facilitated by the MOU's provision that permits the employers to keep the documents in their custody for several purposes.[706] Henceforth, procedures within this administrative mechanism, or commonly called the "Labor Court" (*Mahkamah Buruh* in Bahasa Malaysia) fails to accommodate undocumented Cambodian MDWs or those MDWs who flee their employers in distress.

In addition, Cambodian MDWs are required to attend every schedule of hearing and mention, otherwise, the Director-General will deem the complaint withdrawn.[707] This procedural requirement imposes a great challenge for Cambodian MDWs. If Cambodian MDWs are not identified as victims of TIPs, they are not entitled to be placed under a 90-day protection order at the "Place of Refuge." Furthermore, the Malaysian Employment Act does not stipulate anti-retaliation penalties for employers, who terminate the services or otherwise punish a worker for a filing a claim against them to the Director-General. This gap can put Cambodian MDWs in a difficult position where they can lose their employment, accommodation, and

[702] Bar Council Malaysia (n 78), at p.123.
[703] Anderson (n 8) p.56.
[704] Carol Strickler and Khun Sophea (n 46), at p.44.
[705] ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labor Migration to Growth and Development in ASEAN (TRIANGLE II Project) (n 14), at p.17.
[706] Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers, 2015, Appendix B, clause 3(j).
[707] Bar Council Malaysia (n 78), p.125.

immigration status upon lodging the complaint against the employer through this framework because permission to stay and work in Malaysia is strictly tied to an employer. As a result, leaving Malaysia and coming back for each date at the Labor Court is financially difficult for Cambodian MDWs. Their complaints are consequently at risk of being withdrawn or dismissed. In the Malaysian Minister of Human Resources' statement delivered to the Parliament in 2015, it was revealed that almost 40 percent of cases filed by migrant workers were withdrawn or dismissed, between 2010 and 2014, because migrant workers failed to attend the hearing.[708] This pattern is extremely alarming because migrant workers filed only two percent (1,435) of 65,833 cases registered at the Labor Court between 2010 and 2014.[709] This figure does not indicate the proportion shared by Cambodian MDWs, but it is unsurprisingly expected that Cambodian MDWs might have contributed a minor percentage, considering the nature of domestic work and above-mentioned identified barriers in accessing the Labor Court. This could be considered a failure if one looks at the example of the South African Commission for Conciliation, Mediation, and Arbitration (CCMW). A 2008 Study analyzing 873 arbitration awards sampled unfair dismissal and labor practice cases between 2003 and 2005 found that domestic workers, including MDWs, accounted for 12.1 percent of referrals to CCMA while they constituted 8.7 percent of the workforce.[710]

The Labor Court can order the employer to pay unpaid wages, as well as indemnity due to employees. It also has the mandate to prosecute an employer for failing to comply with an order, but the offence is simply a fine of MYR 10,000 and a penalty of MYR 100 per day for every day the offence continues after convictions. There is no inclusion of imprisonment in the range. Besides, it is unclear how this provision is effectuated in practice. In the statement, the Minister of Human Resources informed the Malaysian Parliament that around 85 percent of filed complaints were decided in favor of the worker, while 15 percent in favor of the employer or agents. The Minister did not explain whether the term "in favor" meant "complete victory" or "partial victory."[711] In this sense, the term "in favor" could have meant the repatriation of Cambodian MDWs, like asserted by Harkins and Åhlberg.

[708] Bar Council Malaysia (n 78), p.129.
[709] Bar Council Malaysia (n 78), p.126.
[710] Ian Macun, Daniel Lopes and Paul Benjamin, 'An Analysis of Commission for Conciliation Mediation and Arbitration Awards' p.1.
[711] Bar Council Malaysia (n 78), p.129.

5.4.2. An Analysis of How the Malaysian Legislation differs from International Human Rights Law

5.4.2.1. International Labor Standards

The Right of Effective Access to the Courts and Tribunals

Cambodian MDWs, particularly those who are undocumented or go alone to make a complaint, are dissuaded to report Malaysian authorities of TIPs-related offences because they have been arrested or threatened to be arrested for immigration offence. Their vulnerability is further increased because they have difficulty in accessing state-funded legal aid, as well as assistance from the Cambodian Embassy and recruitment agencies. Evidently, the Malaysian DOL referred irregular migrant workers to the Immigration Department for repatriation during the investigation, without adequately investigating their statuses as potential victims of forced labor. The repatriation of Cambodian MDWs during the investigation also hinders competent authorities to carry out its mandate to investigate TIPs-related offences. In addition to the Malaysian ATIPSOM, the formal requirement of submitting supporting documents to file a complaint to Director-General of DOL has likewise the potential to indirectly discriminate against undocumented Cambodian MDWs or those who have fled their employers in distress. The spill-over effect is that irregular and undocumented Cambodian MDWs are denied the right of access to justice.[712]

Article 16 ILO Convention (No.189) provides that "each member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative, have effective access to courts, tribunals or other dispute resolution mechanisms under the conditions that are not less favorable than those available to workers generally."[713] Members States should secure access of domestic workers to complaint mechanisms and their ability to pursue legal civil and criminal remedies, both during and after employment, irrespective of departure from the country concerned.[714] This provision must be construed in accordance with the Protocol to the Forced Labor Convention (No.29). Article 4(1) establishes that "each members shall ensure that all victims of forced labor or compulsory labor, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation." The Forced Labor Recommendation (No.203) stipulates that members should take measures to ensure that all victims of forced labor or

[712] Jane Hodge, 'Assessment of the Complaints Mechanism for Cambodian Migrant Workers' (2016) Report p.4 <http://www.ilo.org/asia/publications/WCMS_466494/lang--en/index.htm> accessed 17 March 2020.
[713] Convention concerning Decent Work for Domestic Workers (No.189), 2011, Article 16.
[714] Recommendation concerning Decent Work for Domestic Workers (No.201), 2011, para 21(e).

compulsory labor have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages, including by providing that all victims of forced or compulsory labor that occurred in the member State, both nationals or non-nationals, can pursue appropriate administrative, civil and criminal remedies in that state, irrespective of their presence or legal status in the state, under simplified procedural requirements, when appropriate.[715]

Having observed measures taken by the Government to protect migrant workers and the vulnerability of MDWs to forced labor intensified by the lack of fair, efficient, and accessible means to resolve complaints, the CEACR, in its 2019 observation of the ILO Convention (No.29), expressed its deep concern at the persistence of labor rights violations and the continued abusive working conditions of migrant workers that amount to forced labor, such as passport confiscation by employers, wage arrears, long working hours, and forced contract extension. The Committee consequently urged the Malaysian Government to strengthen the measures to ensure that migrant workers, particularly MDWs, are fully protected from abusive practices and conditions that amount to forced labor. The Government was also requested to continue providing information on the activities undertaken by the Special Enforcement Team and other monitoring agencies to combat forced labor and the results achieved.[716]

The Duty to Investigate

ATIPSOM gives the mandate of investigation in TIPs-related offences to labor inspectors. The CEACR, in its observation of the ILO Convention (No.81), ratified by Malaysia, asserted that the primary duty of labor inspectors is to secure the enforcement of the legal provisions relating to conditions of work and the protection of workers, and not to enforce immigration law. In accordance with Article 3(2) of the ILO Convention (No.81), additional duties should be assigned to labor inspectors only in so far as they do not interfere with primary duties and do not prejudice in any way the authority and impartiality which are necessary to inspectors in their relations with employers and workers. In this connection, the CEACR recalled that entrusting labor inspectors with the function of enforcing legislation on immigration may not be conducive to the relationship of trust needed for enlisting the cooperation of employers and workers with labor inspectors. Accordingly, the committee requested the Government of Malaysia to take the necessary measures to ensure that the enforcement of the ATIPSOM by labor officers does not prejudice the effective discharge of their primary duties and does not impair the relationship of trust with employers and

[715] Forced Labor (Supplementary Measures) Recommendation, 2014, (No.203), para 12(a).
[716] *Observation (CEACR) - adopted 2018, published 108th ILC session (2019): Forced Labor Convention, 1930 (No.29) - Malaysia (Ratification: 1957)* (n 509).

workers.[717] It is a breach of Article 3(2) of the Labor Inspection Convention (No.81), which provides that "further duties entrusted to labor inspectors shall not interfere with the effective discharge of their primary duties or to prejudice the authority and impartiality which are necessary to inspectors in their relations with employers and workers."

The Right to Effective Remedy

Malaysian public prosecutors have struggled to prosecute and convict perpetrators of TIPs under the Malaysian ATIPSOM. This also rules out the possibility of prosecuting against representatives of the Government for TIPs-related offences. Notwithstanding successful convictions, the most common type of sanction that was ordered for offenders was an administrative penalty in 18 percent of cases, while no sanction was applied in 72 percent of complaints resolved in the country. Article 25 of the Forced Labor Convention (No.29) stipulates that "the illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced." The CEACR states that "given that victims of forced labor are in a vulnerable position; specifically, domestic workers who often perform work which is not visible to the society outside of the household members, it is the responsibility of the State to ensure that the law enforcement authorities can conduct rapid, effective and impartial investigations and, where appropriate, initiate prosecutions against those responsible for violations."[718] Having observed impunity for those responsible, including officials who were complicit in TIPs-related offences, the CEACR, in its observation of the Forced Labor Convention, requested the Government of Malaysia to continue its efforts to prevent, suppress, and combat trafficking in persons, and to take the necessary measures to ensure that all persons who engage in trafficking and related offences, including complicit law enforcement officials, are subject to thorough investigation and robust prosecutions. It also requested the Government to continue providing information on the number of victims of TIPs who have been identified

[717] *Observation (CEACR) - adopted 2014, published 104th ILC Session (2015): Labor Inspection Convention, 1947 (No.81) - Malaysia (Ratification: 1963)* (n 659).
[718] International Labor Conference (ed), *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008: International Labor Conference, 101st Session, 2012 ; Third Item on the Agenda ; Information and Reports on the Application of Conventions and Recommendations ; Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)* (1. ed, International Labor Office 2012), at para 322, p.149.

and who have benefited from adequate protection, and on the number of investigations, prosecutions, and convictions in this regard.[719]

Article 25 should be read in accordance with Article 6 of the Migrant Workers (Supplementary Provisions) Convention (No.143). It states that "provisions shall be made under national laws or regulations for the effective detection of the illegal employment of migrant workers and for the definition and the application of administrative, civil and penal sanctions, which include imprisonment in their range, in respect of the illegal employment of migrant workers, in respect of the organization of movements of migrants for employment defined as involving the abuses referred to in Article 2 of this Convention, and in respect of knowing assistance to such movements, whether for profit or otherwise."[720] The question was raised during the preparatory work for the adoption of Convention (No.143) as to whether the provisions concerning administrative, civil and penal sanctions meant that these three types of sanctions had to be applied simultaneously. The answer was that it did not, although it was pointed out that this possibility was not excluded in certain particularly grave instances.[721] The ILO Convention (No.143) leaves it to each State to define the sanctions it considers adequate to combat the illegal employment of and clandestine movement of migrant workers. However, sanctions that may be applied against employers in cases of illegal employment and clandestine movement usually include imprisonment.[722]

States can apply administrative sanctions, but it should be in accordance with two prescribed forms. First, employers who have infringed the provisions regulating the employment of foreign workers or who have failed to comply with labor legislation generally may be refused further authorizations to employ foreign workers. Second, financial penalties may be imposed administratively in the form of an obligation to pay the costs of repatriating the worker and his or her family, as well as a fine of a compulsory contribution to the funds used for regulating the immigration of foreign workers.[723] However, administrative penalties

---

[719] *Observation (CEACR) - adopted 2018, published 108th ILC session (2019): Forced Labor Convention, 1930 (No.29) - Malaysia (Ratification: 1957)* (n 509).
[720] Migrant Workers (Supplementary Provisions) Convention, 1975, (No.143), Article 6.
[721] International Labor Conference, *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Reports on the Migration for Employment Convention (Revised) (No.97), and Recommendation (Revised) (No.86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151),* para 336.
[722] International Labor Conference, *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations, General Survey on the Reports on the Migration for Employment Convention (Revised) (No.97), and Recommendation (Revised) (No.86), 1949, and the Migrant Workers (Supplementary Provisions) Convention (No.143), and Recommendation (No.151),* para 356.
[723] *ibid*, para 357.

ordered by Malaysian special trafficking courts or Director-General of Labor involve a licensing sanction for recruitment agencies to facilitate recruitment.[724]

The most common remedy provided to migrants, including MDWs, by TIPs special courts and Director-General of Labor, was to return to their country of origin. Repatriation was the outcome in 63 percent of complaint cases, while compensation represented the outcome in 27 percent of complaint cases. Some of these cases involved migrant workers, who were provided with shelter services after enduring forced labor, and repatriation was a high priority.[725] Article 4(1) of Protocol of 2014 to the Forced Labor Convention (No.29) guarantees that all victims of forced and compulsory labor – irrespective of their presence or legal status in the national territory – the right to appropriate and effective remedies, such as compensation.[726] It should be read together with the Forced Labor (Supplementary Measures) Recommendation (No.203). Members should take measures to ensure that all victims of forced or compulsory labor have access to justice and other appropriate and effective remedies, such as compensation for personal and material damages, including by providing that victims can pursue compensation and damages from perpetrators, including unpaid wages and statutory contributions for social security benefits and ensuring access to appropriate existing compensation schemes.[727]

Therefore, it can be argued that Malaysia has failed to fulfil its international human rights obligation to ensure that the illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced. Furthermore, the application of the Malaysian ATIPSOM and the Employment Act are not in line with the Protocol to the Forced Labor Convention (No.29). The protocol is one of the ILO fundamental Conventions. Despite the fact that Malaysia is not a party to the Protocol, the country still has the underlying obligation that is devoured from the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, to respect, to promote, and to realize the principle of fundamental rights of the elimination of all forms of forced and compulsory labor.[728]

[724] Harkins and Åhlberg (n 661), p.39.
[725] *ibid*, p.32.
[726] Protocol of 2014 to the Forced Labor Convention 1930.
[727] Forced Labor (Supplementary Measures) Recommendation, 2014, (No.203), para 12(a).
[728] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, 1998, Article 2.

5.4.2.2. Other International Human Rights Law Standards

The Right to a Fair Trial

Cambodian MDWs, particularly those who are undocumented, are dissuaded from reporting TIPs-related offences to Malaysian authorities because they fear being convicted and deported for the "Irregular Entry or Stay Offence" under Section 15(4) of the Malaysian Immigration Act. It is documented that the DOL of Malaysian MOHR referred irregular migrant workers to the Immigration Department for repatriation during the investigation, without adequately investigating their statuses as potential victims of forced labor.[729] The first sentence of Article 14, paragraph 1, of ICCPR guarantees the right to equality before courts and tribunals, which is a specific application of the right to non-discrimination, contained in Article 26 of ICCPR, to judicial proceedings.[730] Thus, it incorporates the right of equal access to courts.[731] The right of equal access to courts applies in cases of determination of criminal charges, and rights and obligations in a suit of law. According to the Human Rights Committee, all individuals, regardless of nationality, or whatever their status, whether migrant workers, who find themselves in the territory or subject to the jurisdiction of the State party, must have an equal chance to pursue their legal rights.[732] The Committee of Migrant Workers Convention (CMW) asserted that the right of equal access to courts means that MDWs should be able to equally access courts and other justice mechanisms without fear of deportation as a consequence.[733] The Committee on the Convention on the Elimination of All Forms of Discrimination (CEDAW) further states that "undocumented women migrant workers must have access to justice in cases of risk to life and of cruel and degrading treatment, of if they are coerced into forced labor, face deprivation of fulfillment of basic needs, including in times of health emergencies or pregnancy and maternity, or if they are abused physically or sexually by employers or others."[734]

---

[729] *Observation (CEACR) - adopted 2014, published 104th ILC Session (2015): Labor Inspection Convention, 1947 (No.81) - Malaysia (Ratification: 1963)*.

[730] International Covenant on Civil and Political Rights, 1966, Article 26. It provides that *"all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*

[731] General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial, General Comment (No.32), 2007, para 8.

[732] General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial, General Comment (No.32), 2007, para 9.

[733] General Comment (No.1) on Migrant Domestic Worker 2011, para 50.

[734] General Recommendation (No.26) on Women Migrant Workers, 2008, para 26 (l).

Having relied on the Malaysian CPC to try TIPs-related offences, it usually takes between 12 months and 18 months for Malaysian special trafficking courts to dispose of TIPs cases. Article 14(1) of ICCPR recognizes the right to fair hearing by a competent, independent and impartial tribunals established by law. An essential aspect of the fairness of hearing is its expeditiousness, as asserted by the Human Rights Committee. It means the right to a fair trial encompasses the right to timely resolution of disputes, but it may be limited to specific fields of application, depending on the domestic legal system applicable.[735] However, states parties should consider time-bound or expeditated legal proceedings to address complaints by MDWs, according to the CMW.[736] By the same token, the CEDAW suggests States to take steps to guarantee that all cases of gender-based discrimination under criminal law, including violence, are heard in a timely and impartial manner.[737] The term "gender-based discrimination" is an aspect of gender-based violence against women which occurs in all spaces and sphere of human interaction, whether public or private, including in the contexts of workplace.[738] It is often exacerbated in the contexts of migration and linked to migration status, as well as TIPs.[739] It can impair and nullify the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions.[740] Domestic workers, particularly MDWs, who are predominately female, are especially vulnerable to violence as they work and often live in private homes and hence are isolated from their own families and support systems.[741] Thus, cases of forced labor, including TIPs, and discrimination lodged by MDWs, particularly those who are undocumented and identified as victims of TIPs, should be heard in a timely and expeditious manner.

Cambodian MDWs, who are arrested for immigration offences, are detained for 14 days before being brought to the Magistrate. Article 14(3) of the ICCPR recognizes the right to be tried without undue delay for any person subject to any criminal charge. This provision should be read with Article 9(3) of the ICCPR, which stipulates that "anyone arrested or detained on a criminal charge shall be brought promptly before a

---

[735] General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial, General Comment (No.32), 2007, para 27.
[736] General Comment (No.1) on Migrant Domestic Worker, 2011, para 50.
[737] General Recommendation on Women's Access to Justice, 2015, para 51(j).
[738] General Recommendation (No.35) on gender-based violence against women, updating General Recommendation (No.19) 2017 paras 20 & 21.
[739] General Recommendation (No.35) on gender-based violence against women, updating General Recommendation (No.19) 2017 paras 13 & 14.
[740] General Recommendation (No.35) on gender-based violence against women, updating General Recommendation (No.19) 2017, paras 15-20.
[741] Adrienne Cruz, Sabine Klinger and International Labour Office, *Gender-Based Violence in the World of Work: Overview and Selected Annotated Bibliography* (ILO 2011) p.19.

judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release." Regarding the requirement of "promptness" the Human Rights Committee explained that 48 hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any delay longer than 48 hours must remain absolutely exceptional and justified under the circumstances.[742] However, what constitutes a "reasonable time" is decided on a case by case assessment, which should, amongst other things, take into consideration the complexity of the case, the behavior of the accused or party, and the way the matter was handled by the administrative and judicial authorities, and what is at stake for the accused.[743]

On the other hand, the Director-General of the DOL's jurisdiction to hear and decide on complaint lodged by Cambodian MDWs is restricted to "payment of indemnity," "notice of termination," and "payments of wages" under the contract of employment and applicable provisions of the Employment Act. Cambodian MDWs cannot lodge a complaint against their employers or recruitment agencies regarding violations of the Minimum Wage Order, the Workers' Minimum Standard of Housing and Amenities Act, the Workmen's Compensation Act, and provisions that are not applicable to domestic workers, including MDWs, under the Employment Act. Nor could the Director-General hear a case concerning the confiscation of passports and excessive hours of work from MDWs. Article 14(1) of the ICCPR, in conjunction with Article 26, guarantees the right to equality before courts and tribunals. The Human Rights Committee asserts that access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his or her rights to claim justice. This guarantee prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds. The guarantee is violated if certain persons are barred from brining suit against any other persons such as by reason of their race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[744] Cambodian MDWs are barred from lodging certain cases to the Director-General because they are not recognized as workers under the Malaysian Employment Act. Such discriminatory procedures are based on traditional gender-stereotypes and norms in relation to women and domestic work, as asserted by the ILO. Thus, it can be argued that the Malaysian Employment Act which gives the mandate to the Director-General to hear and decide complaints

[742] General Comment (No.35) on Article 9: Liberty and Security of Person 2014 para 33.
[743] General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial, General Comment (No.32), 2007, para 35.
[744] General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial, General Comment (No.32), 2007, para 9.

lodged by domestic workers, including Cambodian MDWs, is not in full compliance with Article 14(1) of the ICCPR.

The right to effective remedy

Malaysian public prosecutors struggle to prosecute and convict perpetrators of TIPs under the Malaysian ATIPSOM. The Human Rights Committee has held repeatedly that States parties are under an obligation to bring perpetrators of human rights violations to justice.[745] However, the term "bring to justice" is rather vague and raises the question of whether this requires criminal prosecution and imprisonment. In *Thomas v. Jamaica*, the Committee allowed a degree of latitude as to how a perpetrator should be brought to justice and, in so doing, has left the choice of means to the State party.[746] Since the case of *Bautista v. Colombia*, the Human Rights Committee has nevertheless asserted that Article 2(3) of the ICCPR gives rise to a state obligation to prosecute and punish the perpetrators of serious violations of human rights.[747] In *Coronel v. Colombia*, the Committee asked for more than purely administrative measures if a fundamental human right is at stake.[748] The elimination of all forms of forced or compulsory labor is recognized as a fundamental human right entitled to MDWs. In its concluding observation of Slovenia, the Committee specifically called on the State party to reinforce its measures to combat trafficking in women and children by prosecuting and punishing perpetrators.[749] The adoption of this position is significant because, at the time of drafting, a proposal to expressly recognize criminal prosecution as an example of an effective remedy was not approved.[750]

The complexity, expenses, and duration of hearings within Malaysian criminal procedures have led to a situation in which informal-out-of-court settlement of complaint is the norm. This also suggests that the investigating authorities and public prosecutors are likely to drop the investigation and prosecution of TIPs-related offences. Irrespective of whether there is a duty to prosecute, the Human Rights Committee has

---

[745] *Barbato v Uruguay* [1981] Human Rights Committee Communication No.84/1981, U.N. Doc. A/38/40 [11].

[746] *Thomas v Jamaica* [1993] Human Rights Committee Communication No. 321/1988, U.N. Doc. CCPR/C/49/D/321/1988 [11]. Also read *Peter Grant v. Jamaica* (n 650) para 9.

[747] *Bautista de Arellana v Colombia* Human Rights Committee Communication No.563/1993, U.N. Doc. CCPR/C/55/D/563/1993 [8.6].

[748] *Coronel v Colombia* [2002] Human Rights Committee Communication No.778/1997, U.N. Doc. CCPR/C/76/D/778/1997 [6.2]. Also read *Krasovskaya v Belarus* [2012] Human Rights Committee Communication No.1820/2008, U.N.D.cCCPR/C104/D1820/2008 [8.3].

[749] *Concluding Observations of the Human Rights Committee: Slovenia* [2005] Human Rights Committee CCPR/CO/84/SVN, U.N.Doc.CCPR/CO/84/SVN [11].

[750] David S Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001), p. 29–30.

repeatedly emphasized that State authorities must investigate human rights violations in every case, even if the victim can bring a civil suit against his or her offender.[751] This duty, though overlapping with the duty to prosecute, is independent of the duty to eradicate impunity. Thus, even if there were no duty to prosecute and punish a violation, there would still be a duty to investigate allegations of human rights violations.[752] It is not enough to pay compensation without investigating and taking appropriate measures of sanction. It states that "compensation, however admirable in itself, would not be sufficient. Only identification and punishment of those responsible would do so since it would make plain that there was no impunity for such and prevent any repetition."[753] The statement clarifies that compensation and accountability are two separate matters. While compensation is a remedy for the victim, prosecution and punishment are sought to prevent repetition. CEDAW asserts that alternative dispute settlement procedures do not restrict access for women to judicial remedies in all areas of law.[754] States should ensure that gender-based violence against women is not mandatorily referred to alternative dispute resolution procedures, including mediation and conciliation. The use of those procedures should be strictly regulated and allowed only when a previous evaluation by a specialized team ensure the free and informed consent of victims and that there are no indicators of further risks to victims or their families members.[755]

By contrast, the Director-General of DOL (commonly known as Labor Court) can only order the employer to pay unpaid wages, as well as indemnity due to employees. This is, together with repatriation, the only form of compensation that can be received by Cambodian MDWs. This could be less effectuated in actuality. Besides that, the Director-General has no mandate to impose imprisonment on those who fail to comply with his decision. Under Article 2(3) of ICCPR, each Members States undertakes to ensure that "(i) any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity, and (ii) any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state." The Human Rights Committee asserts that Article 2(3) of ICCPR requires each State Party to make

---

[751] *Blanco v Nicaragua* [1994] Human Rights Committee Communication No.328/1988, CCPR/C/51/D/328/1988 [10.6].
[752] Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) p.35 Prosecuting serious human rights violations.
[753] Human Rights Committee, 'Summary Record of the 1365th Meeting' (Human Rights Committee 1994) U.N. Doc. CCPR/C/SR/.1365 para 54.
[754] General Recommendation on Women's Access to Justice, 2015, para 58(b).
[755] General Recommendation (No.35) on gender-based violence against women, updating General Recommendation (No.19) 2017 paras 32(b).

reparations to individuals whose Covenant rights have been violated. The Human Rights Committee defines the term "reparations" to include restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes in relevant laws and practices, as well as bringing justice to perpetrators of human rights violations.[756] Although States have discretionary powers as regards the type of reparation, the reparation ought to be "proportional to the gravity of the violations and the harm suffered."[757] The CEDAW asserts that, to provide effective reparations to victims of gender-based violence against women, reparations should include different measures, such as monetary compensation, the provision of legal, social, and health services, including sexual, reproductive, and mental health services for a complete and satisfactory recovery and to provide guarantees of non-repetition.[758]

Having observed the existence of multiple barriers impeding women and girls from obtaining access to justice and effective remedies for violations of their rights in its concluding observation, CEDAW recommended the Government of Malaysia to identify and address the specific obstacles faced by women who are in disadvantaged situations to ensure that they have access to justice and recourse to effective remedies, including migrant workers, particularly undocumented migrant women, women held in immigration detention centers, and asylum-seeking and refugee women. Therefore, it can be argued that Malaysian ATIPSOM and Employment Act are not in full compliance with International Human Rights Law, notably ICCPR. Even though Malaysia is not a party to the Covenant, the fundamental principles of fair trial form part of customary international law and become peremptory norms in international law.[759] Although not listed within derogation clauses, such principles are non-derogable, even in times of emergency, because they ensure that the principles of legality and the rule of law are respected.[760]

---

[756] General Comment (No.31): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Article 2), at para 16.
[757] Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005, at para 15.
[758] General Recommendation (No.35) on gender-based violence against women, updating General Recommendation (No.19) 2017 para 33.
[759] CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency, 2001, para 11.
[760] *ibid*, at para 15.

Chapter 6 Conclusion

This chapter is designed to answer the following main research question: "*What are the implications of the Memorandum of Understanding (MOU) between Cambodia and Malaysia on the human rights of Cambodian migrant domestic workers (MDWs)? How does the MOU differ from International Human Rights Law Standards?* The study is restricted to the recruitment and employment of Cambodian MDWs, as well as the guarantee of the right of access to justice under related Malaysian legislation, and measures the results against fundamental principles and rights at work concerning (i) the elimination of all forms of forced or compulsory labor and (ii) the elimination of discrimination in respect of employment and occupation. The study solely used International Labor Standards, with the exception of the fifth chapter, when examining the compatibility of the MOU with International Human Rights Standards. The examination began with Domestic Workers Convention (No.189) and extended to other International Human Rights instruments of the International Labor Organization (ILO) and United Nations. Although Convention (No.189) centers on the rights of all domestic workers, which Malaysia and Cambodia are not States Parties to, it is important to recall the special characteristic of the ILO Convention (No.189). The Convention (No.189) is interconnected to other International Human Rights instruments of the ILO and UN which Malaysia and Cambodia are States Parties to, or are recognized as the fundamental International Human Rights Conventions. Given the special characteristic, the Domestic Workers Convention (No.189) is applicable to the circumstance in which Cambodian MDWs find themselves in Malaysia – trapped in forced labor and discrimination.

The first sub-research question aims to answer the following: *"How does the MOU regulate the admission procedures and recruitment practices of Cambodian MDWs? What are the implications of the MOU-compliant framework of admission procedures and recruitment practices on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the admission procedures and recruitment practices of MDWs? How does the MOU differ from the International Human Rights Law Standards?"* As discussed in the third chapter, it is found that high costs, complex administrative requirements, and restrictive immigration provisions enshrined under the MOU-based admission procedures and recruitment practices drive the majority of Cambodian MDWs to pursue informal and irregular migration to take up domestic work in Malaysia. It is further facilitated by independent brokers, who give Cambodian MDWs incomplete, false, or misleading information about terms and conditions of employment. Here, the study reached a conclusion that irregular and informal migration have exposed Cambodian MDWs to forced labor situations, including trafficking in persons (TIPs). The study also found that high recruitment costs charged by private employment agencies, together with

administrative fees, under the MOU-based framework have evidently trapped Cambodian MDWs in situations akin to debt bondage, an indicator of forced labor, trying to pay exorbitant debts owed to traffickers, recruitment agencies, and employers from their journey.

In addition, burdensome and lengthy admission procedures and recruitment practices under the MOU-issued framework is not in full compliance with the objective of the Migration for Employment Convention (Revised) (No.97), which echoes the need for each Member State to take appropriate measures, within its jurisdiction, to facilitate the departure, journey, and reception of migrants for employment. This principle is also embedded in the 2006 ILO Multilateral Framework on the Labor Migration, the 2019 ILO General Principles and Operational Guidelines for Fair Recruitment, and the United Nations 2030 Sustainable Development Goals (SDGs). Even though Sabah State is the only region that is bound by the ILO Convention (No.97), the Federal Government of Malaysia is still under the obligation of Article 19(7) of the ILO Constitution to make progress toward coordinated actions among federal States to give effect to the ILO Convention (No.97) and inform the Director-General of the International Labor Office of measures taken to bring such Convention and its accompanying Recommendation before the appropriate federal State, provincial or cantonal authorities. Besides that, when observing the Convention (No.97) for the Sabah State, the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) does not restrict its jurisdiction to national and migrant workers who are employed in Sabah State. It reflects that the Convention (No.97) applies to foreign workers, including Cambodian MDWs, in the entirety of Malaysia.

By the same token, the mandatory pregnancy and HIV/AIDS examinations imposed by the Malaysian Department of Immigration are tantamount to discrimination within the context of the Discrimination (Employment and Occupation) Convention (No.111), regarded as the fundamental human rights instrument under the ILO Declaration on Fundamental Principles and Rights at Work. Despite the non-ratification of the ILO Convention (No.111) by Malaysia, the country is still under the obligation, that is derived from being a Member State of the ILO, to respect, promote, and realize the fundamental principle and rights at work concerned, in good faith and in accordance with the ILO Constitution. Therefore, both countries have violated or have not adequately fulfilled their obligations towards the fundamental principles and rights at work concerning the elimination of discrimination in respect of employment and occupation. The MOU also disregards completely the general principle *"no recruitment fees or related costs should be charged to, otherwise borne by workers and jobseekers"* embedded in the Migration for Employment Convention (Revised) (No.97), Private Employment Agencies Convention (No.181), Domestic Workers Convention (No.189), and the ILO General Principles and Operational Guidelines for Fair Recruitment. Although both

countries are not parties to the ILO Conventions (No.181) and (No.189), they still carry out the obligation of Article 19(5)(e) of the ILO Constitution to report to the Director-General of International Labor Office, at appropriate intervals, the position of their laws and practices in regard to the matters dealt with in the Convention concerned. This obligation enables the ILO to take stock of the progress made by both Governments towards the application of the unratified Conventions and serves as a useful reminder to Governments of the existence of the standards in question. It additionally clarifies doubts that may exist concerning the scope and requirements of the instruments, thereby paving the way for further ratifications or at least fuller implementations.

The second sub-research question sets out to answer the following: *"How does the MOU regulate the employment of Cambodian MDWs? What are the implications of the MOU-issued contract of employment and related provisions on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the employment of MDWs? How does the MOU differ from the International Human Rights Law Standards?"* In this dissertation, terms and conditions of employment entail: (i) the contract of employment, (ii) wages, (iii) hours of work, and (iv) the termination of employment. The examination goes beyond provisions of the MOU-compliant contract as the MOU stipulates that "the contract of employment is governed by and shall be construed in accordance with Malaysian legislation." This dissertation asserts that, having no compatibility with International Human Rights Standards, the MOU has failed to fully protect Cambodian MDWs from forced labor situations, including TIPs, and ensure Cambodian MDWs the right to equality of treatment and opportunity in respect of employment and occupation.

The study discovered that Malaysia and Cambodia have failed to implement the MOU's obligations to ensure that (i) private recruitment agencies would fully explain terms and conditions of employment to Cambodian MDWs during the selection exercise, and (ii) Cambodian MDWs would sign and keep the contract of employment in Cambodia before departure to Malaysia. Thus, Cambodian MDWs are prone to contract substitution, an indicator of forced labor. The research also observed that Cambodian MDWs have faced difficult situations, including the non-payment of wages (three to six months in most ILO reports), despite the MOU-issued contract's obligation of employers to pay Cambodian MDWs regularly (every month and not later than the seventh day after the last day of each wage period). Such deliberate withholding of wages aims to compel MDWs to stay for more extended periods. Furthermore, under the contract, Cambodian MDWs are required to work between 15 and 16 hours per day, without having 24 consecutive hours of weekly rest, additional remunerations, and adequately compensatory rest. When their contract of employment is terminated, without notice, on the grounds of misconduct inconsistent with the fulfilment

of the domestic workers' duties, or if MDWs breach any of terms and conditions of the contract, Cambodian MDWs would also lose their right to reside and work legally in Malaysia, and must be immediately repatriated back to Cambodia. Having perceived this particular situation as a loss of investment, some Cambodian MDWs would endure with abusive working conditions, while others decide to abscond from his or her employment situation, before the termination of contract. Thus, his or her status in Malaysia would become precarious as the MOU permits the Malaysian authorities to revoke his or her Visit Pass (Temporary Employment). This leaves Cambodian MDWs vulnerable and into potential further situations of forced labor and trafficking in persons (TIPs), as well as detention and conviction for an immigration offence. Their vulnerability is further aggravated by the lack of mechanisms, through which they can contest against any unfair dismissal initiated by their employers. These findings point to a conclusion that Cambodia MDWs are not fully protected from forced labor situations, including TIPs, under the MOU and related provisions.

In addition, the exclusion of domestic workers, including MDWs, from the Malaysian Minimum Wages Order(s) and the Malaysian National Wages Consultative Council Act has the effect of indirectly discriminating against Cambodian MDWs. The form of discrimination experienced by Cambodian MDWs is also akin to intersectional discrimination, based on multiple grounds of discrimination, including sex and nationality. The MOU has also failed to ensure the equality of treatment and opportunity between Cambodian MDWs and workers generally, in respect of hours of work, given the exclusion of domestic workers, including Cambodian MDWs, from the Malaysian Employment Act's key labor provisions. The discrimination is also based on multiple grounds, including sex and nationality, as Cambodian MDWs are expected to work for longer hours (16 hours), as compared to Indonesian and Filipino MDWs' hours of work (between 14 and 15 hours). As a result, this dissertation concludes that Cambodian MDWs are not guaranteed the right to equality of treatment and opportunity in respect of employment and occupation, under the MOU-issued contract and related provisions.

Even though the MOU-issued contract includes provisions, which are not guaranteed to Cambodian MDWs under the Malaysian legislation, this standard contract does not reconcile with International Human Rights Law Standards. In particular, it does not address (1) the normal hours of work, (2) paid annual leave, and (3) the period of probation of trial period, which must be informed to domestic workers (including MDWs) in appropriate, verifiable, and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements, as required by Article 7 of the ILO Convention (No.189). The failure of the MOU parties to ensure that Cambodian MDWs would fully understand, sign, and keep the contract of employment before departure to Malaysia additionally

constitutes a gap with Article 8 of the ILO Convention (No.189), which establishes that "national laws and regulations shall require that MDWs, who are recruited in one country for domestic work in another, receive a written job offer, or the contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment required by the Convention (Article 7), prior to crossing national borders for the purpose of taking up the domestic work to which the offer or contract applies."

Such different treatment between domestic workers (including MDWs) and workers generally, in terms of wages, is also found to violate the fundamental principle of *"equal remuneration for work of equal value"* as set out in the Equal Remuneration Convention (No.100), which are ratified by Cambodia and Malaysia. Furthermore, it contradicts the Minimum Wage Fixing Convention (No.131) that is ratified by Malaysia. Considering the CEACR's existing comments on the ILO Convention (No.131) for other Members States, when the CEACR conducts a study of the situation in Malaysia, it is expected that the exclusion of domestic workers, including MDWs, from the country's minimum wage system will be highlighted, and Malaysia will be requested to take every effort to extend the protection afforded by the minimum wage system to domestic workers, including MDWs. Irrespective of the flexible provision in the Convention (No.131), the country is still under the obligation to state in its reports to the ILO the position of its law and practice in respect of the group not covered, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such group. Furthermore, the in-kind payment in respect of accommodation imposed by the MOU in conjunction with the Malaysian legislation is inconsistent with the Domestic Workers Convention: "when provision is made for the payment in kind of a limited proportion of remunerations, Members States should consider ensuring that there is no deduction made from the remunerations concerning that accommodation, when a domestic worker is required to live in accommodation provided by the household, unless otherwise agreed to by the worker."

The exclusion of domestic workers, including Cambodian MDWs, from the Malaysian Employment Act's key labor provisions also created a gap between the MOU and Article 10(1) of the ILO Convention (No.189), which obliges Members States to take measures towards ensuring equal treatment between domestic workers and workers generally in relation to normal hours of work, overtime compensation, periods of daily and weekly rest, and paid annual leave in accordance with national laws, regulations or collective agreements, taking into account the special characteristics of domestic work. Notwithstanding the non-ratification of the Domestic Workers Convention (No.189) by both countries, Malaysia is still under the obligation of Article 6 of the ILO Convention (No.97) to apply, without discrimination in respect of nationality, race, religion, or sex, to immigrants lawfully with its territory, treatment no less favorable than

that which applies to its own national in respect of matters regulated by law or regulation, or subject to the control of administrative authorities, including hours of work and overtime arrangements. This obligation must extend to MDWs, including Cambodian MDWs, and any distinction made to exclude MDWs from protection of the Convention would constitute a prima facie violation of the Convention.

Lastly, related MOU's provisions concerning the termination of employment initiated by the employers are inconsistent with the Termination for Employment Convention (No.158) read together with the Migrant Workers (Supplementary Provisions) Convention (No.143). Neither Cambodia nor Malaysia is the party to both Conventions, but they are under the obligation of Article 19(5)(e) of the ILO Constitution to report the ILO, at appropriate intervals, the positions of its law and practice in regard to the matter dealt with in both Conventions. Besides, the practice of having regard to the ILO Convention (No.158) has not been merely confined to the judiciary of those countries that have ratified the Convention, but has also been observed in judgments delivered by the judiciary and industrial courts of Members States that have not ratified the Convention.

The quest of the last sub-research question is to answer the following: *"How does the MOU regulate the right of access to justice? What are the implications of the MOU's provisions and related national legislation on the human rights of Cambodian MDWs? How do International Human Rights Law Standards regulate the right of access to justice? How does the MOU differ from the International Human Rights Law Standards?"* Because the MOU's Joint Working Group (JWG) is not mandated to hear and decide on labor disputes presented by Cambodian MDWs regarding the violations of the MOU's provisions, the contract of employment, or any related legislation, Cambodian MDWs have to rely on Malaysian legislation and authorities, in the determination of their legal rights, obligations, and criminal charged against them. The last sub-research centers on the protection of all Cambodian MDWs from forced labor, including TIPs, under the Malaysian Federal Constitution, the Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM), and the Malaysian Employment Act. The groundbreaking *Taj Mahal* case not only asserts that all persons, including documented and undocumented migrants, are equal before the law and are entitled to its equal protection, but also clarifies that all migrants, documented or otherwise, are equally protected from slavery and all forms of forced labor under Article 8 of the Federal Constitution.

However, the complexity, expenses, and duration of hearing within the Malaysian ATIPSOM-based framework have led to a situation in which informal out-of-court settlement of complaint is the norm for Cambodian MDWs. Its effectiveness is further demised by the fact that Malaysian public prosecutors have struggled to prosecute and convict perpetrators of human trafficking for labor exploitation, while

Cambodian MDWs are denied adequate compensation that reflect the loss of earnings, harm done for physical or psychological trauma and expenses incurred under ATIPSOM. On the other hand, the mandate of the Director-General of the Department of Labor of the Malaysian Ministry of Human Resources (or commonly known as Labor Court) to hear and decide complaints presented by domestic workers, including Cambodian MDWs, is limited to issues concerning "payment of indemnity," "notice of termination," and "payment of wages" under the contract of employment and applicable provisions of the Malaysian Employment Act. One should recall that this standard applies differently to workers, including migrant workers, in other sectors. The Director-General has no jurisdiction over issues relating to forced labor, including the retention of passports, excessive hours of work, and overtime compensation. The formal requirements of submitting supporting documents to file a complaint and attending every schedule of hearing and mention under the Malaysian Employment Act have the effect of indirectly discriminating against Cambodian MDWs, particularly undocumented Cambodian MDWs or those who flee their employers in distress. Therefore, it can be concluded Cambodian MDWs, who are victims of forced labor, including TIPs, are not guaranteed the right of access to justice under the Malaysian legislation, thereby justifying the assertion that Cambodian MDWs are not fully and equally protected against forced labor, including TIPs, under the MOU and related Malaysian legislation.

These findings also point to a gap existing between the discussed Malaysian legislation and the Forced Labor Convention (No.29), as well as its accompanying Protocol. The order of administrative and financial penalties by Malaysian competent authorities for offenders of TIPs is not in full compliance with Article 25 of the Forced Labor Convention (No.29), read together with Migrant Workers (Supplementary Provisions) Convention (No.143). The illegal exaction of forced or compulsory labor shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced. By contrast, having repatriation as the most common remedy provided to Cambodian MDWs by TIPs special courts and the Director-General of Labor also contradicts Article 4(1) of the Protocol to the Forced Labor Convention (No.29), which stipulates that "each member shall ensure that all victims of forced labor, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation." Malaysia is a party to the ILO Convention (No.29), but not to the Protocol to the Forced Labor Convention (No.29). However, the instrument concerned is also regarded as an ILO fundamental human rights instrument, so the country is under the obligation devoured from the 1998 ILO Declaration on Fundamental Principles and Rights at Work to respect, promote, and realize, in a good faith and in

accordance with ILO Constitution, the principles relating to the elimination of all forms of forced or compulsory labor that is the subject of the Protocol concerned.

In addition, the contradiction extends to International Covenant on Civil and Political Rights (ICCPR). Malaysia has failed to adequately fulfil its international human rights obligations towards the rights to a fair trial and effective remedy of Cambodian MDWs, which derives from Article 14(1) and (3) of ICCPR, read together with Articles 2(3), 9(3) and 26 of the same Covenant, as well as other international human rights instruments. Even though Malaysia is not the party to the ICCPR, the fundamental principles of fair trial form part of customary international law and have become peremptory norms in international law.

To conclude, the MOU, together with related national legislation, regulations, and directives, has failed to fully and equally protect Cambodian MDWs from forced labor, including TIPs, and ensure the equality of treatment between Cambodian MDWs and workers generally in respect of employment and occupation. The MOU and relevant legislation concerned are also incompatible with, and most of their provisions are found to violate, International Human Rights Law Standards applicable to Cambodian MDWs.

Bibliography

Books

Andreassen B-A, Sano H-O and Mclnerney-Lankford S (eds), 'The Art and Science of Interpretation in Human Rights Law', *Research methods in Convehuman rights: a handbook* (Edward Elgar Publishing 2017)

Blanpain R and Baker J (eds), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (XIth edition, Kluwer Law International 2014)

Butler WE, Hepple BA and Neal AC (eds), *Comparative Labour Law: Anglo-Soviet Perspectives* (Gower in conjunction with the International Journal of Comparative Labour Law and Industrial Relations 1987)

Constable N, *Maid to Order in Hong Kong: Stories of Migrant Workers* (Cornell University Press 2007)

Dias AK, Welch GH and United Nations Development Programme (eds), *Justice for the Poor: Perspectives on Accelerating Access* (Oxford University Press 2009)

Huang S, Yeoh BSA and Noor Abdul Rahman (eds), *Asian Women as Transnational Domestic Workers* (Marshall Cavendish Academic 2005)

Jenks CW, *Social Justice in the Law of Nations: The ILO Impact after 50 Years* (Oxford University Press 1970)

Kahneman D and Tversky A, 'Choices, Values, and Frames', *Handbook of the fundamentals of financial decision making: Part I* (World Scientific 2013)

Killias O, *Follow the Maid: Domestic Worker Migration in and from Indonesia* (NIAS Press 2018)

Krause C (ed), 'International Labour Organization and Human Rights', *International protection of human rights: a textbook* (2., rev ed, Åbo Akademi Univ, Inst for Human Rights 2012)

Lee CC, ‘Exploitative Labour Brokerage Practices in Cambodia: The Role and Practices of Private Recruitment Agencies1’

Lutz H, *Migration and Domestic Work: A European Perspective on a Global Theme* (Routledge 2016)

Moeckli D and others (eds), *International Human Rights Law* (Third edition, Oxford University Press 2018)

Osieke E, *Constitutional Law and Practice in the International Labour Organisation* (M Hijhoff 1985)

‘Overcoming Barriers: Human Mobility and Development’ (Palgrave Macmillan 2009)

Seibert-Fohr A, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009)

Smits JM, ‘What Is Legal Doctrine?: On the Aims and Methods of Legal-Dogmatic Research’ in Rob van Gestel, Hans-W Micklitz and Edward L Rubin (eds), *Rethinking Legal Scholarship* (Cambridge University Press 2017)

South Ural State University and others, ‘Formal-Dogmatic Approach in Legal Science in Present Conditions’ [2018] Journal of Siberian Federal University. Humanities & Social Sciences 968.

Weissbrodt DS, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (2001)

International Regulations

Basic Principles and Guidelines on the Right to a Remedy and Reparation 2005

CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency 2001

Convention concerning Decent Work for Domestic Workers, 2011

Convention on the Elimination of All Forms of Discrimination against Women 1979

Discrimination (Employment and Occupation) Convention 1958

Equal Remuneration Convention (No.100), 1951

Forced Labor (Supplementary Measures) Recommendation 2014

Forced Labor Convention 1930

General Comment No.1 on Migrant Domestic Worker 2011

General Comment (No.2) on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families 2013

General Comment (No.20): Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment (Article 7) 1992

General Comment (No.24) on State Obligation under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities 2017

General Comment (No.29) on Article 4: Derogations during a State of Emergency 2001

General Comment (No.31): The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (Article 2) 2004

General Comment (No.33): The Obligation of States Parties under the Optional Protocol to International Covenant on Civil and Political Rights 2009

General Comment (No.35) on Article 9: Liberty and Security of Person 2014

General Comment on Article 14: The Right to Equality before Courts and Tribunals and to Fair Trial 2007

General Principles and Operational Guidelines for Fair Recruitment and Definition of Recruitment Fees and Related Costs 2019

General Recommendation (No.26) on Women Migrant Workers 2008

General Recommendation on Women's Access to Justice 2015

Hours of Work (Commerce and Offices) Convention (No.30) 1930

ILO Constitution 1948

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

International Covenant on Civil and Political Rights 1966

International Covenant on Economic, Social and Cultural Rights 1966

Maternity Protection Convention 2000

Migrant Workers Recommendation 1975 (R151)

Migrant Workers (Supplementary Provisions) Convention 1975

Migration for Employment Convention (Revised) 1949 (No.97)

Migration for Employment Recommendation (Revised) 1949

Minimum Wage Fixing Convention 1970

Minimum Wage Fixing Recommendation 1970 (No.135)

Private Employment Agencies Convention 1997

Private Employment Agencies Recommendation 1997

Protection of Wages Convention 1949

Protocol of 2014 to the Forced Labor Convention, 1930

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 2000

Recommendation concerning Decent Work for Domestic Workers 2011

Recommendation concerning HIV and AIDS and the World of Work, 2010

Termination of Employment Recommendation 1982

Universal Declaration of Human Rights 1948

Vienna Convention on the Law of Treaties 1969

UN Materials

Department of Economic and Social Affairs, 'Global Indicator Framework for the Sustainable Development Goals and Targets of 2030 Agenda for Sustainable Development' (2020) E/CN.3.3/2020/2

'Human Development Reports: Cambodia' (*United Nations Development Programme: Human Development Reports*, 2019) <http://hdr.undp.org/en/countries/profiles/KHM> accessed 17 August 2020

Human Rights Committee, 'Summary Record of the 1365th Meeting' (Human Rights Committee 1994) U.N. Doc. CCPR/C/SR/.1365

International Monetary Fund, 'World Economic Outlook: Globalization and External Imbalances' (IMF 2005)

'Secretary-General's Remarks to the Ministerial Meeting of the Security Council on Justice and the Rule of Law: The United Nations Role' (*United Nations Secretary-General*, 24 September 2003) <https://www.un.org/sg/en/content/sg/statement/2003-09-24/secretary-generals-remarks-ministerial-meeting-security-council> accessed 20 July 2020

'Statistics for SDG Indicator 10.7.1: Guidelines for Their Collection' (2019) Working paper <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_670175/lang--en/index.htm> accessed 27 August 2020

'The International Convention on Migrant Workers and Its Committee: Fact Sheet No.24 (Rev.1)' (Office of the United Nations High Commissioner for Human Rights 2005)

The World Bank, 'Indonesia's Global Workers: Juggling Opportunities and Risks' (The World Bank 2017)

UNDP, 'Inequalities in Human Development in the 21st Century: Briefing Note for Countries on the 2019 Human Development Report: Cambodia' (United Nations Development Programme 2019) <http://hdr.undp.org/en/content/national-human-development-report-2019-cambodia> accessed 19 March 2020

UNIAP (ed), *Recruitment Agencies and the Employment of Cambodian Domestic Workers in Malaysia* (United Nations Inter-Agency Project on Human Trafficking 2011) <https://hdl.loc.gov/loc.gdc/gdcovop.2012330494> accessed 6 March 2020

United Nations Department of Economic and Social Affairs, 'United Nations' Trends in Total Migrant Stock: The 2008 Revision' (United Nations Department of Economic and Social Affairs 2008)

United Nations Development Programme, *Programming for Justice: Access for All : A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (United Nations Development Programme 2005)

——, 'Country Programme Action Plan 2013-2015' (2012)

Vereinte Nationen (ed), *In Pursuit of Justice* (UN Women 2011)

World Bank, *Migration and Remittances Factbook 2011 Second Edition* (World Bank 2012) <http://hdl.handle.net/10986/2522> accessed 17 August 2020

ILO Materials

ACTRAV, *Achieving Decent Work for Domestic Workers* (2012) <http://www.ilo.org/actrav/info/fs/WCMS_181344/lang--en/index.htm> accessed 23 March 2020

'Anderson B, *Worker, Helper, Auntie, Maid? Working Conditions and Attitudes Experienced by Migrant Domestic Workers in Thailand and Malaysia* (First published, ILO Regional Office for Asia and the Pacific 2016)

Asian Development Bank Institute and International Labour Organization, *Safeguarding the Rights of Asian Migrant Workers from Home to the Workplace.* (2017) <https://doi.org/10.1787/9789264268937-en> accessed 17 March 2020

Blackett A, 'International Legal Materials Introductory Note to the Decent Work for Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201)' (2014) 53 International Legal Materials 250

'Choice of Conventions and Recommendations on Which Reports Should Be Requested under Article 19, Paragraph 5(e)a and 6(d) of the Constitution in 2019' (2017)

Committee on Domestic Workers, 'Report of the Committee on Domestic Workers (PR No.15)' (International Labour Conference 2011) Record of proceedings <http://www.ilo.org/ilc/ILCSessions/previous-sessions/100thSession/reports/provisional-records/WCMS_157696/lang--en/index.htm> accessed 19 August 2020

D. McCann JM, 'The Legal Regulation of Working Time in Domestic Work' (2011) Working paper <http://www.ilo.org/travail/whatwedo/publications/WCMS_150650/lang--en/index.htm> accessed 24 June 2020

Department ILS, *Conference Committee on the Application of Standards: Record of Proceedings (ILC 2018)* (2018) <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/conference-committee-on-the-application-of-standards/WCMS_643937/lang--en/index.htm> accessed 22 June 2020

Direct Request (CEACR) - adopted 2017, published 107th ILO Session (2018)- Domestic Workers Convention, 2011 (No189) - Bolivia (Plurinational State of Bolivia) (Ratification: 2013) (CEACr)

Direct Request (CEACR) – adopted 2017, published 107th session (2018): Domestic Workers Convention, 2011 (No.189) – Ireland (Ratification: 2014)

Direct Request (CEACR) - adopted 2018, published 108th ILC Session (2019): Domestic Workers Convention, 2011 (No189) - Chile (Ratification 2015) (CEACR)

Direct Request (CEACR) – adopted 2018, published 108th ILC Session (2019) Domestic Workers Convention, 2011 (No.189) – South Africa (Ratification: 2013)

Direct Request (CEACR) - adopted 2018, published 108th ILC Session, Migration for Employment Convention (Revised), 1949 (No.97), Malaysia (Sabah)

Direct Request (CEACR) - Adopted 2018, Published 108th ILC Session (2019): Domestic Workers Convention, 2011 (No.189) - Nicaragua (Ratification: 2013)

Direct Request (CEACR) - adopted 2018, published 108th ILO Session (2019): Domestic Workers Convention, 2011 (No189) - Panama (Ratification 2015)

Direct Request (CEACR) - adopted 2019, published 109th Session: Domestic Workers Convention, 2011 (No189) - Ecuador (Ratification: 2013)

Direct Request (CEACR) – adopted 2019, published 109th ILC Session (2021): Equal Remuneration Convention, 1951 (No.100) – Malaysia (Ratification: 1997)

Direct Request (CEACR) - Migrant Workers (Supplementary Provision) Convention, 1975 (No143) - Albania (Ratification 2006) (CEACR)

Direct Request (CEACR)- adopted 2019, published 109th ILC session (2020): Lebanon Protection of Wages Convention, 1949 (Ratification:1977)

Direct Request (CEACR) - adopted 2019, published 109th ILC Session (2020) - Sri Lanka - Minimum Wage Fixing Convention, 1970 (No131) (Ratification:1975)

Direct Request (CEACR) - Migrant Workers (Supplementary Provisions) Convention, 1975(No143) - Italy (Ratification 1981) (CEACR)

Direct Request (CEACR) – adopted 2019, published 109th ILC session (2021) – Migrant Workers (Supplementary Provisions) Convention, 1975 (No.143) – Cyprus (Ratification: 1977)

'Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection' (ILO 2013)

Form for Report on Unratified Conventions (Article 19 of the Constitution): Migration for Employment (Revised) Convention (No.97) and Recommendation (No.86),1949; Migrant Workers (Supplementary Provisions) Convention (No.143) and Migrant Workers Recommendation (No.151), 1975' (1997) <https://www.ilo.org/public/english/standards/relm/gb/docs/gb268/lils10-1.htm> accessed 20 August 2020

General Observation on the Equal Remuneration Convention, 1951 (No.100), in Report of the Committee of Experts on the Application of Conventions and Recommendations' (International Labour Conference 2007) Report III (Part 1A)

General Survey Concerning Employment Instruments in Light of the 2008 Daclaration on Social Justice for a Fair Globalization ; Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution) ; International Labour Conference, 99th Session, 2010 ; Report III (Part 1 B) (1. ed, Internat Labour Off 2010).

Harkins B and Åhlberg M, *Access to Justice for Migrant Workers in South-East Asia* (First published, ILO Regional Office for Asia and the Pacific 2017)

Hobden C, 'Domestic Workers Organize – but Can They Bargain?' (2015) Fact sheet <http://www.ilo.org/global/topics/domestic-workers/WCMS_345704/lang--en/index.htm> accessed 19 March 2020

Hodge J, 'Assessment of the Complaints Mechanism for Cambodian Migrant Workers' (2016) Report <http://www.ilo.org/asia/publications/WCMS_466494/lang--en/index.htm> accessed 17 March 2020

ILO, *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws* (2012) <http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_173365/lang--en/index.htm> accessed 25 March 2020

——, 'TRIANGLE in ASEAN: Towards Achieving Decent Work for Domestic Workers in ASEAN: 10th ASEAN Forum on Migrant Labour (AFML) – Thematic Background Paper' (International Labour Organization 2018) <https://www.ilo.org/asia/publications/WCMS_631089/lang--en/index.htm> accessed 8 March 2020

——, 'TRIANGLE in ASEAN Quarterly Briefing Note: Malaysia' (Regional Office for Asia and the Pacific 2019) <https://www.ilo.org/asia/publications/WCMS_614381/lang--en/index.htm> accessed 7 March 2020

ILO Governing Body, 'Date, Place and Agenda of the 99th Session (2010) of the International Labor Conference: Second Item on the Agenda' (International Labour Office 2008) GB301_2_[2008-02-0115-1]-En.doc/v3

ILO Multilateral Framework on Labor Migration: Non-Binding Principles and Guidelines for a Rights-Based Approach to Labour Migration (International Labour Office 2006)

ILO, ' Situation and Gap Analysis on Malaysian Legislation, Policies, and Programmes and the ILO Forced Labor Convention and Protocol' (2019) Document <http://www.ilo.org/asia/projects/WCMS_650658/lang--en/index.htm> accessed 25 March 2020

ILO Regional Office for Asia & the Pacific and others, *Regulating Recruitment of Migrant Workers: An Assessment of Complaint Mechanisms in Thailand* (ILO 2013)

ILO Regional Office for Asia & the Pacific and Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project), *Review of Labour Migration Policy in Malaysia* (ILO 2016)

International Labor Office, 'Eliminating Forced Labour: Handbook for Parliamentarians No. 30' (2019) Publication <http://www.ilo.org/global/topics/forced-labour/publications/WCMS_723507/lang--en/index.htm> accessed 22 July 2020.

International Labor Office (ed), *The Cost of Coercion: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work ; International Labour Conference, 98th Session 2009, Report I (B)* (Internat Labour Off 2009).

International Labour Conference (ed), *Migrant Workers: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations ; General Survey on the Reports on the Migration for Employment Convention (Revised) (No. 97), and Recommendation (Revised) (No. 86), 1949,and the Migrant Workers (Supplementary Provisions) Convention (No. 143), and Recommendation (No. 151), 1975* (Internat Labour Off 1999)

——, 'Fourth Item on the Agenda: Decent Work for Domestic Workers' (International Labour Organization 2011) Record of proceedings 15 <http://www.ilo.org/ilc/ILCSessions/previous-sessions/100thSession/reports/provisional-records/WCMS_157696/lang--en/index.htm> accessed 23 March 2020

—— (ed), *General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Declaration on Social Justice for a Fair Globalization, 2008: International Labour Conference, 101st Session, 2012 ; Third Item on the Agenda ; Information and Reports on the Application of Conventions and Recommendations ; Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)* (1. ed, Internat Labour Office 2012)

—— (ed), *General Survey of the Reports on the Minimum Wage Fixing Convention, 1970 (No. 131), and the Minimum Wage Fixing Recommendation, 1970 (No. 135): Third Item on the Agenda ; Information and Reports on the Application of Conventions and Recommendations ; Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution)* (1. ed, ILO 2014)

—— (ed), *Promoting Fair Migration: General Survey Concerning the Migrant Workers Instruments: Third Item on the Agenda: Information and Reports on the Application of Conventions and Recommendations: Report of the Committee of Experts on the Application of Conventions and Recommendations (Articles 19, 22 and 35 of the Constitution): International Labour Conference, 105th Session, 2016* (first edition 2016, International Labour Office 2016)

International Labor Office (ed), *Protection of Wages: Standards and Safeguards Relating to the Payment of Labour Remuneration* (International Labour Office 2003)

—— (ed), *Eradication of Forced Labor* (1st ed, International Labor Office 2007)

—— (ed), *International Labour Migration: A Rights-Based Approach* (International Labour Office 2010)

——, *ILO Global Estimates of Migrant Workers and Migrant Domestic Workers: Results and Methodology: Special Focus on Migrant Domestic Workers* (ILO 2015)

International Labor Organization and International Organization for Migration (eds), *Mandatory HIV Testing for Employment of Migrant Workers in Eight Countries of South-East Asia: From Discrimination to Social Dialogue* (ILO 2009)

International Labor Organization, 'ILO Indicators of Forced Labor' (ILO 2012)

——, *Kingdom of Cambodia Decent Work Country Programme (DWCP) 2019-2023* (2019) <http://www.ilo.org/asia/publications/WCMS_710183/lang--en/index.htm> accessed 17 August 2020

——, *Recruitment Fees and Related Costs: What Migrant Workers from Cambodia, the Lao People's Democratic Republic, and Myanmar Pay to Work in Thailand* (2020) <http://www.ilo.org/asia/publications/WCMS_740400/lang--en/index.htm> accessed 20 June 2020

International Labor Standards Department (Sector I) the EA and RU (Sector I and the SD, 'Note on Convention No. 158 and Recommendation No. 166 Concerning Termination of Employment' (9 March 2009) <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/employment-security/WCMS_171404/lang--en/index.htm> accessed 13 April 2020

International Organization for Migration (ed), *Labor Migration: Trends, Challenges and Policy Responses in Countries of Origin* (International Organization for Migration 2003)

Kingdom of Cambodia Decent Work Country Programme (DWCP) 2019-2023 (2019) <http://www.ilo.org/asia/publications/WCMS_710183/lang--en/index.htm> accessed 17 August 2020

Malte Luebker and Conditions of Work and Employment Branch, *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (International Labor Office 2013).

Mr. Martin Oelz LS on WC, 'Remuneration in Domestic Work' (19 May 2011) <http://www.ilo.org/travail/whatwedo/publications/WCMS_155654/lang--en/index.htm> accessed 25 April 2020

Ms. Amelita King Dejardin Chief Technical Adviser C of work & E programme (TRAVAIL), 'Working Hours in Domestic Work' (19 May 2011) <http://www.ilo.org/travail/whatwedo/publications/WCMS_156070/lang--en/index.htm> accessed 24 June 2020

Nasri A, Tannous W and International Labour Office, *Accès à La Justice Des Travailleurs Domestiques Migrants Au Liban* (BIT 2014)

Observation (CEACR) - adopted 1995, published 83rd ILC Session (1996) - Malaysia

Observation (CEACR) - adopted 2014, published 104th ILC Session (2015): Labor Inspection Convention, 1947 (No81) - Malaysia (Ratification: 1963)

Observation (CEACR) - adopted 2016, published 106th ILC session (2017): Forced Labor Convention, 1930 (No29) Malaysia (Ratification: 1957).

Observation (CEACR) - adopted 2018, published 108th ILC session (2019): Forced Labor Convention, 1930 (No29) - Malaysia (Ratification: 1957).

Observation (CEACR) - adopted 2017, published 107th ILC Session (2018) Termination of Employment Convention, 1982 (No158) - Cameroon (Ratification 1988)

Observation (CEACR) - adopted 2018, published 108th ILC (2019) Migration for Employment Convention (Revised), 1949 (No.97) - Malaysian -Sabah (Ratification:1964)

Observation (CEACR) - adopted 2019, published 109th ILC Session (2020) - Private Employment Agencies Convention, 1997 (No181) - Ethiopia (Ratification: 1999)

Observation (CEACR) - adopted 2019, published 109th ILC Session (2020), Domestic Workers Convention, 2011 (No189) – Paraguay

Oelz M, Olney SL and Tomei M, *Equal Pay: An Introductory Guide* (ILO 2013)

Ramirez-Machado JM, 'Domestic Work, Conditions of Work and Employment: A Legal Perspective, Conditions of Work and Employment Series No. 7.' (International Labour Office 2003) Working paper <http://www.ilo.org/travail/whatwedo/publications/WCMS_TRAVAIL_PUB_7/lang--en/index.htm> accessed 23 March 2020

Rebecca Napier-Moore, 'Protected or Put in Harm's Way?' (International Labour Organization & UN Women 2017) Report <http://www.ilo.org/asia/publications/WCMS_555974/lang--en/index.htm> accessed 17 March 2020

'Recognizing the Rights of Domestic Workers' (23 August 2018) <http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_641738/lang--en/index.htm> accessed 18 August 2020

Rules of the Game: A Brief Introduction to International Labour Standards (Revised Edition 2014) (2014) <http://www.ilo.org/global/standards/information-resources-and-publications/publications/WCMS_318141/lang--en/index.htm> accessed 25 March 2020

Ruwanpura KN, Rai P and ILO InFocus Programme on Promoting the Declaration on Fundamental Principles and Rights at Work, *Forced Labour: Definitions, Indicators and Measurement* (ILO 2004)

Tayah M-J, 'Decent Work for Migrant Domestic Workers: Moving the Agenda Forward' (International Labour Organization 2016) Report <http://www.ilo.org/global/topics/labour-migration/publications/WCMS_535596/lang--en/index.htm> accessed 17 March 2020

Tripartite Action to Protect the Rights of Migrant Workers within and from the Greater Mekong Subregion (GMS TRIANGLE project), *Review of the Effectiveness of the MOUs in Managing Labour Migration between Thailand and Neighbouring Countries* (2015), pp.8-22, <http://www.ilo.org/asia/publications/WCMS_356542/lang--en/index.htm> accessed 18 September 2020.

'Who Are Domestic Workers (Domestic Workers)' <https://www.ilo.org/global/topics/domestic-workers/who/lang--en/index.htm> accessed 18 August 2020

‘Who Cares for the Carers?’ (16 June 2016) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_490924/lang--en/index.htm> accessed 25 March 2020

Wickramasekara P, ‘Malaysia: Review of Admission and Recruitment Practices of Indonesian Workers in the Plantation and Domestic Work Sectors and Related Recommendations’ (2020) Report <https://www.ilo.org/global/publications2/WCMS_749695/lang--en/index.htm> accessed 24 July 2020

‘Youth Employment Policy Summary - Cambodia’ (1 November 2016) <http://www.ilo.org/asia/publications/WCMS_534260/lang--en/index.htm> accessed 17 August 2020

Case Law

Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) p.639 (International Court of Justice (ICJ)

Barbato v Uruguay [1981] Human Rights Committee Communication No.84/1981, U.N. Doc. A/38/40

Bautista de Arellana v Colombia Human Rights Committee Communication No.563/1993, U.N. Doc. CCPR/C/55/D/563/1993

Blanco v Nicaragua [1994] Human Rights Committee Communication No.328/1988, CCPR/C/51/D/328/1988

Chin Well Fasterners Co Sdn Bhd v Sampath Kumar Vellingiri & Ors [2003] High Court 1 MLJ 117

Concluding Comments of the Human Rights Committee: Romania (1993) U.N.Doc.CCPR/C/79/Add.30 (Human Rights Committee)

Concluding Observation of the Human Rights Committee: Chile (1999) U.N.Doc.CCPR/C/79/Add.104 (Human Rights Committee)

Concluding Observation of the Human Rights Committee: Dominican Republic (1993) U.N.Doc.CCPR/C/79/Add.18 (Human Rights Committee)

Concluding observation on the combined third to fifth periodic reports of Malaysia (2018) CEDAW CEDAW/C/MYS/CO/3-5.

Concluding Observations of the Human Rights Committee: Slovenia [2005] Human Rights Committee CCPR/CO/84/SVN, U.N.Doc.CCPR/CO/84/SVN

Coronel v Colombia [2002] Human Rights Committee Communication No.778/1997, U.N. Doc. CCPR/C/76/D/778/1997

Demir and Baykara v Turkey [2008] European Court of Human Rights (ECtHR) No.34503/97

IB v Greece [2013] European Court of Human Rights (ECtHR) No.552/10

Kiyutin v Russia [2011] European Court of Human Rights (ECtHR) No.2700/10

Krasovskaya v Belarus [2012] Human Rights Committee Communication No.1820/2008, U.N.D.cCCPR/C104/D1820/2008

Markin v Russia [2012] European Court of Human Rights (ECtHR) No.3007/06

Mohammed Alzery v Sweden [2006] Human Rights Committee CCPR/88/D/1416/2005

Peter Grant v Jamaica [1996] The Human Rights Committee CCPR/C/56/D/597/1994

Rainys and Gasparavicus v Lithuania [2005] European Court of Human Rights (ECtHR) No.70665/01

Rodriguez v Uruguay [1994] Human Rights Committee Communication No.322/1988, CCPR/C/51/D/322/1988

Sidabras v Dziautas v Lithuania [2004] European Court of Human Rights (ECtHR) No.55480/00 and 59330/00

Siti Rashidah Razali & Yang Lain v Public Prosecutor (2011) 6 MLJ 417

Subramaniam a/l Ramachandran v Public Prosecutor (2012) 10 MLJ 795

Sumarni v Yow Bing Kwong & Anor [2008]

Thomas v Jamaica [1993] Human Rights Committee Communication No. 321/1988, U.N. Doc. CCPR/C/49/D/321/1988

Zhakhongir Maksudov and Adil Rakhimov, Yakub Tashbaev and Rasuldzhon Pirmatov v Kyrgyzstan [2008] Human Rights Committee CCPR/C/93/D/1461

Bilateral Agreement

Memorandum of Understanding between the Government of Malaysia and the Government of Cambodia on the Recruitment and Employment of Domestic Workers 2015

Standard Employment Contract for Filipino Domestic Workers: Appendix D Standard Contract for Filipina Domestic Workers in Malaysia

Malaysian Legislation

Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015

Federal Constitution 1957

Guidelines and Tips for Employers of Foreign Domestic Workers 2017

Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrant Act 2010

Laws of Malaysia: Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015

Laws of Malaysia: Civil Law Act 1956

Laws of Malaysia: Criminal Procedure Code 1935

Laws of Malaysia: Employment Act 1955 (Act 265)

Laws of Malaysia: Immigration Act 1959 (Act 155)

Laws of Malaysia: Industrial Relations Act 1967

Laws of Malaysia: Legal Aid Act 1971

Laws of Malaysia: Legal Profession Act 2012

Laws of Malaysia: National Wages Consultative Council Act 2011

Laws of Malaysia: Private Employment Agencies Act 1981

Minimum Wages Order 2020 (P.U. (A) 5). 2020

Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia 2014

Cambodian Legislation

Code of Conduct for Cambodian Private Recruitment Agencies 2020

Law on the Prevention and Control of HIV/AIDS 2002

Prakas on On Site service of the Private Recruitment Agency and Repatriation 2013 (No252)

Prakas on Private Recruitment Agency 2013

Prakas on Promulgation of Minimum Standards of Job Placement Services Abroad Contract 2013

Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies 2011

Reports conducted by Special Rapporteurs

Crepeau F, 'Report of the Special Rapporteur on the Human Rights of Migrants' (United Nations General Assembly 2015) A/70/310.

Giammarinaro MG, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Maria Grazia Giammarinaro: Mission to Malaysia' (United Nations Human Rights Office of the High Commissioner 2015) A/HRC/29/38/Add.1.

Report from Government of Cambodia

Ministry of Labor and Vocational Training, 'Policy on Labor Migration for Cambodia' (MOLVT 2014)

——, 'Statistic on Cambodian Workers Officially Sent to Work Abroad' (MOLVT 2015)

——, ‘Number of Cambodian Workers in Malaysia 1998-2016’ (MOLVT 2017)

Ministry of Planning, ‘Migration in Cambodia: Report of the Cambodian Rural Urban Migration Project (CRUMP)’ (Ministry of Planning 2012)

OECD and Cambodia Development Resource Institute, *Interrelations between Public Policies, Migration and Development in Cambodia* (OECD 2017) <https://www.oecd-ilibrary.org/development/interrelations-between-public-policies-migration-and-development-in-cambodia_9789264273634-en> accessed 7 March 2020

Journal Articles

Au WC and others, ‘The Work-Life Experiences of an Invisible Workforce: The Case of Live-in Women Migrant Domestic Workers in Malaysia’ (2019) 39 Equality, Diversity and Inclusion: An International Journal 567

Coser LA, ‘Servants: The Obsolescence of an Occupational Role’ (1973) 52 Social Forces 31

Crenshaw K, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ [1989] u. Chi. Legal f. 139

David V, ‘The Expanding Right to an Effective Remedy: Common Developments at the Human Rights Committee and the Inter-American Court’ [2014] Ghent University

Derks A, ‘Migrant Labour and the Politics of Immobilisation: Cambodian Fishermen in Thailand’ (2010) 38 Asian Journal of Social Science 915

Drolet N, ‘Domestic Workers and Sub Decree No.190: Time to Protect Cambodia’s Migrants’ (LSCW 2013)

Hamid BA, ‘The Identity Construction of Women/Maids in Domestic Help for Hire Discourse in Selected Malaysian Newspapers’ (2009) 9 European Journal of Social Sciences 168

Holliday JK, ‘Turning the Table on the Exploitative Recruitment of Migrant Workers: The Cambodian Experience.’ (2012) 40 Asian Journal of Social Science 464

Jeyabalan R and Nordin R, ‘Protection of the Rights of the Victims of Human Trafficking: Has Malaysia Done Enough?’ (2019) 3 Journal of Southeast Asian Human Rights 300

Macun I, Lopes D and Benjamin P, ‘An Analysis of Commission for Conciliation Mediation and Arbitration Awards’

Poblete L, ‘The Influence of the ILO Domestic Workers Convention in Argentina, Chile and Paraguay’ [2018] International Journal of Comparative Labour Law and Industrial Relations 177

Punpuing, Sureeporn, Therese Caouette, Awatsaya Panam, Khaing Mar Kyaw Zaw, and S. Suksinchai. "Migrant domestic workers: from Burma to Thailand." (2005).

Rozakis CL, ‘The European Judge as Comparatist’ (2005) 80 Tul. L. Rev. 257

Sidhu BS, Mohamed S and Akram M, ‘Third Voice in a Criminal Justice System: The Voice of the Victim through Victim Impact Statement’ (2015) 6 Current Law Journal i

Teklè T, ‘The Contribution of the ILO’s International Labour Standards System to the European Court of Human Rights’ Jurisprudence in the Field of Non-Discrimination’ (2020) 49 Industrial Law Journal 86

Theeravit N and others, *Understanding Recruitment Industry in Thailand* (Asian Research Centre for Migration, Institute of Asian Studies … 2010)

Valticos N, ‘International Labour Standards and Human Rights: Approaching the Year 2000’ (1998) 137 Int’l Lab. Rev. 135

Vatsikopoulos H, *Maid in Malaysia* (ABC - Foreign Correspondent 2006)

Reports

Amnesty International, ‘Trapped: The Exploitation of Migrant Workers in Malaysia’ (Amnesty International 2010) ASA 28/002/2010 <https://www.amnesty.org/en/documents/document/?indexNumber=ASA28%2f002%2f2010&language=en> accessed 19 March 2020

Bar Council Malaysia, 'Migrant Workers' Access to Justice: Malaysia' (Bar Council Malaysia) <https://www.malaysianbar.org.my/document/about-us/committees/migrants-refugees-and-immigration-affairs-committee&rid=38729> accessed 14 July 2020

Carol Strickler and Khun Sophea, 'We Are Not Invisible - Analysis of the Situation of Cambodian Migrant Domestic Workers in Malaysia and Singapore — English' (DANCHURCHAID/ CHRISTAIN AID CAMBODIA 2015) <https://idwfed.org/en/resources/we-are-not-invisible-analysis-of-the-situation-of-cambodian-migrant-domestic-workers-in-malaysia-and-singapore> accessed 9 March 2020

Human Rights Watch (Organization) (ed), *Cambodia's Dirty Dozen: A Long History of Rights Abuses by Hun Sen's Generals* (Human Rights Watch 2018)

McBride J, *Access to Justice for Migrants and Asylum Seekers in Europe* (Council of Europe 2009)

Nurlina I, 'Migrant Worker Recruitment Costs: Malaysia' (Transient Workers Count too 2016)

Paitoonpong S and Chalamwong Y, 'Managing International Labor Migration in ASEAN: A Case of Thailand'

Parsons L and Lawreniuk S, 'I Know I Cannot Quit." The Prevalence and Productivity Cost of Sexual Harassment to the Cambodian Garment Industry' <http://rgdoi.net/10.13140/RG.2.2.25475.35366> accessed 17 August 2020

Poudyal J, *'They Deceived Us at Every Step': Abuse of Cambodian Domestic Workers Migrating to Malaysia* (Human Rights Watch 2011)

U.S. Department of State, 'Trafficking in Persons Report' (US Department of State 2015)

U.S Department of State, 'Trafficking in Persons Report 2019' (2019)

U.S. Department of State, 'Trafficking in Persons Report 20th Edition' (US Department of State 2020) <http://my.usembassy.gov/our-relationship/official-reports/2020-trafficking-in-persons-malaysia/> accessed 14 July 2020

Newspapers

Adilah A, ‘Group Wants RM1,200 Salary for Only Experienced Maids | Malay Mail’ *Malay Mail* <https://www.malaymail.com/news/malaysia/2015/06/01/group-wants-rm1200-salary-for-only-experienced-maids/907035> accessed 18 June 2020

Aliza S, ‘Labor Rights Groups Stunned by Malaysia-Cambodia Agreement to Protect Domestic Maids’ *New Straits Times* (4 December 2017) <https://www.nst.com.my/news/nation/2017/12/310428/labour-rights-groups-stunned-malaysia-cambodia-agreement-protect-domestic> accessed 3 March 2020

Blomberg M, ‘Concern Over Migration Chief’s Family Connections’ *The Cambodia Daily* (24 April 2014) <https://english.cambodiadaily.com/news/concern-over-migration-chiefs-family-connections-57202/> accessed 16 July 2020

‘Indonesia/Malaysia: New Pact Shortchanges Domestic Workers: Weak Protection as Global Body Finalizes Comprehensive Standards’ (*Human Rights Watch*, 31 May 2011) <https://www.hrw.org/news/2011/05/31/indonesia/malaysia-new-pact-shortchanges-domestic-workers> accessed 2 March 2020

Khoo V-J, ‘Foreign Patients to Pay Higher Deposit Rates in Malaysian Public Hospitals’ *MIMS News* (12 April 2017) <https://today.mims.com/foreign-patients-to-pay-higher-deposit-rates-in-malaysian-public-hospitals> accessed 2 July 2020

Kimsay H, ‘Cambodia’s Remittance Payments Reach $1.4B’ <https://www.phnompenhpost.com/business/cambodias-remittance-payments-reach-14b> accessed 18 August 2020

Len HY, ‘Malaysian Association of Foreign Maid Agencies Denies Monopoly of Cambodian Maids’ *Asia News Network* (7 December 2017) <https://annx.asianews.network/content/malaysian-association-foreign-maid-agencies-denies-monopoly-cambodian-maids-62665> accessed 27 August 2020

Leonie Kijewski and Yon Sineat, ‘Cambodian Maids to Head to Malaysia in June | Phnom Penh Post’ *The Phnom Penh Post* (24 January 2018) <https://www.phnompenhpost.com/national/cambodian-maids-head-malaysia-june> accessed 3 March 2020

Liz Gooch, 'A Cry for More (Domestic) Help in Malaysia - The New York Times' *The New York Times* (22 February 2011) <https://www.nytimes.com/2011/02/23/world/asia/23iht-maids23.html> accessed 2 March 2020

Lokman T, 'Employers to Pay Levy for Foreign Workers from Jan 1, 2018' *NST Online* (20 December 2017) <https://www.nst.com.my/news/nation/2017/12/316614/employers-pay-levy-foreign-workers-jan-1-2018> accessed 23 June 2020

'Maid in Cambodia Turning Tidy Profits' *Khmer Times* (12 October 2014) <https://www.khmertimeskh.com/51908/maid-in-cambodia-turning-tidy-profits/> accessed 9 August 2020

'Malaysia: More Khmer Workers Wanted' *Khmer Times* (30 November 2018) <https://www.khmertimeskh.com/554848/malaysia-more-khmer-workers-wanted/> accessed 18 June 2020

Malaysiakini, 'Proposing a Non-Citizens Health Act for Malaysia' *Malaysiakini* (10 January 2020) <https://www.malaysiakini.com/news/506622> accessed 2 July 2020

'Malaysia's First "ethical" Job Agency Targets Modern Slavery' *Reuters* (7 October 2019) <https://www.reuters.com/article/malaysia-migrants-rights-idUSL5N25F2KY> accessed 9 August 2020

Mom Kunthear, 'Unions Happy Over Labor Protections' *Khmer Times* (1 December 2016) <https://www.khmertimeskh.com/62667/unions-happy-over-labor-protections/> accessed 19 August 2020

Muhamading M, 'Gov't Urged to Adopt Convention 189, Provide Domestic Workers with Fundamental Workers' Rights' (*NST Online*, 16 June 2017) <https://www.nst.com.my/news/nation/2017/06/249559/govt-urged-adopt-convention-189-provide-domestic-workers-fundamental> accessed 15 June 2020

Reporters FMT, 'Report: Cambodia to Resume Sending Maids to Malaysia' (*Free Malaysia Today,* 23 January 2018) <https://www.freemalaysiatoday.com/category/nation/2018/01/23/report-cambodia-to-resume-sending-maids-to-malaysia/> accessed 22 April 2020

Peter Z, 'Agencies With Government Ties to Send Maids to Hong Kong' *The Cambodia Daily* (9 August 2017) <https://english.cambodiadaily.com/news/agencies-with-govt-ties-to-send-maids-to-hong-kong-133458/> accessed 9 August 2020

‘Safeguard the Rights of Migrant Workers’ *The Star* (Kuala Lumpur, 20 December 2019) <https://www.thestar.com.my/opinion/letters/2019/12/20/safeguard-the-rights-of-migrant-workers> accessed 16 July 2020

Tasnim L and Fernando F, ‘No Maids for You If You Have a Record’ *New Straits Times* (1 March 2018) <https://www.nst.com.my/news/exclusive/2018/03/340084/no-maids-you-if-you-have-record.> accessed 27 August 2020

The Star, ‘Case Calls for Domestic Workers’ Act’ *The Star* (20 May 2020) <https://www.thestar.com.my/opinion/letters/2020/05/20/case-calls-for-domestic-workers-act> accessed 25 August 2020

Thomson Reuters Foundation, ‘Cambodia to Curb Recruitment Fees’ *Bangkok Post* (19 September 2019) <https://www.bangkokpost.com/world/1753684/cambodia-to-curb-recruitment-fees> accessed 27 August 2020

Vatsikopoulos H, *Maid in Malaysia* (ABC - Foreign Correspondent 2006)

Welle (www.dw.com) D, ‘Mass Exodus of Cambodian Workers Continues Following Thai Military Coup | DW | 17.06.2014’ *DW.COM* (10 August 2020) <https://www.dw.com/en/mass-exodus-of-cambodian-workers-continues-following-thai-military-coup/a-17711665> accessed 10 August 2020

Website

‘Agensi Pekerjaan Danu Gemliang Sdn Bhd: DG Maid Agency’ (2020) <https://www.dgmaidagency.com.my/index.php> accessed 27 August 2020

‘Best House Maid Agency in Kuala Lumpur & Selangor | Maid Station’ <https://www.maidstation.com/, https://www.maidstation.com/, https://www.maidstation.com/> accessed 27 August 2020

‘Conventions and Recommendations’ (*International Labor Organization (ILO)*) <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> accessed 20 August 2020

‘Filipino Maids Must Be Paid Minimum US$400’ (*Malaysian Trades Union Congress*, 2015) <http://www.mtuc.org.my/filipino-maids-must-be-paid-minimum-us400/> accessed 18 June 2020

‘FOMEMA: Prevention & Care’ (2020) <http://www.fomema.com.my/> accessed 27 August 2020

‘Foreign Worker Medical Insurance’ (*Federation of Malaysia Manufacturers: Making Malaysia Industries Globally Comptetitve*) <https://www.fmm.org.my/Industry-@-Foreign_Worker_Medical_Insurance.aspx> accessed 25 August 2020

‘Foreign Workers’ (*Immigration Department of Malaysia:*, 9 August 2020) <https://www.imi.gov.my/portal2017/index.php/en/main-services/foreign-workers.html> accessed 9 August 2020

‘GDP per Capita (Current US$) - Cambodia’ (*The World Bank*, 2020) <https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=KH> accessed 20 June 2020

Immigration Department of Malaysia and Ministry of Home Affairs, ‘Foreign Domestic Helper (FDH)’ (*Foreign Domestic Helpers (FDH)*) <https://www.imi.gov.my/index.php/en/foreign-domestic-helper-fdh.html> accessed 29 February 2020

‘Landmark Treaty for Domestic Workers Comes into Force’ (5 September 2013) <http://www.ilo.org/global/standards/information-resources-and-publications/news/WCMS_220793/lang--en/index.htm> accessed 25 March 2020

‘Maids Insurance | Kurnia Insurance’ <https://www.kurnia.com/products-and-services/home-insurance/kurnia-maids-insurance> accessed 2 July 2020

‘Malaysia Pro Bono Directory | Rights in Exile Programme’ (16 July 2020) <http://www.refugeelegalaidinformation.org/malaysia-pro-bono-directory> accessed 16 July 2020

‘National Legal Aid Foundation (NLAF)/ Yayasan Bantuan Guaman Kebangsaan (YBGK) | German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG)’ (16 July 2020) <https://www.cpg-online.de/2015/03/01/national-legal-aid-foundation-nlaf-yayasan-bantuan-guaman-kebangsaan-ybgk/> accessed 16 July 2020

‘Persatuan Agensi Pekerjaan Malaysia: Malaysian Association of Foreign Maid Agencies’ (2020) <http://www.papa.org.my/> accessed 27 August 2020

‘Ratifications for Cambodia’ (*International Labor Organization (ILO)*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103055> accessed 20 August 2020

‘Ratifications for Malaysia - Sabah’ (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103586> accessed 20 August 2020

‘Ratifications of C095 - Protections of Wages Convention, 1949 (No.95)’ (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312240:NO> accessed 20 August 2020

‘Ratifications of C131 - Minimum Wage Fixing Convention, 1970 (No.131)’ (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312276> accessed 20 August 2020

‘Ratifications of C158 - Termination of Employment Convention, 1982 (No.158) - Date of Entry into Force: 23 November 1985’ <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312303:NO> accessed 29 September 2020.

‘Ratifications of C181 - Private Employment Agencies Convention, 1997 (No.181)’ (*International Labor Organization: NORMLEX*) <https://www.ilo.org/dyn/normlex/de/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312326> accessed 20 August 2020

‘Ratifications of C189: Domestic Workers Convention, 2011 (No.189)’ (*International Labor Organization (ILO)*) <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:2551460:NO> accessed 19 August 2020

‘Ratifications of P029 - Protocol of 2014 to the Forced Labor Convention, 1930’ (*International Labor Organization: NORMLEX*)

<https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:3174672:NO> accessed 20 August 2020

Other Sources

Migrant Workers and Overseas Filipinos Act 1995