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Table of Content

Acknowledgement	i
List of Tables	vi
List of abbreviations	vii
1. Introduction	2
1.1 Research Issue and Rational.....	2
1.2 Objective of the Study, Research Questions and Structure.....	5
1.3 Methodology	6
1.4 Limitations	6
2. The International Legal Framework for migrant domestic workers.....	8
2.1 United Nations Core Conventions and General Comments / Recommendations for the treatment of migrant domestic workers and the improvement of their situation	9
2.1.1 The Universal Declaration of Human Rights.....	9
2.1.2 The International Covenant on Civil and Political Rights	10
2.1.3 The International Covenant on Economic, Social and Cultural Rights	11
2.1.4 The Convention on the Elimination of All Forms of Discrimination against Women	13
2.1.5 International Convention on the Elimination of All Forms of Racial Discrimination	14
2.1.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	15
2.1.7 International Convention on the Rights of the Child	16
2.2 International Labour Standards	17
2.2.1 Migration for Employment Convention and Supplementary Provisions.....	17
2.2.2 Domestic Workers Convention and Recommendation.....	18

2.3	Overview of international legal framework per country	21
3.	The State of Domestic Employment in Malaysia	23
3.1	Malaysia's obligation under international law	26
3.2	Malaysia's domestic law	30
3.2.1	Labour Law	30
3.2.2	Immigration Law	33
3.3	International reactions and policy development in Malaysia.....	37
3.3.1	Reactions by international organisations	37
3.3.2	Policy developments in Malaysia	39
4.	Legal and social analyses of countries of origin.....	41
4.1	Cambodia	44
4.1.1	Country evaluation and discussion of the circumstances of Cambodian migrant domestic workers	44
4.1.2	Domestic law	47
4.1.3	Bilateral agreements and international framework	50
4.1.4	Conclusion on Cambodia	53
4.2	Indonesia	53
4.2.1	Country evaluation and discussion of the circumstances of Indonesian migrant domestic workers	53
4.2.2	Domestic Law	57
4.2.3	Bilateral agreements and international framework	59
4.2.4	Conclusion on Indonesia	65
4.3	Philippines.....	66
4.3.1	Country evaluation and discussion of the circumstances of Filipino migrant domestic workers	66
4.3.2	Domestic Law	69

4.3.3	Bilateral agreements and international framework	72
4.3.4	Conclusion on the Philippines	73
5.	Comparative study – differences between Cambodian, Indonesian and Pilipino DWs in Malaysia.....	74
5.1	Assessment of differences in circumstances of domestic workers	74
5.1.1	Protection from abuse, harassment and violence	74
5.1.2	Fair terms of employment, decent living and working conditions and respect of privacy	76
5.1.3	Written job offers and contracts specifying minimum terms and conditions, enforceable in the receiving country and receipt of a copy of said documents.....	77
5.1.4	Provisions concerning the live-in situation of domestic workers required in Malaysia, confinement in the employers’ homes during rest and leave periods and the confiscation of passports	78
5.1.5	Equal treatment with other workers regarding hours of work, overtime pay, daily and weekly rest and annual leave	78
5.1.6	Minimum Wage	79
5.1.7	Social security and maternity protection.....	80
5.1.8	Recruitment process including private employment agencies – prevention of abuse, licensing and prohibition of deducting fees from salaries.....	81
5.1.9	Effective access to courts and complaint mechanisms	81
5.1.10	Bilateral agreements.....	82
5.1.11	Cost of repatriation	83
5.1.12	Other differences.....	83
5.2	Impact of home State behaviour on domestic workers in Malaysia	83
6.	Conclusion.....	86
	Bibliography	90

Abstract	104
Zusammenfassung.....	106

List of Tables

Table 1	Ratification of International Treaties by Country
Table 2	Disparities in Gross Domestic Product (GDP) per capita in 2015: Cambodia, Indonesia, Philippines, and Malaysia
Table 3	Foreign domestic workers' country of origin

List of abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
FOMEMA	Foreign Workers Medical Examination Monitoring Agency
G2G	Government-to-government agreements
GDP	Gross Domestic Product
HDI	Human Development Index
HRC	Human Rights Committee
HRW	Human Rights Watch
HIV	Human immunodeficiency virus
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
CMW	Migrant Workers Committee
CRC	International Convention on the Rights of the Child
ICRMW	United Nations Convention on Migrants' Rights
ILO	International Labour Organization
IOM	International Organization for Migration
ITUC	International Trade Union Confederation
JAG	Joint Action Group
MCW	Magna Carta of Women
MEF	Malaysian Employers Federation
MOHA	Ministry of Home Affairs
MOHR	Ministry of Human Resources
MOLVT	Ministry of Labour and Vocational Training

MOU	Memorandum of Understanding
MTUC	Malaysian Trade Union Congress
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
OWWA	Overseas Workers Welfare Administration
POEA	Philippine Overseas Employment Administration
POLO	Philippine Overseas Labor Offices
RM	Malaysian Ringgit
UDHR	Universal Declaration of Human Rights
UN	United Nations
UN Women	United Nations Entity for Gender Equality and the Empowerment of Women
UPR	Universal Periodic Review

Migrant domestic workers are 'women of love' because they leave their families to provide for their loved ones. They go to foreign lands to become caregivers in these families and give love to those they look after in spite of the loneliness they face.

Dr. Irene Fernandez, Executive Director of the Malaysian NGO Tenaganita, CARAM, Sri Lanka, 2002

1. Introduction

1.1 Research Issue and Rational

Since Malaysia became independent in 1957, women's participation in the labour market has increased.¹ Modern societal development and the impact of globalisation are changing traditional family life. With diminishing family sizes and almost 50% of women in formal employment, more and more households are in need of domestic workers.² Although it is becoming much more common for women to work and it is even encouraged by the Malaysian government, it is culturally accepted that paid and unpaid work are distributed unequally and men have barely increased their 'participation in domestic and care tasks'.³ The double burden is sorely felt by working women, especially if they have children as registered Child Care Centres are scarce. As a consequence, migrant domestic workers often take on the role of caring, cooking and cleaning, mostly organised and supervised by the women in the house.⁴

Thus an increasing demand for domestic work in Malaysia is apparent and ties in with a general trend in Southeast Asia which sees domestic work as 'one of the largest and most feminized migratory flows' in the region.^{5,6}

¹ Ministry of Women, Family and Community Development (MWFCDD) and United Nations Development Programme (UNDP), 'Study to Support the Development of National Policies and Programmes to Increase and Retain the Participation of Women in the Malaysian Labour Force: Key Findings and Recommendations' (*UNDP Malaysia*, 2013) p.28
<<http://www.my.undp.org/content/dam/malaysia/docs/Women%20In%20Malaysian%20Labour%20Force%20Study%20with%20UNDP-2013.pdf>> accessed 31 May 2016.

² Dewi Anggraeni, *Dreamseekers: Indonesian Women as Domestic Workers in Asia* (Equinox Pub : ILO 2006) p.179.

³ Ministry of Women, Family and Community Development (MWFCDD) and United Nations Development Programme (UNDP) (n 1) p.28,92.

⁴ Anggraeni (n 2) p.179.

⁵ Juanita Elias, 'Foreign Policy and the Domestic Worker: THE MALAYSIA-INDONESIA DOMESTIC WORKER DISPUTE' (2013) 15 *International Feminist Journal of Politics* 391, p.395.

⁶ Since the 1970s, a global trend of rising female labour migration has been observed; scholars refer to this phenomenon as "feminization of migration". Barbara Ehrenreich and Arlie Russell Hochschild (eds), *Global Woman: Nannies, Maids, and Sex Workers in the New Economy* (1st publ, Granta Books 2003) p.5.

At the same time Malaysia's economic growth and relative success in reducing poverty and inequality in the 1970s, 80s and 90s⁷ led it to be a stable economy with one of the lowest poverty rates in Southeast Asia⁸. This and a significantly higher per capita Gross Domestic Product (GDP) compared to Cambodia, Indonesia and the Philippines⁹ continues to act as a major pull factor for migrants from these countries. Wide gaps between GDP per capita together with differences in life expectancy and education levels are some of the main causes for migration.¹⁰

Most of the over 300,000 foreign domestic workers employed in Malaysia are from Cambodia, Indonesia and the Philippines.¹¹

In a report, following her 2015 mission to Malaysia, the Special Rapporteur on trafficking in persons, especially in women and children, Ms Maria Grazia Giammarinaro, expresses concern about the human rights situation of migrant domestic workers in Malaysia. For many women the exploitative working conditions can amount to domestic servitude and debt bondage. The Special Rapporteur describes

[w]idely reported abuses and exploitation [...] include[ing] breaches of contract, excessive recruitment fees, non-payment of salary, deductions from low wages, excessive working hours, lack of rest days and withholding of passports.¹²

Furthermore, she records that

⁷ R Rasiah and I Shari, 'Market, Government and Malaysia's New Economic Policy' (2001) 25 Cambridge Journal of Economics 57, p.57,58.

⁸ The World Bank, 'Poverty & Equity, East Asia & Pacific' <http://databank.worldbank.org/data/Views/Reports/ReportWidgetCustom.aspx?Report_Name=POV_RE G_1&Id=be849c9d&tb=y&dd=n&pr=n&export=y&xlbl=y&ylbl=y&legend=y&wd=420&ht=390&isportal=y&inf=n&exptypes=Excel&country=EAP&series=SI.POV.NOPI,SI.POV.DDAY> accessed 1 August 2016.

⁹ The World Bank, 'World Development Indicators| World DataBank' <http://databank.worldbank.org/data/reports.aspx?Code=NY.GDP.MKTP.CD&id=af3ce82b&report_name=Popular_indicators&populartype=series&ispopular=y> accessed 1 August 2016.

¹⁰ Khalid Koser, *International Migration: A Very Short Introduction* (Oxford University Press 2007) p.30-31.

¹¹ Maria Grazia Giammarinaro, 'Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Addendum : Mission to Malaysia' (UN Human Rights Council 2015) A/HRC/29/38/Add.1 para.12 <<http://www.refworld.org/docid/5577eadc4.html>> accessed 31 May 2016.

¹² *ibid.*

[m]any domestic workers have also experienced unimaginable physical and mental abuse at the hand of their employers from being deprived of food, to beatings with electrical wires, scalding with hot water, harassment, psychological abuse and sexual assault. Owing to the hidden nature of their work conducted in private homes, fear of arrest and eventually deportation, they are unable to leave their employers and seek redress for human rights violations.¹³

Minimal protection under domestic employment law¹⁴, an insufficiently regulated recruitment sector¹⁵ and an immigration policy which criminalises undocumented workers with little regard of how they come to be in this situation¹⁶ are all factors contributing to the vulnerability of migrant domestic workers.

Performing household chores and caring for children and elderly persons is seen as labour mainly performed by women without any remuneration. This ‘labour of love’ concept has been ingrained into our societies ideologically and is very hard to break because of the lack of economic and political power women have.¹⁷ Malaysia is no exception and domestic work is perceived as private and legislation deemed unnecessary.¹⁸

Notwithstanding the importance of labour migration for sending countries, not least because of the remittances contributing to home-economies and poverty reduction¹⁹, home States of migrant domestic workers have reacted to repeated reports of abuse and exploitation. During an internship with a support organisation for women workers in Malaysia I was confronted with the idea that migrant domestic workers might find themselves in different situations according to their nationality. Insights gained in personal observations as well as discussions with local human rights activists led me to develop my interest in migrant domestic workers further and form the hypothesis that

¹³ ibid para.12,13.

¹⁴ ibid para.36.

¹⁵ ibid para.80.

¹⁶ ibid para.22.

¹⁷ Shirlena Huang and others, *Asian Women as Transnational Domestic Workers* (Times Publishing Limited 2005) p.1ff.

¹⁸ ILO Regional Office for Asia and the Pacific, ‘Review of Labour Migration Policy in Malaysia - Tripartite Action to Enhance the Contribution of Labour Migration to Growth and Development in ASEAN (TRIANGLE II Project)’ (International Labour Organization (ILO) 2016) p.22.

¹⁹ Elias (n 5) p.398.

differences exist. The purpose of this thesis is to research if this assumption holds true, and if so, what these differences are, what the likely causes could be and what influence the actions or inactions of the home States play.

1.2 Objective of the Study, Research Questions and Structure

This thesis examines whether migrant domestic workers in Malaysia are facing different circumstances depending on whether they are of Cambodian, Indonesian or Philippine nationality. It further investigates the possible causes and factors leading to this situation.

To analyse the points at issue the following research questions will be posed:

- What is the international legal framework pertaining to domestic workers?
- What is the state of Domestic Employment in Malaysia and which protections do exist for foreign domestic workers there?
- What approach do Cambodia, Indonesia and the Philippines have towards their nationals who migrate as domestic workers?
- What differences in treatment if any do migrant domestic workers from Cambodia, Indonesia and the Philippines face in Malaysia?
- Which role do home States play in impacting these possible differences?

In order to give an overview on international frameworks protecting domestic workers, international law including United Nations core treaties, general comments and recommendations as well as International Labour Standards will be explained and examined in Chapter 2. Here it will be shown which of the countries included in the discussion of this paper have ratified relevant human rights conventions.

Conducive to an indication of the issues arising for foreign domestic workers in Malaysia, Chapter 3 will provide both a general analysis of their position in society and a critical examination of Malaysia's relevant international obligations and domestic laws. In Chapter 4, Cambodian, Indonesian and Filipino domestic workers' home countries' attitude towards their working conditions abroad and the extent to which their rights are

protected by their countries of origin will be determined. With the purpose of assessing possible differences in treatment and working conditions of foreign domestic workers from different nationalities, in Chapter 5, some main provisions of the International Labour Organisation's Domestic Workers Convention (C189) and Recommendation (R201) will be used. If such differences can be found, this chapter will further clarify if they can be attributed to home States behaviour. Lastly, in chapter 6 final conclusions will be drawn.

1.3 Methodology

In this thesis a comparative literature study of the situation of migrant domestic workers from Cambodia, Indonesia and the Philippines in Malaysia will be undertaken.

In order to approach the research questions, a desk-based literature review will be carried out. This will firstly comprise of legal documentary research and analysis of international legislation, of individual communications, general comments and country-related concluding observations of United Nations (UN) treaty and charter based monitoring bodies as well as legislation, reports, publications, recommendations and guidelines by the International Labour Organisation (ILO) and related institutions.

Secondly legislation and reports by national, regional and international organisations such as the World Bank, UN bodies, workers and employers representations and non-governmental organisations regarding domestic law applicable to domestic workers migrating to Malaysia from Cambodia, Indonesia and the Philippines will be investigated. Furthermore, a thorough analysis of books, reports, academic publications and articles as well as newspaper articles will be conducted.

1.4 Limitations

It is not in the scope of this thesis to include trafficked, irregular or child domestic workers even though they make up a considerable proportion of migrant domestic workers in

Malaysia. This paper will focus on documented migrants only. Furthermore, I recognise the invaluable contribution of civil society organisations to the improvement of migrant domestic workers' rights and the assistance they afford to victims of abuse and exploitation but their impact will not be analysed due to the limited scope of this thesis.

2. The International Legal Framework for migrant domestic workers

This Chapter will give a brief overview on the existing international law relevant to domestic migrant workers.

Around half of all migrants are women. This number has not increased hugely over recent decades but what has changed is that an ever increasing amount are migrating to seek employment and in some countries the female migrant workers amount to half or more than half of the working migrant population.²⁰ This phenomenon is often coined ‘feminization of migration’ even though this term can be ambiguous because it is the ratio of women’s migration to work that has changed and not the number of female migrants. What that means is that women’s role in international migration has changed because they have become more important as senders of remittances to their home countries. This changed situation has also boosted the interest shown in female migration by scholars on the one hand but also by policy-makers.²¹ A trend towards growing demand for workers in the service sector, health care and entertainment has led to this independent migration by women.²² According to the newest estimates by the International Labour Organization, 67 million people work in domestic labour of which 80% are women. This amounts to 4% of the worldwide female labour force. Furthermore, 17 % of all domestic workers are international migrants, nearly every fifth.²³

Although we will find that Malaysia has ratified hardly any international law relevant to our case, it is nevertheless necessary to show that there are international conventions

²⁰ ‘Women and Men Migrant Workers: Moving towards Equal Rights and Opportunities’ (International Labour Organization (ILO) 2008) Document p.2-3 <http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS_101091/lang--en/index.htm> accessed 1 August 2016.

²¹ ‘Feminization of Migration - Gender, Remittances and Development’ (United Nations, instraw (International Research and Training Institute for the Advancement of Women) 2007) p.2 <http://www.renate-europe.net/wp-content/uploads/2014/01/Feminization_of_Migration-INSTRAW2007.pdf> accessed 9 June 2016.

²² Koser (n 10) p.6-7.

²³ ‘Decent Work for Domestic Workers: Achievements since the Adoption of Convention C189’ (International Labour Organization (ILO) 2016) Briefing note p.2 <http://www.ilo.org/global/topics/domestic-workers/publications/WCMS_490778/lang--en/index.htm> accessed 1 August 2016.

regulating these women's rights and demonstrating a growing movement towards better protection.

2.1 United Nations Core Conventions and General Comments / Recommendations for the treatment of migrant domestic workers and the improvement of their situation

2.1.1 The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) states in its Article 1 that 'all human beings are born free and equal in dignity and rights' and article 2 sets forth that nobody shall be discriminated against on grounds of 'race, colour, sex, language, religion, political or other opinion, national or social origin [...]'.²⁴ Importantly, this, as other core UN conventions contain such non-discrimination clauses so that they are also applicable to non-citizens.²⁵ This applies also to equal legal protection.²⁶ Furthermore, Article 3 wants to ensure the right 'to liberty and the security of person', Article 4 prohibits all forms of slavery or servitude and Article 5 forbids 'torture or [...] cruel, inhuman or degrading treatment or punishment'. Article 13 guarantees the rights to 'freedom of movement' and 'the right to leave any country, including [her or] his own, and to return to [her or] his country.'

Specifically related to work, Article 23 includes the right 'to free choice of employment' and Article 24 the right to rest and leisure. Also especially important for live-in domestic workers are Article 25 ensuring social security and standard of living adequate for health and well-being and Article 12 – the right to be protected from arbitrary interference with privacy, family, home and correspondence.

²⁴ 'Universal Declaration of Human Rights (Adopted 10 December 1948) Resolution 217 A (III)'.

²⁵ Silvia Gonzalez del Pino, 'Rights of Migrant Domestic Workers in Europe' (OHCHR Regional Office for Europe 2011) p.11

<http://www.europe.ohchr.org/Documents/Publications/Study_Domestic_Migrant_webversion.pdf>.

²⁶ 'Universal Declaration of Human Rights (Adopted 10 December 1948) Resolution 217 A (III)' (n 24) art.7.

These rights are inalienable and all United Nations' Member States have to adhere to them. This means an obligation to respect (non-interference with the exercise of these rights), protect (States' duty to hinder private actors and third parties from violating these rights) and fulfil (actively putting forward measures to enable the achievement of human rights).²⁷ As will be shown, Malaysia has only ratified two core UN conventions; nevertheless, the UDHR's fundamental rights should be taken into account by all States.

2.1.2 The International Covenant on Civil and Political Rights

Already in 1986, the Human Rights Committee (HRC) published a General Comment on 'The Position of Aliens under the Covenant'. Therein it is stated that as a general rule and in accordance with its non-discrimination Article 2, the International Covenant on Civil and Political Rights (ICCPR) applies to everyone 'within its territory and subject to its jurisdiction'²⁸ 'irrespective of [...] his or her nationality'²⁹.

Therefore the ICCPR is also relevant to all migrants including those who work in domestic employment especially the following: the rights to peaceful assembly and freedom of association³⁰ because these rights are restricted for foreign workers in Malaysia³¹; the prohibition of slavery, slave trade and forced labour³² which is relevant because both the current and the previous Special Rapporteur on trafficking state that the

²⁷ OHCHR, 'Behind Closed Doors: Protecting and Promoting the Human Rights of Migrant Domestic Workers in an Irregular Situation' (Office of the United Nations High Commissioner for Human Rights 2015) HR/PUB/15/4 p.8

<http://www.ohchr.org/Documents/Publications/Behind_closed_doors_HR_PUB_15_4_EN.pdf>.

²⁸ 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' Art.2 para1.

²⁹ UN Human Rights Committee, 'General Comment No.15: The Position of Aliens Under the Covenant' (UN Human Rights Committee (HRC) 1986) General Comment para.1

<<http://www.refworld.org/docid/45139acfc.html>> accessed 14 June 2016.

³⁰ 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' (n 28) art.21,22.

³¹ local laws and practices restrict migrant workers in Malaysia from being in associations, de facto keeping them from joining unions see Philippa Smales et al., *The Right to Unite: A Handbook on Domestic Worker Rights across Asia* (Asia Pacific Forum on Women, Law and Development (APWLD) 2010) p.47.

³² 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' (n 28) art.8.

situation of some domestic workers can amount to domestic servitude, also in Malaysia³³; fair trial rights³⁴ and an article specific to aliens dealing with expulsion or deportation of international migrants lawfully residing in a State and their right to have their case heard before a ‘competent authority’³⁵ which are lacking in Malaysia for migrant workers³⁶; and the article on equality before the law without any discrimination³⁷ which is being violated when a country excludes domestic workers from its definition of “employee” in its labour laws³⁸.

2.1.3 The International Covenant on Economic, Social and Cultural Rights

Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) discusses the right of everyone to the enjoyment of just and favourable conditions of work. In their most recent General Comment on this article the Committee on Economic, Social and Cultural Rights (CESCR)³⁹ confirms the applicability of this article to all workers including migrant and domestic workers, without discrimination (Art.2 para.2) and for both women and men (Art.3). The document mentions both domestic and migrant workers several times: Firstly in the context of health and safety

³³ referred to in the introduction and Chapter 3 respectively

³⁴ ‘International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.’ (n 28) art.14.

³⁵ *ibid* art.13.

³⁶ see chapter 3.2 in the section about Malaysia’s immigration policies

³⁷ ‘International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.’ (n 28) art.26.

³⁸ Both the US Shadow Report 2013-14 see ‘United Workers Congress & Coalition - Excluded Workers - ICCPR Shadow Report 2013-4’ p.327. and the Concluding observations on the fourth periodic report of the United States of America see UN Human Rights Committee, ‘Concluding Observations on the Fourth Periodic Report of the United States of America’ (UN Human Rights Committee (HRC) 2014) Concluding Observations CCPR/C/USA/CO/4 para.14. are concerned that the United States of America violates amongst other provisions article 26 of the ICCPR by excluding domestic workers from labour law protection. Malaysia is not party to the ICCPR but with its explicit exclusion of domestic workers from several provisions in its labour act, as will be discussed in Chapter 3.2, it would violate article 26.

³⁹ UN Committee on Economic, Social and Cultural Rights, ‘General Comment No. 23 on the Right to Just and Favourable Conditions of Work (Article 7 of the International Covenant on Economic, Social and Cultural Rights)’ (UN Committee on Economic, Social and Cultural Rights (CESCR) 2016) General Comment E/C.12/GC/23 <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/087/51/PDF/G1608751.pdf?OpenElement>> accessed 16 June 2016.

for pregnant workers.⁴⁰ The obligations of States to ensure accountability, introduce labour inspectorates to monitor working conditions of i.a. domestic workers' workplaces but not to control migration statuses are suggested⁴¹ and the Committee upholds that specific measures might be necessary for domestic workers to be able to enjoy their right to just and favourable conditions of work⁴². The vulnerability of domestic workers to abuse, harassment and, especially for live-in workers, to 'slave-like conditions' are detailed and their rights to decent working conditions, non-discrimination and monitoring are listed.⁴³ Reversely, it is also mentioned that States are required to protect their nationals when they migrate to seek employment abroad, for example through bilateral agreements, including as domestic workers.⁴⁴

Also Articles 8, 9 and 10 are important to domestic workers, as they state the rights to form and join trade unions, to enjoy social security and to be accorded maternity leave which, as will be shown in chapter 3, are afforded to other workers in Malaysia but not those in domestic employment.⁴⁵ The obligation of States to aspire to lessen discrimination according to Article 2 of the covenant is elaborated in the CESCR's General comment No. 20. The Committee reasserts the inseparable significance of non-discrimination to the achievement of all economic, social and cultural rights.⁴⁶

⁴⁰ *ibid* para.26.

⁴¹ *ibid* para.54.

⁴² *ibid* para.42.

⁴³ *ibid* para.47 (f).

⁴⁴ *ibid* para.73.

⁴⁵ Gonzalez del Pino (n 25) p.12.

⁴⁶ UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)' (UN Committee on Economic, Social and Cultural Rights (CESCR) 2009) General Comment E/C.12/GC/20 para.7-10

<<http://www.refworld.org/docid/4a60961f2.html>> accessed 16 June 2016.

2.1.4 The Convention on the Elimination of All Forms of Discrimination against Women

Likewise, article 11 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) establishes States' obligation to ensure equal opportunities for women in employment and with regards to remuneration, social security and safe working conditions.⁴⁷

In 1991, the Committee on the Elimination of Discrimination against Women mentioned domestic work for the first time in a General recommendation in which it recommends to 'measure and value the unremunerated domestic activities of women' and its contribution to development and the gross national product.⁴⁸ This was also a first important step towards the recognition of domestic work as paid work.⁴⁹

A more recent General Recommendation, No. 26 on women migrant workers, makes a distinction of obligations depending on the role of a State as country of origin, transit or destination which is particularly interesting to migrant domestic workers and the thesis at hand. The Committee reminds that migration policies always need to be in line with human rights obligations and that female migration has to be viewed through the gender lens if discrimination, exploitation and abuse are to be tackled successfully.⁵⁰ It very specifically details the risks for female migrant (domestic) workers inter alia through abusive recruitment agencies and employers, gender-specific discrimination, financial disadvantages, health issues and legal disadvantages.⁵¹ Amongst the responsibilities the

⁴⁷ 'Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, Entered into Force 3 September 1981) 1249 UNTS 13.'

⁴⁸ UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 17: Measurement and Quantification of the Unremunerated Domestic Activities of Women and Their Recognition in the Gross National Product, Adopted at the Tenth Session' (UN Committee on the Elimination of Discrimination Against Women (CEDAW) 1991) General Recommendation A/46/38 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=453882a322&skip=0&query=CEDAW&querysi=CEDAW%2017&searchin=title&sort=relevance>> accessed 19 June 2016.

⁴⁹ Gonzalez del Pino (n 25) p.13.

⁵⁰ UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 26 on Women Migrant Workers' (UN Committee on the Elimination of Discrimination Against Women (CEDAW) 2008) General Recommendation CEDAW/C/2009/WP.1/R p.4 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4a54bc33d&skip=0&query=CEDAW%2026&querysi=General%20Recommendation%2026&searchin=title&sort=relevance>> accessed 19 June 2016.

⁵¹ *ibid* p.5-8.

Committee sees for countries of origins are awareness-raising and pre-departure training, regulating and monitoring recruiting and employment agencies, legal and administrative assistance as well as diplomatic and consular protection and the facilitation of the right to return.⁵² Countries of destination should lift discriminatory restrictions on immigration such as bans on pregnancy, ensure legal protection such as recognising domestic work in their labour laws and afford access to remedies, including more flexibility regarding migrant workers' migration status whilst processing cases of abuse. Furthermore countries should make sure that migrant domestic workers' travel documents are not seized and protect them from forced seclusion. Recruitment agencies and all relevant State and non-State actors in contact with the women, should be supported through mandatory awareness-raising programmes and agents are to be monitored. Appropriate services must be available for victims of abuse.⁵³

The Committee on the Elimination of Discrimination Against Women recommends for all sending and receiving States to enter into bilateral, multilateral or regional agreements or memorandums of understandings to protect the human rights of women migrant workers.

2.1.5 International Convention on the Elimination of All Forms of Racial Discrimination

Also the treaty body of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) has published a General Recommendation relevant to migrant domestic workers. The Committee on the Elimination of Racial Discrimination (CERD) in its General Comment No. 30 on Discrimination Against Non Citizens reminds of the equality of all humans and warns about racism and discrimination especially against migrants amongst others. The Committee reaffirms States' obligation to ensure everyone's right to enjoy civil, political, economic, social and cultural rights, without discrimination under Article 5 of the Convention. In paragraph 34, CERD urges States to

⁵² *ibid* p.9-10.

⁵³ *ibid* p.11-13.

implement measures against the acute problems non-citizen workers, especially in domestic work, have to endure, ‘including debt bondage, passport retention, illegal confinement, rape and physical assault’.⁵⁴

2.1.6 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

In 2003, the United Nations Convention on Migrants’ Rights (ICRMW) entered into force.⁵⁵ This convention should be increasingly relevant seen as the numbers of international migrants have risen from 173 million in 2000 to 244 million in 2015,⁵⁶ but has up to now only been ratified by 48 UN members.⁵⁷ However, the Migrant Workers Committee (CMW) has made migrant domestic workers the topic of its first General Comment. Even though a limited number of countries are State Party to the Covenant, such documents can provide guidance to States all around the world and can be of help to understand the complex situation of this specific group.⁵⁸ In this recommendation they call distinguishing between migrant domestic workers and other migrant workers a violation of the ICRMW and give detailed accounts of their specific problems and the gaps in protection. Furthermore the *Recommendations to State parties* form valuable and comprehensive guidelines for States of employment and States of Origin of women migrant domestic workers.⁵⁹

⁵⁴ Committee on the Elimination of Racial Discrimination, ‘General Recommendation XXX on Discrimination Against Non Citizens’ (Committee on the Elimination of Racial Discrimination (CERD) 2002) General Comment <<http://www.refworld.org/docid/45139e084.html>> accessed 22 June 2016.

⁵⁵ ‘United Nations Convention on Migrants’ Rights: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families - Information Kit’ (UNESCO 2005) p.5 <<http://unesdoc.unesco.org/images/0014/001435/143557e.pdf>>.

⁵⁶ ‘International Migration Report 2015: Highlights’ (United Nations, Department of Economic and Social Affairs, Population Division 2016) ST/ESA/SER.A/375 p.1.

⁵⁷ ‘OHCHR Dashboard for Status of Ratification’ <<http://indicators.ohchr.org/>> accessed 22 May 2016.

⁵⁸ Gonzalez del Pino (n 25) p.15.

⁵⁹ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, ‘General Comment No.1 on Migrant Domestic Workers’ (Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW) 2011) General Comment CMW/C/GC/1 <http://www2.ohchr.org/english/bodies/cmw/docs/GC_Domestic_Workers.doc> accessed 21 June 2016.

2.1.7 International Convention on the Rights of the Child

A 2012 ILO fact sheet on child labour in domestic work estimates that 17.2 million children between the age of 5 and 17 toil in the field of domestic work; for 5 to 14 year olds this number still stands at 11.2 million. Over 2/3 of them are girls and this gender gap widens with age, reaching nearly 4/5 for 15-17 year olds.⁶⁰

Some of the articles of the International Convention on the Rights of the Child (CRC)⁶¹ often violated when children become domestic workers are non-discrimination (art 2), to be cared for by his or her parents (art 7), not being separated from and keeping in contact with parents (art 9), freedom of expression (art 13) and freedom of association (art 15), upbringing and development in the best interest of the child by parents or guardians (art 18), protection from physical or mental ill-treatment, neglect or exploitation (art 19), adequate living conditions necessary for a child's development (art 27), education (art 28), rest, leisure, play and recreation (art 31). Furthermore, children need to be protected from economic exploitation, hazardous work and interference with their education (art 32), from all forms of sexual exploitation and sexual abuse (art 34), from abduction, sale or trafficking (art 35) and from cruel or degrading treatment, and arbitrary deprivation of liberty (art 37).⁶²

Another way in which the CRC is relevant is regarding children of migrant domestic workers: Article 3 states that the best interests of the child have to be at the core of all considerations regarding children and a separation of children from their parents should be avoided whenever possible (art 9). Moreover, in article 18 it is set out that children of working parents are entitled to child-care facilities and States are to take measures to ensure this right.⁶³

⁶⁰ International Programme on the Elimination of Child Labour (IPEC), 'Child Domestic Work: Global Estimates 2012' (International Labour Office (ILO) 2013) Fact Sheet p.2-3

<<http://www.ilo.org/ipecinfor/product/download.do?type=document&id=23235>> accessed 23 June 2016.

⁶¹ 'Convention on the Rights of the Child (CRC) (Adopted 20 November 1989, Entered into Force 2 September 1990) 1577 UNTS 3.'

⁶² Bharati Pflug, 'An Overview of Child Domestic Workers in Asia' (International Programme on the Elimination of Child Labour (IPEC) 2002) Annex 1

<<http://www.ilo.org/public/english/region/asro/bangkok/download/cdwasia-paper.pdf>> accessed 23 June 2016.

⁶³ Gonzalez del Pino (n 25) p.16.

2.2 International Labour Standards

The International Labour Organisation (ILO) is ‘the only tripartite U.N. agency, [bringing] together governments, employers and workers representatives of 187 member States, to set labour standards, develop policies and devise programmes promoting decent work for all women and men’.⁶⁴ Already in 1965 the ILO published a resolution on domestic workers⁶⁵ and the organisation asserts that all ILO labour Conventions and Recommendations include domestic workers in the scope of their definition of workers, except when it is stated otherwise⁶⁶. Several treaties are especially relevant to Migrant Domestic Worker and some of which will be discussed in the following:

2.2.1 Migration for Employment Convention and Supplementary Provisions

The Migration for Employment Convention from 1949⁶⁷, as all main UN treaties, underlines the principle of non-discrimination. It specifies that ‘nationality, race, religion or sex’ are no reasons to exclude immigrants from any domestic laws regarding employment conditions such as remuneration, hours of work, overtime arrangements, etc., nor freedom of association or social security.⁶⁸ This treaty asks member States to assist international migrant workers with accurate information, by providing health services and possibilities for money transfers.⁶⁹ In 1975, a Supplement to the Migrant

⁶⁴ ‘About the ILO’ (*International Labour Organisation*) <<http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>> accessed 25 June 2016.

⁶⁵ Gonzalez del Pino (n 25) p.17.

⁶⁶ International Labour Conference (ed), *Decent Work for Domestic Workers:: Fourth Item on the Agenda. 1: [...] (1 ed, Internat Labour Off 2009)* p.16.

⁶⁷ ‘Migration for Employment Convention (Revised) (Adopted 1 July 1949, Entered into Force 22 January 1952) C097, ILO’.

⁶⁸ *ibid* Art 6.

⁶⁹ ‘International Labour Standards on Migrant Workers’ <<http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/migrant-workers/lang--en/index.htm>> accessed 24 May 2016.

Workers Convention⁷⁰ was adopted which includes the ‘general obligation to respect the basic human rights of all migrant workers’. ‘[T]he scope of equality between legally resident migrant workers and national workers’ was extended to ‘ensure equality of opportunity and treatment in respect of employment and occupation’ as well as ‘cultural rights and individual and collective freedoms’.⁷¹

There are also other ILO Conventions concerning migrant workers, however, the main underlying aim can be said to be the ‘equality of treatment of nationals and migrants’.⁷²

2.2.2 Domestic Workers Convention and Recommendation

‘A Landmark Victory for Domestic Workers’⁷³ is the title of the Human Rights Watch report on the adoption of the ILO Convention 189 Concerning Decent Work for Domestic Workers adopted in 2011⁷⁴. For the first time, this trade carried out by an estimated 50 to 100 million people around the globe who are mainly women and girls, is recognised as formal work by an international treaty.⁷⁵

Article 10.1 of the ILO Domestic Workers Convention (C189) reads as follows:

Each Member shall 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.⁷⁶

⁷⁰ ‘Migrant Workers (Supplementary Provisions) Convention (Adopted 24 June 1975, Entered into Force 9 December 1978) C143, ILO’.

⁷¹ ‘International Labour Standards on Migrant Workers’ (n 69).

⁷² Noeleen Heyzer and others (eds), *The Trade in Domestic Workers Causes, Mechanisms, and Consequences of International Migration* (APDC ; Zed Books 1994) p.162.

⁷³ ‘World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch’ <<https://www.hrw.org/world-report/2012/country-chapters/global-0>> accessed 24 May 2016.

⁷⁴ ‘Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO’.

⁷⁵ ‘World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch’ (n 73).

⁷⁶ ‘Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO’ (n 74) Art 10.

Convention C189 together with the Domestic Workers Recommendation (R201) sets out standards to protect all domestic workers, regardless if they are migrants or nationals⁷⁷. Domestic workers should be given information about terms and conditions, preferably in a written contract (art.7), which in the case of migrants should be received before entering the country of employment and valid therein (art.8.1.). Cooperation between countries of origin and destination countries through bi- and/or multilateral agreements should be reached in order to regulate private employment agencies⁷⁸ and to generally enforce migrant domestic workers rights and further the implementation of the Domestic Workers Convention and Recommendation⁷⁹. Article 15 (e) specifies that agency fees should not be taken out of domestic workers' salaries as is currently common practice in many places.⁸⁰

Other key provisions as summarised by the Human Rights Watch report on Convention C189 include:

- Article 3: **ILO fundamental principles:** 1) freedom of association; 2) elimination of forced labour; 3) abolition of child labour; 4) elimination of discrimination
- Article 4: **protections for children**
- Article 5: **protection from abuse**
- Article 6: **fair terms of employment**, decent working conditions, and decent living conditions if living at the workplace
- Article 9: **prohibits confinement** and withholding of passports/identity documents
- Article 10: **equal treatment with other workers** with regards to hours of work, overtime pay, and rest periods, taking into account the special characteristics of domestic work;
- Article 11: **minimum wage coverage** where it exists

⁷⁷ *ibid* Art.2 para1.

⁷⁸ *ibid* Art.15.

⁷⁹ 'Domestic Workers Recommendation (Adopted 16 June 2011) R201, ILO' Para.26.

⁸⁰ OHCHR (n 27) p.9.

- Article 12: **payment at least once a month**
- Article 13: **safe and healthy working environment**
- Article 14: **social security, including maternity protection**
- Article 16: **effective access to courts**
- Article 17: effective and accessible **complaints mechanisms, measures for labour inspections, and penalties**⁸¹

In Chapter 5, some articles of the ILO Convention 189 will be used to analyse and compare differences in the circumstances of Cambodian, Indonesian and Filipino migrant domestic workers in Malaysia.

⁸¹ ‘The ILO Domestic Workers Convention: New Standards to Fight Discrimination, Exploitation, and Abuse | Human Rights Watch’ p.7
 <https://www.hrw.org/sites/default/files/related_material/2013ilo_dw_convention_brochure.pdf>
 accessed 27 June 2016.

2.3 Overview of international legal framework per country

Now that it has been established which international conventions, comments and recommendations are relevant to migrant domestic workers, it is interesting which ones have been ratified by Malaysia, Cambodia, Indonesia and the Philippines.

Table 1 Ratification of International Treaties by Country

	Malaysia	Cambodia	Indonesia	Philippines
ICCPR	✗	✓	✓	✓
ICESCR	✗	✓	✓	✓
CEDAW	✓	✓	✓	✓
ICERD	✗	✓	✓	✓
ICRMW	✗	signed	✓	✓
ICRC	✓	✓	✓	✓
C097	✗	✗	✗	✓
C143	✗	✗	✗	✓
C189	✗	✗	✗	✓
<div style="text-align: right;">✓ ratified ✗ not ratified</div>				
Source: OHCHR Dashboard for Status of Ratification ⁸²				

The only treaties Malaysia has ratified are CEDAW and CRC whereas Cambodia and Indonesia are party to all relevant UN treaties (except Cambodia has only signed not ratified the ICRMW) and the Philippines have ratified all the Conventions discussed above including the ones concerning international labour standards. Once the foreign domestic workers are on Malaysian territory and under Malaysia's jurisdiction, it is legally speaking of relatively little significance that the home States have a high degree of ratifications, however, if sending countries are committed to the international framework for the rights of migrant domestic workers, this might still play a role in the protection they afford their nationals when working abroad. Furthermore, recommendations and comments by international treaty bodies can still be valid as

⁸² 'OHCHR Dashboard for Status of Ratification' (n 57).

guidelines and good practices, also for countries not party to them and can be a useful tool to civil society organisations.

The Philippines was one of the leading countries on the way to the adoption of the Domestic Workers Convention and also ratified it very early on. Neither Malaysia nor Cambodia or Indonesia have ratified the Domestic Workers Convention. However, Indonesia was one of the countries which after first being opposed to a legally binding convention, eventually voted in favour of its adoption⁸³. Malaysia was one of the only nine countries out of 183 member States who voted against⁸⁴. The ILO has a unique setup consisting of workers' groups, employers' groups and governments, which all have a vote. This allows for real inclusive debate. Even though the treaty has so far just over 20 ratifications⁸⁵, the discussion leading up to its adoption and its entry into force have raised awareness and are accelerating a change in perception of domestic labour away from informal work towards an acknowledgement as formal work.⁸⁶

⁸³ 'World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch' (n 73) p.6.

⁸⁴ *ibid* p.7.

⁸⁵ 'ILO Ratifications of C189 - Domestic Workers Convention'

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460> accessed 27 June 2016.

⁸⁶ 'World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch' (n 73).

3. The State of Domestic Employment in Malaysia

Ms. Gulnara Shahinian, Special Rapporteur on contemporary forms of slavery from 2008-2014, stated in a 2010 report to the Human Rights Council on domestic workers that '[m]any countries specifically exclude domestic workers from the protection of their labour laws or fail to enforce existing laws', and that in some countries a restriction of their freedom of movement and communication is tolerated. This seclusion 'interferes with their human rights thereby turning domestic work into domestic servitude'. This includes child and migrant workers.⁸⁷

As we will see, Malaysia is one of the many countries where domestic workers are excluded from most provisions of the national labour law, regardless of their being nationals or not. Live-in workers' freedom of movement is often restricted and wages, working hours, rest or holiday days are not regulated for domestic workers. They are vulnerable to exploitation and physical, mental and sexual abuse because of this lack of legislation but also because of discrimination on the basis of sex and race.

'Globally, one in every 13 female wage earners are employed in domestic work.'⁸⁸

The ILO has figures to prove that there are around 52.6 million people employed in domestic work, however, they estimate that this number could in reality be as high as 100 million.⁸⁹

Moreover, their research shows that 83 % of domestic workers are female and that there is also a further gender division within. Men counted in the category of domestic work more commonly perform tasks as gardeners, gatekeepers, watchmen, drivers etc. whereas women typically conduct work as "housemaids/servants".⁹⁰ This work contains varied

⁸⁷ 'From Domestic Work to Modern Day Slavery'

<<http://www.ohchr.org/EN/NewsEvents/Pages/Domesticworkslavery.aspx>> accessed 22 May 2016.

⁸⁸ International Labour Organisation, 'Who Are Domestic Workers?'

<http://www.ilo.org/global/docs/WCMS_209773/lang--en/index.htm> accessed 14 May 2016.

⁸⁹ Yamila Simonovsky, Malte Luebke and Conditions of Work and Employment Programme (TRAVAIL), 'Global and Regional Estimates on Domestic Workers (Domestic Work Policy Brief No. 4)' (International Labour Organization (ILO)) p.6 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_155951.pdf> accessed 3 July 2016.

⁹⁰ *ibid* p.4.

duties such as cleaning and cooking and functions such as caring for elderly people and children.⁹¹

Considering that work in this sector is carried out mainly by women it will also be important to look at the provisions dealing with discrimination on basis of gender in Malaysia. The deep-rooted gendered concept that work carried out in private households should not be interfered with by government, aids a system which sees very limited regulations for this line of work.⁹²

It is estimated that 300,000 - 400,000 migrant domestic workers are currently working in Malaysia.⁹³ This is a big proportion of the over 2 million documented migrant workers and approximately 1 million who are not registered (figures as of 2014).⁹⁴ According to a 2015 World Bank report⁹⁵ on the impact of immigrant labour on Malaysia, migrant labour has had a positive impact on the development of the country's economy. Industrialisation and an increase in the education levels of nationals mean that Malaysians have moved more into high-skilled occupations whilst gaps appeared in labour-intensive, low-skilled jobs, also known as 3D jobs (dirty, dangerous and demeaning).⁹⁶ The study further attributes a 1.1 per cent increase in Malaysia's GDP directly to immigration. With low unemployment and migrant workers who bring complementary skills to the country, immigrant labour poses no threat to the local workforce. Projections show that countries like Malaysia, which have an increasingly well educated population, usually benefit from immigration.⁹⁷

⁹¹ *ibid* p.2.

⁹² ILO Regional Office for Asia and the Pacific (n 18) p.22.

⁹³ *ibid* p.21.

⁹⁴ The World Bank, 'Malaysia Economic Monitor, December 2015 - Immigrant Labor' (1 December 2015) <<http://www.worldbank.org/en/country/malaysia/publication/malaysia-economic-monitor-december-2015-immigrant-labour>> accessed 14 July 2016.

⁹⁵ Southeast Asia Country Management Unit, 'Malaysia Economic Monitor - Immigrant Labour' (The World Bank 2015) 102131.

⁹⁶ *ibid* p.28.

⁹⁷ *ibid* p.39-40.

Although migrant workers have proven crucial for the country's economy and development, Malaysian policies have been directed towards the reduction of foreign workers.⁹⁸ This has led to sectorial labour shortages and an increase in undocumented migrant workers. Political leaders and popular media alike have resorted to anti migrant rhetoric and portrayed them as contributors to national social problems, like rising street crime etc. This has led to an atmosphere where many Malaysians have adopted a xenophobic and hostile stance towards foreign workers. The government seems to formulate policies with immigration control and national security in mind, rather than economic and social considerations, and even less the wellbeing of the migrants. This fosters exploitation and abuse which is socially accepted in parts of society.⁹⁹

Ironically it is proven that working conditions and wages for the whole workforce deteriorate when labour standards are not 'enforced equally on local and foreign workers'. Furthermore, unequal treatment of foreign workers can lead to an increase in informality.¹⁰⁰

In Malaysia, housework and looking after children or elderly family members is still very much seen as women's work. There is a lot of public debate over whether or how much men should "help" in the household. The pressure to prioritise house- and care work partly accounts for women's low participation in the labour market which was only 52.4 per cent in 2013.¹⁰¹ In comparison, the ILO estimates the average in the East Asian and Pacific region at 70 per cent.¹⁰² However, more Malaysian women are joining the labour market and together with an increase in the population of over 65 year olds, demand for

⁹⁸ Domestic workers are an exception; they are encouraged to seek employment in Malaysia, however, they still suffer from the general anti migrant rhetoric and politics.

⁹⁹ ILO Regional Office for Asia and the Pacific (n 18) p.2-3.

¹⁰⁰ Southeast Asia Country Management Unit (n 95) p.70-71.

¹⁰¹ Boo Su-Lyn, 'The Wrong Debate on Women at Work' *Malay Mail Online* (9 January 2015) <<http://www.themalaymailonline.com/print/opinion/boo-su-lyn/the-wrong-debate-on-women-at-work>> accessed 15 July 2016.

¹⁰² Southeast Asia Country Management Unit (n 95) p.30.

foreign domestic workers is growing.¹⁰³ Indeed, they can actually aid higher skilled Malaysian women to be able to (re-) enter the workforce.¹⁰⁴

3.1 Malaysia's obligation under international law

Malaysia's obligations under CEDAW

CEDAW is one of the few international treaties ratified by Malaysia, even though they made several reservations including a general provision for the Convention to 'not conflict with the provisions of the Islamic Sharia' law and the Federal Constitution of Malaysia'¹⁰⁵. According to Article 2 of CEDAW, States Parties 'condemn discrimination against women in all its forms' and 'agree to pursue [...] without delay a policy of eliminating discrimination against women' including 'by any person, organization or enterprise'¹⁰⁶.

The Malaysian Constitution's Article 8 guarantees equality before the law and non-discrimination. According to Art.8(2) 'there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law relating to [...] carrying on of any trade, business, profession, vocation or employment.'¹⁰⁷ After lobbying from Malaysian women's groups¹⁰⁸ the term "descent, or place of birth" was replaced by "descent, place of birth or *gender*" (emphasis added) in 2001¹⁰⁹.

Malaysia fails to follow through with these non-discrimination clauses in its domestic legislation by treating domestic work, which is almost entirely carried out by women,

¹⁰³ ILO Regional Office for Asia and the Pacific (n 18) p.21.

¹⁰⁴ Southeast Asia Country Management Unit (n 95) p.30.

¹⁰⁵ 'OHCHR Dashboard for Status of Ratification' (n 57) Malaysia, Declarations. (ratified 1995)

¹⁰⁶ 'Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, Entered into Force 3 September 1981) 1249 UNTS 13.' (n 47) Art 2.

¹⁰⁷ 'Constitution of Malaysia, Article 8: Equality Before the Law and Non-Discrimination' <<https://berkeleycenter.georgetown.edu/quotes/constitution-of-malaysia-article-8-equality-before-the-law-and-non-discrimination>> accessed 28 June 2016.

¹⁰⁸ For example by the Women's Aid Organisation (WAO) in Gender Discrimination & The Federal Constitution (19 June 2001) and "Sex" & Article 8(2) of The Federal Constitution (6 September 2001) <<http://www.wao.org.my/news.php?s=80&id=0&lang=1&category=press>>

¹⁰⁹ Federal Constitution (MY) Reprint 2010 Note to Art.8.

differently from general labour in its laws and by failing to provide proper protection from exploitation and abuse of foreign domestic workers by employers and other stakeholders involved. As local scholar and member of the Malaysian Bar Salibiah Ahmad states in an Essay on 'Gender Equality under Article 8', gender equality 'is shaped [...] by social constructions on sex differences [as well as] class, race and ethnicity' but the State also plays a role in 'constructing ideologies and relations of power'.¹¹⁰ She continues to examine how the Malaysian government does not show enough commitment to eliminate structural discrimination. She brings examples of several Malaysian court cases in which Article 8 has not been interpreted in a way that conforms to international standards in discrimination case law. Furthermore, she points out that CEDAW provides the obligation for State parties to take the necessary steps to realise women's equality de facto and not only in its laws¹¹¹ whereas the Malaysian government does not even guarantee these rights de jure by explicitly excluding domestic workers from most of its Employment Act. It is not within the scope of this paper to discuss the implications of Islam on the gender aspect of Article 8 of the Malaysian Constitution, however, as Islam is the official religion¹¹², it needs to be noted that there are many arguments in favour of the view expressed by Salibiah Ahmad that in Islam 'sexual difference does not call for discriminatory treatment' and does not clash with gender equality and justice as set out in CEDAW and other international human rights law.¹¹³

A coalition of Malaysian women's organisations, Joint Action Group (JAG), points out that employment rights of migrant domestic workers are also curtailed concerning their reproductive rights. Article 11(2) of CEDAW calls for measures against discrimination of women 'on the grounds of pregnancy or of maternity' whereas Malaysia's immigration policy does not give work permits to pregnant foreigners and revokes the permit of migrant workers if they become pregnant. Furthermore, foreign workers are banned from

¹¹⁰ Salbiah Ahmad, 'Gender Equality under Article 8: Human Rights, Islam and "Feminisms"' (The Malaysian Bar 2005) p.3

<http://www.malaysianbar.org.my/gender_issues/gender_equality_under_article_8_human_rights_islam_and_feminisms_by_salbiah_ahmad.html> accessed 28 June 2016.

¹¹¹ *ibid* p.5-7.

¹¹² Federal Constitution (MY) Reprint (n 109).

¹¹³ Ahmad (n 110) p.12-14.

marrying in Malaysia and are denied the right to bring any of their family members into the country.¹¹⁴

Additionally, the CEDAW Committee also defines gender-based violence as a form of discrimination when women cannot enjoy their basic rights and freedoms because of their gender and where women are disproportionately affected.¹¹⁵ It can be derived therefrom that exploitation and abuse of domestic workers fall within gender-based violence.¹¹⁶ It will be shown that there is little to no protection from violence against migrant domestic workers in national labour or immigration laws. As this violence usually takes place in the confines of private homes, it is disappointing that the 1994 Domestic Violence Act also implicitly excludes domestic workers because they are not family members as such.¹¹⁷

In 2006, Malaysia reported to the CEDAW Committee for the first time. In its Concluding Observation the Committee expressed concern that the Convention has not been incorporated into Malaysian law. Albeit the Malaysian government's failure to submit any further outstanding reports since its first submission in 2006, local NGOs have produced a comprehensive alternative report on Malaysia's progress on the Committee's recommendations.

Even though the Malaysian constitution's discrimination clause has been extended to include gender, no domestic legislation actually defines discrimination against women or

¹¹⁴ Joint Action Group for Gender Equality (JAG), 'Response to the Ministry of Human Resources (MOHR) on the Holistic Review of the Employment Act 1955, Industrial Relations Act 1967, and Trade Unions Act 1959 (and All Labour Laws)' (Women's Aid Organisation (WAO) 2015) p.10-11.

¹¹⁵ UN Committee on the Elimination of Discrimination Against Women, 'General Recommendation No. 19: Violence against Women' (UN Committee on the Elimination of Discrimination Against Women (CEDAW) 1992) General Recommendation para 6,7 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=52d920c54&skip=0&query=CEDAW%20General%20Recommendation%20No.%20%2019>> accessed 6 July 2016.

¹¹⁶ Alice Huling, 'Domestic Workers in Malaysia: Hidden Victims of Abuse and Forced Labor' (2011) 44 NYUJ Int'l L. & Pol. 629, p.660.

¹¹⁷ *ibid* p.651.

the principle of equality between men and women nor does it encompass suitable sanctions or remedies.¹¹⁸ Very little has been done by the government to change this.¹¹⁹ Another issue pointed out is ‘the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and men in the family and society’ which is detrimental, amongst other areas, to women’s role in the labour market.¹²⁰ Following recommendations to review all reservations to the Convention¹²¹, Malaysia withdrew some of them, including article 5(a), in 2010. This article speaks about the modification of ‘social and cultural patterns of conduct of men and women’ with the aim to eliminate prejudices and customs ‘based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women’.¹²² However, polygamous marriages and obligatory circumcision for Muslim women are legal in Malaysia; these practices are in breach of this article.¹²³ In politics and wider society derogatory sexist language prevails and when the prime minister and other politicians speak about women’s participation in the work force, they emphasise the duties women have as mothers and carers for the family and how this role has priority over their careers.¹²⁴ The committee concedes that there are some efforts to increase women’s participation in the labour market, however, these do not mirror their education level and more needs to be done to counter stereotypes.¹²⁵ Any measures such as flexible work hours, working from home or

¹¹⁸ UN Committee on the Elimination of Discrimination Against Women, ‘Concluding Comments of the Committee on the Elimination of Discrimination against Women: Malaysia’ (UN Committee on the Elimination of Discrimination Against Women (CEDAW) 2006) Concluding Observations CEDAW/C/MYS/CO/2 para.7,8 <<http://www.refworld.org/publisher,CEDAW,,MYS,453778438,0.html>> accessed 25 June 2016.

¹¹⁹ Women’s Aid Organisation (WAO) (ed), *CEDAW & MALAYSIA: Malaysian Non-Government Organisations’ Alternative Report Assessing the Government’s Progress in Implementing the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)* (Women’s Aid Organisation 2012) p.25-27.

¹²⁰ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW Concluding Comments: Malaysia’ (n 118) para.3.

¹²¹ *ibid* para.10.

¹²² ‘Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, Entered into Force 3 September 1981) 1249 UNTS 13.’ (n 47) art.5(a).

¹²³ Women’s Aid Organisation (WAO) (n 119) p.27,28.

¹²⁴ *ibid* p.31,32.

¹²⁵ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW Concluding Comments: Malaysia’ (n 118) para.19,20.

child care target ‘mothers’ rather than speaking of ‘parents’ which would send the message that childrearing is the responsibility of both women and men.¹²⁶

Migrant domestic workers are specifically included in the Committee’s recommendations regarding migrant workers’ rights: Malaysia is called upon to introduce comprehensive laws and effective procedures to safeguard these rights, including the right to redress and to legally remain in the country during the process.¹²⁷ However, the Malaysian government repeatedly gives the impression that their opinion is that domestic work should not be of equal standing with other work.¹²⁸ We will see in more detail below, how this is reflected in Malaysia’s domestic law. As mentioned earlier, Malaysia is to date party only to CEDAW and the CRC. The Committee emphasises that in order for women to enjoy ‘their human rights and fundamental freedoms in all aspects of life’ all seven major UN treaties are relevant and therefore encourages Malaysia to become member as well of the ICESCR, the ICCPR, the ICERD, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the ICRMW.¹²⁹

3.2 Malaysia’s domestic law¹³⁰

3.2.1 Labour Law

PART XIIB of the Employment Act 1955 grants foreign workers under a valid temporary working visa (Visit Pass Temporary Employment) to enjoy the labour laws in force in

¹²⁶ Women’s Aid Organisation (WAO) (n 119) p.34,35.

¹²⁷ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW Concluding Comments: Malaysia’ (n 118) para.19,20.

¹²⁸ Women’s Aid Organisation (WAO) (n 119) p.37-39.

¹²⁹ UN Committee on the Elimination of Discrimination Against Women, ‘CEDAW Concluding Comments: Malaysia’ (n 118) p.35.

¹³⁰ Only some Malaysian laws will be discussed as deemed necessary for the discussion of foreign domestic workers in this paper. A list of Malaysian Law relevant to the employment of foreign workers according to the Malaysian Employers Federation’s Practical Guidelines for Employers, 2014 is as follows:

Anti Trafficking In Persons and Smuggling of Migrant 2007

Employment Act 1955

Trade Union Act 1959

Industrial Relations Act 1967

Immigration Act 1959/63

Malaysia.¹³¹ In theory, regular migrant workers are entitled to ‘equality of treatment’ with Malaysian citizens ‘in terms of wages, work hours, holidays, termination, non-discrimination, freedom of association, access to complaint mechanisms’ etc. as stipulated in the Employment Act 1955 and other Malaysian labour legislation applicable to migrant workers.¹³² In reality, however, the Ministry of Human Resources (MOHR) lacks the means to enforce labour inspections and for domestic work, as it takes place in private homes, they are not foreseen at all.¹³³ Also the complaint mechanisms remain ineffectual, especially for migrants, seen as a complainant has to stay in the country throughout the whole process according to Malaysian law¹³⁴ and the length of time these proceedings takes. In such cases a “Special Pass” can be issued for a maximum of three months so that migrant workers can remain in the country, however, most cases take at least six month and the claimants are not allowed to work during this time. MOHR is currently trying to reduce the duration per case to three months; it remains to be seen if that directive will prove effective.¹³⁵

For domestic workers, the Employment Act holds very limited protection. They are not contained in the definition of “employee” and rather listed separately as ‘domestic servant’¹³⁶ and excluded from the most basic provisions of the law¹³⁷ such as ‘work hours, rest days, public holidays, annual leave, sick leave, maternity leave and severance benefits’. Other provision which domestic workers do not enjoy are, ‘minimum wage rules, social security coverage, mandatory medical insurance and workers’ compensation benefits’.¹³⁸

Workmen Compensation Act 1952

Occupational Safety and Health Act 1994

National Wages Consultative Council Act 2012

¹³¹ Employment Act (MY) 1955 Amendment 2012 2012 (Act 265).

¹³² ILO Regional Office for Asia and the Pacific (n 18) p.5.

¹³³ *ibid* p.5 Box 1.

¹³⁴ Jyotsna Poudyal and Nisha Varia, *‘They Deceived Us at Every Step’: Abuse of Cambodian Domestic Workers Migrating to Malaysia* (Human Rights Watch 2011) p.74.

¹³⁵ ILO Regional Office for Asia and the Pacific (n 18) p.6,p.8.

¹³⁶ Employment Act (MY) 1955 Amendment 2012 (n 131).

¹³⁷ *ibid* First Schedule [Subsection 2(1)] 2.(5).

¹³⁸ ILO Regional Office for Asia and the Pacific (n 18) p.21.

The rights to organise, collective bargaining and becoming members of trade unions are in actual fact also hard to enjoy for migrant workers (and often nationals too). Even though the Malaysian Trade Union Congress (MTUC) and other organisations put forth efforts to provide access to trade unions and legal assistance, not least to prevent worsening conditions of work for all workers, the prevailing system of delaying tactics and intimidation deters rather than encourages migrants to take up these offers.¹³⁹ The MTUC has submitted two applications to register a ‘Domestic Workers Association’ but both have been turned down with no explanation given and a 2014 appeal has not yet been processed.¹⁴⁰

The Private Employment Agencies Act 1981, regulates private employment agencies in terms of required licenses, the fees they can charge, the information they need to provide and states that it is an offence to deceive workers or to place them into an occupation ‘injurious or immoral’.¹⁴¹ However, the Joint Action Group for Gender Equality finds that these standards are not sufficiently enforced and agencies need to be inspected and persecuted and their licenses revoked when they do not comply with the Act.¹⁴²

The Private Employment Agency Act was initially introduced to regulate agencies who recruit Malaysian nationals either for work within the country or abroad. Therefore it is inadequate for dealing with the prevailing situation which sees agencies dealing more with foreign migrant workers entering Malaysia. A draft of new legislation better suited to deal with the recruitment of foreign workers and especially foreign domestic workers has been put forward in 2014 but at the moment it is unclear when this law will be passed.¹⁴³ Besides, the criticism that there was not enough participation of the civil society, workers and employers in the creation of the new Bill has not been taken into account.¹⁴⁴

¹³⁹ *ibid* p.6 Box1.

¹⁴⁰ *ibid* p.22.

¹⁴¹ Private Employment Agencies Act (MY) 1981 2006 (Act 246).

¹⁴² Joint Action Group for Gender Equality (JAG) (n 114) p.10.

¹⁴³ ILO Regional Office for Asia and the Pacific (n 18) p.6.

¹⁴⁴ *ibid* p.25.

As it stands the only provision for domestic workers under Section 57 of the Employment Act 1955 is the inclusion of a 14 days' notice period.

3.2.2 Immigration Law

20 % of the workforce in Malaysia consists of migrant workers.¹⁴⁵ The Immigration Act 1959 lays down the rules for migrant workers, including foreign domestic workers, to enter, stay and work in Malaysia. The Temporary Employment Pass which is the work permit for migrant workers is usually limited to two years, subject to renewal and bound to the employer they work with.¹⁴⁶

Prior to entering Malaysia, every prospective migrant worker has to undergo a medical test. Once in the country, another health screening has to be taken within a month of arrival and then again on a yearly basis for renewal of the working visa.^{147, 148} The Malaysian Government has contracted Unitab Medic Sdn. Bhd., a private limited company, to be in charge of medical testing for foreign workers in Malaysia. Their 15 year contract to operate FOMEMA, the Foreign Workers Medical Examination Monitoring Agency started in 1997 and they are in charge of the mandatory health screening for all migrant workers in the country.¹⁴⁹

According to the Malaysian Employers Federation: "The objectives of the concession are to ensure that foreign workers in Malaysia are free of an identified list of communicable diseases and to ensure that Malaysia's public health facilities are not burdened by foreign

¹⁴⁵ 'Malaysia: Submission to the UN Universal Period Review 17th Session of the UPR Working Group, October – November 2013' (Amnesty International 2013) ASA 28/003/2013 p.7.

¹⁴⁶ Juanita Elias and Jonathon Louth, 'Producing Migrant Domestic Work: Exploring the Everyday Political Economy of Malaysia's "Maid Shortage"' [2016] *Globalizations* 1, p.7.

¹⁴⁷ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, 'The FWCMS Portal' (*FWCMS® - Foreign Workers Centralized Management System*) <<http://www.fwcms.com.my/fwcms-portal.html>> accessed 25 June 2016.

¹⁴⁸ This policy does not apply to professional workers (expatriates). FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, 'FAQ' (*FOMEMA, Prevention & Care*) <<http://www.fomema.com.my/index.php/faq>> accessed 28 June 2016.

¹⁴⁹ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, 'Vision, Mission & Objective' (*FOMEMA, Prevention & Care*) <<http://www.fomema.com.my/index.php/about-us/vision-mission>> accessed 28 June 2016.

workers with medical conditions or diseases that require prolonged and extensive treatment. This includes pregnancy test.”¹⁵⁰

Migrant workers are often not informed of the aim of the vast range of tests they have to undergo including blood and urine samples and other examinations. All they know is that they have to pass the test in order to be deemed fit for receipt or renewal of their work permit.¹⁵¹

The results of the initial tests in some countries of origin, as is the case in Cambodia, are usually withheld by recruitment agencies and not even a copy is given to the workers.¹⁵² Examinations try to detect diseases such as HIV/AIDS, hepatitis, diabetes, tuberculosis, malaria, to name but a few. FOMEMA also check for illicit drug use and psychiatric illnesses.¹⁵³

Medical testing without proper information and explanation of what is being tested are highly problematic and one can hardly talk about informed consent under these circumstances.

In Malaysia even employers can ask to see the full medical report if they produce a written letter of consent by the worker.¹⁵⁴ There seems to be no monitoring system to ensure that this consent notes are given freely.

Human Rights Watch (HRW) is concerned that: ‘Malaysian law requiring testing of HIV and other diseases of migrant workers does not advance public health and may violate human rights.’¹⁵⁵

¹⁵⁰ ‘Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia’ (Malaysian Employers Federation (MEF) 2014) p.41
<http://www.mef.org.my/Att_GeneralNews/MEFReport_PGERPERFWM.pdf> accessed 9 April 2016.

¹⁵¹ Poudyal and Varia (n 134) p.40.

¹⁵² *ibid* p.43.

¹⁵³ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, ‘Medical Screening Process’ (*FOMEMA, Prevention & Care*) <<http://www.fomema.com.my/index.php/medical-screening-process>> accessed 25 June 2016.

¹⁵⁴ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, ‘FAQ’ (n 148).

¹⁵⁵ Poudyal and Varia (n 134) p.40.

As mentioned earlier, for female migrant workers their basic reproductive rights are additionally violated. Women workers are asked for the date of their last menstrual period and tested for pregnancy.¹⁵⁶ FOMEMA charges RM 201.40 for women compared to RM 190.80 (RM = Malaysian Ringgit) for men because of the pregnancy tests.¹⁵⁷ These fees are usually deducted from workers' wages.

In an interview with HRW, one staff of a Cambodian recruitment agencies disclosed that they were told to talk women into terminating their pregnancy and to conceal that they will be charged for the abortion afterwards.¹⁵⁸

Potential migrant workers to Malaysia are not issued with a work permit if they are found to be pregnant and domestic workers' contracts stipulate the termination of their employment if they become pregnant.¹⁵⁹ Moreover, although married Malaysians have access to affordable health care during pregnancy and childbirth, for migrants, especially domestic workers, this is not the case due to social stigma, cost and non-citizenship.¹⁶⁰

It is common practise for employers to confiscate and hold migrant workers' passports which makes them susceptible to abuse.¹⁶¹ Additionally, foreign domestic workers have to live in their employer's home and are not free to choose their own accommodation.¹⁶² The employers are held responsible for their whereabouts and have to sign a 'personal bond' and face paying a fine in case their workers abscond.¹⁶³ Domestic workers often lose their wages and other costs they incurred e.g. advancements, travel costs etc. when they run away from a post. There are no numbers on their financial losses but 105,119

¹⁵⁶ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, 'Medical Screening Process' (n 153).

¹⁵⁷ FOMEMA, the Foreign Workers Medical Examination Monitoring Agency in Malaysia, 'Registration Procedures' (*FOMEMA, Prevention & Care*) <<http://www.fomema.com.my/index.php/registration-procedures>> accessed 28 June 2016.

¹⁵⁸ Poudyal and Varia (n 134) p.40.

¹⁵⁹ Women's Aid Organisation (WAO) (n 119) p.39.

¹⁶⁰ *ibid* p.140.

¹⁶¹ 'Malaysia: Submission to the UN Universal Period Review 17th Session of the UPR Working Group, October – November 2013' (n 145) p.7.

¹⁶² Joint Action Group for Gender Equality (JAG) (n 114) p.9.

¹⁶³ Olivia Killias, "Illegal" Migration as Resistance: Legality, Morality and Coercion in Indonesian Domestic Worker Migration to Malaysia' (2010) 38 *Asian Journal of Social Science* 897, p.905.

foreign domestic workers fled employment between 2008 and 2013 which amassed a cost of around 1 billion Malaysian Ringgit for employers.¹⁶⁴

Work permits lose their validity if the employee resigns or is dismissed from her work place. The fear of ending up in an irregular situation and the loss of income, acts as an effective deterrent with regard to leaving abusive employers, trying to organise for better conditions or filing complaints. What aggravates the situation further is that as these workers live in their employer's home they will also lose their accommodation. Migrants are stopped by police or immigration officers on a regular basis and if they cannot produce a passport and documents proving their legal status, they face arrest.¹⁶⁵ Since 2002, changes to the Act mean that migrants who commit any offence against the immigration laws can be treated as criminals, detained, fined and deported. Even though employers can also be fined, migrants face the bulk of the consequences and much harsher punishments. The alterations were apparently a move to reduce the rising numbers of irregular migrants in Malaysia but have shown no convincing effect.¹⁶⁶ The punishment does not stop at financial penalties or loss of liberty however. Under Article 6(3) of the Immigration Act, persons who are found guilty of being in Malaysia 'illegally' are liable to a fine and/or imprisonment and 'shall also be liable to whipping of not more than six strokes'.¹⁶⁷ The Malaysian government stated that between 2005 and 2010 29,759 migrant workers were caned.¹⁶⁸

Also the 'one stop centres where migrants are detained, tried and punished' in Malaysia for offences against the immigration laws since 2006 have come under heavy criticism by international organisations as well as the Malaysian Bar Council. The courts are not delivering fair trials¹⁶⁹ and the conditions of detention are poor. Furthermore, convicted

¹⁶⁴ ILO Regional Office for Asia and the Pacific (n 18) p.22.

¹⁶⁵ 'Malaysia: Submission to the UN Universal Period Review 17th Session of the UPR Working Group, October – November 2013' (n 145) p.7.

¹⁶⁶ ILO Regional Office for Asia and the Pacific (n 18) p.4.

¹⁶⁷ Immigration Act 1959/63 (MY) Reprint 2006 (Act 155) Art.6(3).

¹⁶⁸ 'Malaysia: Submission to the UN Universal Period Review 17th Session of the UPR Working Group, October – November 2013' (n 145) p.7.

¹⁶⁹ Latheefa Beebi Koya, member of the Malaysian Bar, wrote a comment on the conditions at Semenyih Special Immigration Court where it seems that even workers with valid migration documents can find themselves in unfair trials and sentenced to whipping and detention: Latheefa Beebi Koya, 'Comment: A Court within a Camp - Malaysia Welcomes the World' (The Malaysian Bar 2007)

migrants have to pay for their own deportation costs and if they cannot do so, face lengthy incarceration. There are also cases where migrants are kept imprisoned after they served their sentence when they are requested to act as witnesses at court against a former employer.^{170 171}

The confiscation and withholding of passports is a major issue which restricts migrant workers in several ways and can contribute to situations of domestic servitude and forced labour for foreign domestic workers. Although the Malaysian Passports Act¹⁷² makes it an offence to hold another person's passport without lawful authorisation and despite the repeated reports of this practise and recommendations to enforce this law¹⁷³ this practise continues and is even endorsed by the Malaysian Employers Federation (MEF)¹⁷⁴.

3.3 International reactions and policy development in Malaysia

3.3.1 Reactions by international organisations

Malaysia has been criticised for the repeated and severe abuse cases of foreign migrant workers by several international actors.

In the Report of the Working Group on the Universal Periodic Review 2013 by the UN Human Rights Council on Malaysia, three countries commended that Malaysia has made

<http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=8023> accessed 5 June 2016.

¹⁷⁰ 'Malaysia: Submission to the UN Universal Period Review 17th Session of the UPR Working Group, October – November 2013' (n 145) p.7.

¹⁷¹ ILO Regional Office for Asia and the Pacific (n 18) p.4-5.

¹⁷² Passports Act (MY) 1966 Reprint 2006 (Act150) art.12(1)(f).

¹⁷³ for example in the recent 'Trafficking in Persons Report - July 2015' (Department of State United States of America) p.234 <<http://www.state.gov/documents/organization/245365.pdf>> accessed 7 June 2016.

¹⁷⁴ MEF's example of foreign workers' training programme includes a 'request [...] to *safekeeping* of passport' (emphasis added) 'Practical Guidelines for Employers on the Recruitment, Placement, Employment and Repatriation of Foreign Workers in Malaysia' (n 150) p.45. and a 'sample letter of consent' *ibid* p.49.

Furthermore, the author attended a Roundtable on Migrant Workers' Access to Justice on 6 Nov 2015 in Kuala Lumpur where the MEF spokesperson repeatedly stated that it is MEF's position that migrant workers are unable to look after their own passports because they might lose them or get them stolen and that it is necessary for employers to hold their employees' passports for 'safekeeping'

some progress in protecting migrant workers.¹⁷⁵ However, several recommendations were put forward for Malaysia to increase dignity, protection and safety of migrant workers by creating new and enforcing existing policies and legislation, including with regards to recruitment agencies.¹⁷⁶ Furthermore, it was recommended that Malaysia should increase efforts to investigate abuse cases and strengthen access to justice for migrant workers by prosecuting abusers and by making complaints procedures more accessible.¹⁷⁷ The Philippines also made reference to extending protections to foreign workers' families and Indonesia mentioned conditions of domestic workers specifically, including undocumented migrants.¹⁷⁸ The Malaysian government accepted recommendations regarding improved foreign workers' rights, however, it specified clearly that this is limited to regular migrant workers and is not extended to their families or to undocumented migrants. Moreover, it has no intention to adopt new legislation specific to migrant workers in the near future.¹⁷⁹ Another comment proposing that Malaysia should bring migrant workers' rights in line with international standards¹⁸⁰ was flatly declined.¹⁸¹ The recommendations concerning enhancement and implementation of legislation for migrant workers and recruitment agencies were accepted without exceptions.¹⁸² However, as discussed in chapters 3.1 and 3.2, Malaysia shows no genuine commitment to realise these recommendations.

¹⁷⁵ UN Human Rights Council, 'Report of the Working Group on the Universal Periodic Review : Malaysia' (UN Human Rights Council 2013) A/HRC/25/10 para.87,95,96 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=52f8c4134>> accessed 7 August 2016.

¹⁷⁶ *ibid* rec.146.217, 146.218, 146.219, 146.220, 146.222.

¹⁷⁷ *ibid* rec.146.223, 146.224.

¹⁷⁸ *ibid* rec.146.219, 146.220.

¹⁷⁹ Government of Malaysia, 'Report of the Working Group on the Universal Periodic Review, Addendum : Malaysia' (UN Human Rights Council 2014) A/HRC/25/10/Add.1 para.8 <<http://www.refworld.org/docid/533535ba4.html>> accessed 7 May 2016.

¹⁸⁰ UN Human Rights Council (n 175) rec.146.225.

¹⁸¹ Government of Malaysia (n 179) para.9.

¹⁸² *ibid* para.6.

More criticism comes from the US Department of State's annual trafficking report¹⁸³, the UN Special Rapporteur on Trafficking in Persons¹⁸⁴ and further reports amongst others by the International Organization for Migration (IOM), the International Trade Union Confederation (ITUC) and the International Labour Organization (ILO)¹⁸⁵, some of which have been referenced in this paper.

3.3.2 Policy developments in Malaysia

The Eleventh Malaysia Plan (2016–2020) includes policies on immigration and employment which could provide better protection for migrant workers.¹⁸⁶ Due to its membership in the Trans-Pacific Partnership (TPP), Malaysia will have to incorporate the ILO Declaration on Fundamental Principles and Rights at Work.¹⁸⁷ In 2013, a minimum wage law came into force which applies to Malaysians and foreign workers but does not extend to domestic workers.¹⁸⁸ The Malaysian Ministry of Human Resources (MOHR) has announced plans to formulate the 'Regulation (Terms & Conditions of Employment) on Domestic Servants 2014' but to date this has not been finalised much less implemented and the prominent women workers group Tenaganita has expressed serious doubts of the seriousness of these efforts.¹⁸⁹ Another possible route the Malaysian government is trying at the moment in terms of handling labour migration are Government-to-government agreements (G2G). They aim is to recruit through public employment agencies rather than through several avenues as customary under conventional MOUs and thereby reduce recruitment fees for foreign workers and ensure higher rates of formal migration. After relative success of a G2G with Bangladesh for recruitment of plantation workers,

¹⁸³ The report pointed out that some foreign domestic workers 'are subjected to practices indicative of forced labor, such as restricted movement, wage fraud, contract violations, passport confiscation, and imposition of significant debts by recruitment agents or employers' 'Trafficking in Persons Report - July 2015' (n 173) p.234.

¹⁸⁴ as referred to in Chapter 1.1 and 2.1.2

¹⁸⁵ ILO Regional Office for Asia and the Pacific (n 18) p.3.

¹⁸⁶ *ibid* p.1.

¹⁸⁷ *ibid* p.4.

¹⁸⁸ *ibid* p.18.

¹⁸⁹ Glorene A Das, 'End Enslaving of Maids, Address Root Causes' *Malaysiakini* (28 May 2016) <<https://www.malaysiakini.com/news/343293>> accessed 15 June 2016.

Malaysia has started a dialogue with the Indonesian government about a similar arrangement regarding Indonesian domestic workers. Examples of successful implementation of G2Gs for labour migration exist but the success will depend on how fruitful the negotiations are.¹⁹⁰

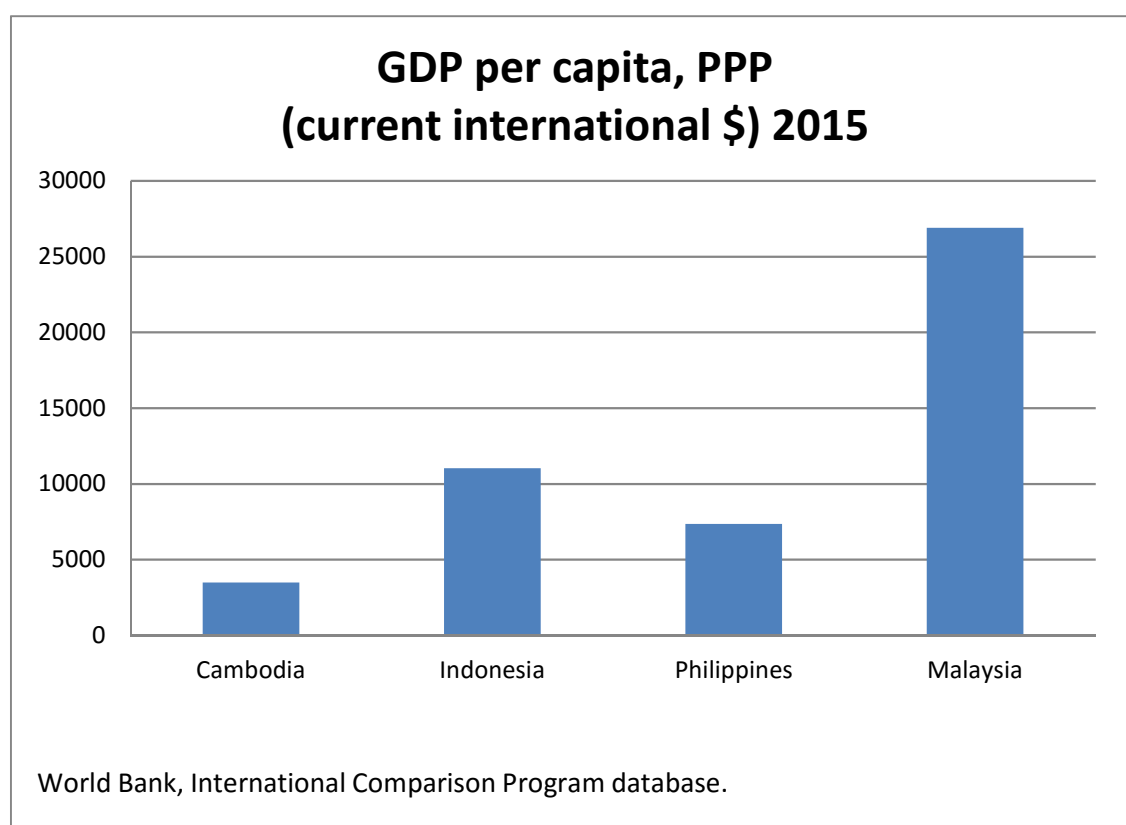
Overall, it can be said that Malaysia's efforts to ensure migrant domestic workers' rights are minimal and show little commitment to adhere to international standards. There are no signs of plans to recognise domestic work as work as can be seen by the lack of relevant legislation but also by the insistence on the persistent usage of pejorative language such as calling domestic workers maids, servants or helpers in its rhetoric and policies. Malaysia seems to be content to continuously profit from cheap foreign labour whilst treating migrant workers as security threat in spite of recognising their contribution to its economy. Domestic workers are not deemed deserving of protection and their work is seen as non-skilled help performed by undesirable foreigners rather than seeing them as humans with inherent dignity and inalienable fundamental rights.

¹⁹⁰ Southeast Asia Country Management Unit (n 95) p.51.

4. Legal and social analyses of countries of origin

The reasons for migration are numerous including economic and political reasons. The decision to move, however, is ultimately caused by the differences across countries. Disparities in income, life expectancy, access to schooling and literacy and political stability are all incentives to find work abroad. It is in poorer countries that the proportion of young people is higher and that girls receive less education.¹⁹¹

Table 2 Disparities in Gross Domestic Product (GDP) per capita in 2015: Cambodia, Indonesia, Philippines and Malaysia



192

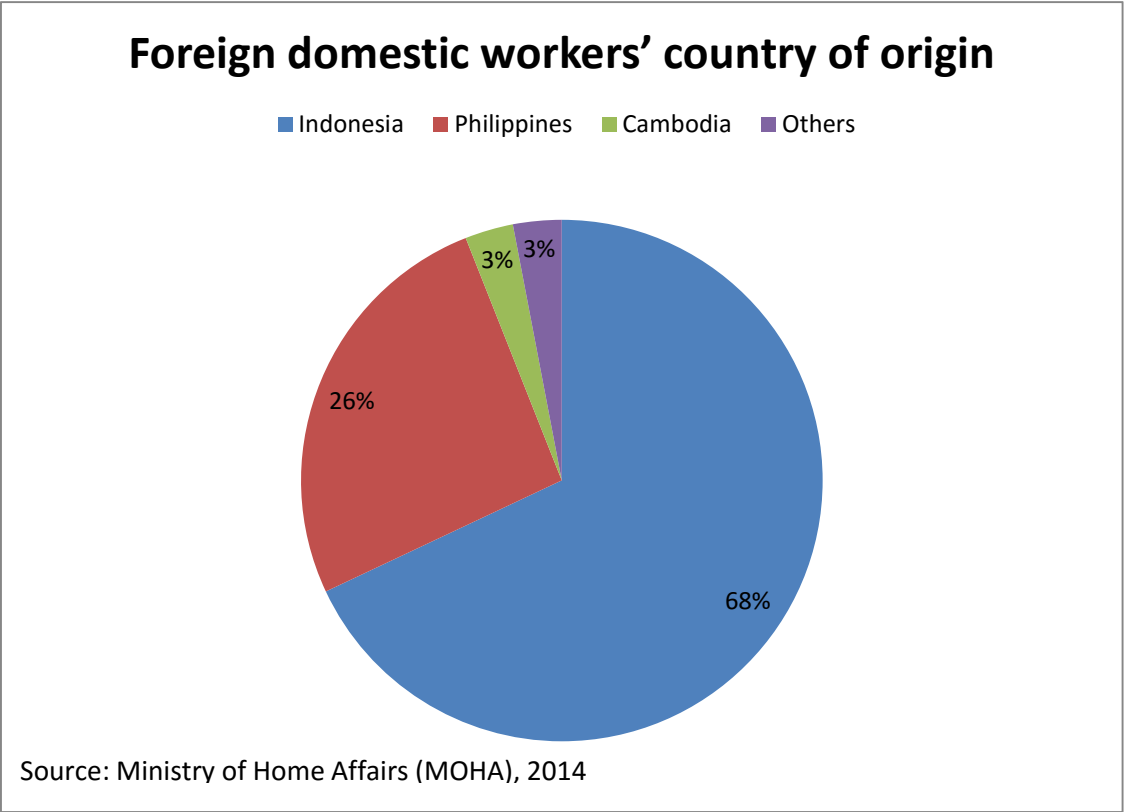
¹⁹¹ Koser (n 10) p.30-31.

¹⁹² The World Bank, 'GDP per Capita, PPP (Current International \$) | 2015' <<http://data.worldbank.org/indicator/NY.GDP.PCAP.PP.CD?view=map&year=2015>> accessed 16 July 2016.

As Table 2 reveals, Malaysia is considerably richer compared to Cambodia, Indonesia and the Philippines and it has already been shown that there is an obvious demand for migrant domestic workers there. These are important factors which make it an attractive destination country for domestic workers from these nearby States. They are also the sending countries where most of Malaysia's foreign domestic workers originate from with an overwhelming majority from Indonesia, which shares a common language and State religion, followed by the Philippines which accounts for around a quarter. Cambodia supplies a comparatively small number which has, however, risen quite dramatically since Indonesia banned its citizens from migrating into domestic labour in Malaysia in 2009¹⁹³. (see Table 3)

¹⁹³ John West, 'Malaysia's Abuses of Migrants' Rights' (Asian Century Institute 2014) <<http://www.asiancenturyinstitute.com/migration/190-malaysia-s-abuses-of-migrants-rights>> accessed 17 July 2016.

Table 3 Foreign domestic workers’ country of origin



194

This chapter will give a brief overview on the protections Cambodia, Indonesia and the Philippines afford its domestic worker population abroad.

¹⁹⁴ Southeast Asia Country Management Unit (n 95) p.30 Box 4.

4.1 Cambodia

4.1.1 Country evaluation and discussion of the circumstances of Cambodian migrant domestic workers

Ranked 143rd out of 188 on the United Nations Human Development Index (HDI) 2014, Cambodia is amongst the poorer countries in the Southeast Asian region.¹⁹⁵ According to the latest available data, nearly half of the population was classed as multidimensionally poor in 2010, meaning they face manifold deprivations in the areas education, health and living standards.¹⁹⁶ The 2014 Gender Inequality Index (GDI) positioned Cambodia 104th out of 155 countries¹⁹⁷ with education levels generally far below the regional average and especially low for women. The global economic crisis¹⁹⁸ hit the garment industry hard, which is a large employer for Cambodian women.¹⁹⁹ The domestic labour market cannot cope with the large amount of young people trying to find employment. At the same time, the attraction of higher earnings abroad is appealing.²⁰⁰

Malaysia is host to the second largest group of migrant workers from Cambodia after Thailand. Especially the need for domestic workers has risen sharply since Indonesia enforced a ban on its citizens between 2009 and 2011 which barred them from seeking domestic employment in Malaysia. The number of Cambodian domestic workers in Malaysia shot up from 10,165 in 2008 to 33,707 in 2011 which means that female domestic workers constituted around four fifth of all Cambodians employed in Malaysia.²⁰¹ Cambodian migrant workers' remittances are an important contributor to the

¹⁹⁵ 'Human Development Report 2015 - Work for Human Development - Cambodia' (United Nations Development Program (UNDP) 2015) p.2,4 <http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/KHM.pdf> accessed 4 August 2016.

¹⁹⁶ *ibid* p.6.

¹⁹⁷ *ibid*.

¹⁹⁸ referring to the 2007-2009 financial crisis

¹⁹⁹ Poudyal and Varia (n 134) p.20.

²⁰⁰ Max Tunon and Khleang Rim, 'Cross-Border Labour Migration in Cambodia: Considerations for the National Employment Policy' (ILO Regional Office for Asia and the Pacific 2013) p.1.

²⁰¹ *ibid* p.2.

economy of the country and rose to US\$364 million in 2010; over 260% of the sum in 2003.²⁰²

With increasing migration, the number of licensed recruitment agencies who organise the migration process for workers has risen²⁰³, some of which specifically for recruiting domestic workers²⁰⁴. Women are presented with the prospect of earning between 400 and 600 RM (US\$133-US\$200) but they are also offered loans in form of upfront cash or goods such as sacks of rice or cattle. These advances together with extortionate recruitment and training fees are later deducted from workers' salaries, meaning that they only start earning after six to seven months of employment.²⁰⁵ Often unaware, that these incentives are not giveaways but actually loans, the workers enter into contracts which see them in debt from the beginning. If they leave this contract at any time before it ends, during their training or once they arrive in Malaysia – of their own accord or because they fall ill or face abuse – they have to reimburse these debts and often accumulated additional fees as well.²⁰⁶ Indeed, Cambodia's labour laws prohibit these methods in article 16 of the 1997 Labor Code. Furthermore, the Ministry of Labor and Vocational Training issued a circular to recruitment agencies 'prohibiting forced labor and hiring people to pay off debts, or offering money to workers before departing for work abroad'. Additionally, these practises fall under article 8 of Cambodia's trafficking law.²⁰⁷

Prospective migrant workers often lack basic information about documents and other requirements for labour migration, contents of work contracts or where to turn if they face problems once they arrive in the destination country. High illiteracy rates further aggravate the situation.²⁰⁸ In many cases, recruitment agents provide information which is purposefully misleading or false. Regarding the women's duties though, workers are repeatedly advised to work hard, follow orders and not to steal or run away.²⁰⁹ Moreover,

²⁰² Poudyal and Varia (n 134) p.21.

²⁰³ Tunon and Rim (n 200) p.2.

²⁰⁴ Poudyal and Varia (n 134) p.26.

²⁰⁵ *ibid* p.22.

²⁰⁶ *ibid* p.27-28.

²⁰⁷ *ibid* p.28.

²⁰⁸ Tunon and Rim (n 200) p.6.

²⁰⁹ Poudyal and Varia (n 134) p.29.

domestic workers are typically not given copies of the contracts they have to sign²¹⁰ even if they ask for it.²¹¹

Prior to departure, domestic workers undergo training for three to six months mostly in centres run by recruitment agencies. Numerous types of abuse have been reported to occur ‘including forced confinement, psychological and physical harassment, and poor living conditions, such as overcrowding, inadequate food, poor sanitation, and lack of medical care’.²¹² Many training centres restrict recruits’ contact with family or friends. If women have second thoughts but are unable to pay back their loans, the costs incurred during training and other fees, they might be forced to migrate against their will.²¹³ However, Cambodian contract law²¹⁴ deems contracts void which recruit workers through debt obligation.²¹⁵

Human Rights Watch has documented cases of collusion and corruption by local and national police, including trafficking police and by state officials.²¹⁶ These include intimidation of workers to pay debts or to hinder them from filing complaints by corrupt police or judges.²¹⁷ Further, recruitment agencies were alerted to planned police raids in training centres²¹⁸ and bribery of immigration officials during the recruitment process has been reported. Some labour agencies are owned or affiliated to government officials in influential positions.²¹⁹

Once in Malaysia, Cambodian domestic workers will find it difficult to seek assistance if they face abuse. Their command of local languages is usually basic and they lack information of who to turn to and about the little protection the Malaysian legal system provides.²²⁰ Agencies are often their only point of contact but women have told of

²¹⁰ usually a work contract, a contract covering the time at the training centre before migration and a loan contract; they might have to sign additional documents including ones that forbid them to leave their employment or stating that they are not allowed to get married *ibid.*

²¹¹ *ibid* p.30.

²¹² *ibid* p.44.

²¹³ *ibid* p.46.

²¹⁴ Decree #38 Referring to Contract and Other Liabilities 1988.

²¹⁵ Poudyal and Varia (n 134) p.53.

²¹⁶ *ibid* p.33-34.

²¹⁷ *ibid* p.52.

²¹⁸ *ibid* p.35.

²¹⁹ *ibid* p.36.

²²⁰ *ibid* p.57.

occurrences when they were returned to abusive employers or forced to work for other employers unwillingly. Workers also reported that they were beaten or threatened with violence or had their travel and work documents seized.²²¹

If women manage to seek help from the Cambodian embassy, they cannot be sure to receive adequate support. The embassy is able to assist some workers but due to a lack of resources and training they risk being sent back to their agencies or employers, ‘even in cases of alleged criminal abuse’.²²²

4.1.2 Domestic law

As already referred to, Cambodia offers some domestic legislation which can be applied to the protection of women who enter into the migration process for domestic employment abroad, namely the Labor Code (1997), Law on the Suppression of Human Trafficking and Sexual Exploitation (2008) and the Decree No. 38 on the Law referring to Contracts and other Liabilities (1998). Further useful legislation includes the Criminal Code of the Kingdom of Cambodia (2009), which could be applied in cases of recruitment of minors, identity fraud or confinement of domestic workers by recruiters or employers and the Civil Code (2007) which includes provisions on the legality of contracts and on negligence whilst in the care of others, applicable again to recruiters or employers.²²³

However, there is no particular legislation covering migration for employment abroad specifically. Domestic workers are excluded from the ‘Labor Code of Cambodia, 1997’ in article 1.^{224, 225} In 2010, the Ministry of Labour and Vocational Training (MOLVT) adopted the ‘Policy on Labour Migration for Cambodia’. The main aims are improved regulation of labour migration, protection of migrant workers including the recruitment process and support services and the promotion of overseas employment as a

²²¹ *ibid* p.61-62.

²²² *ibid* p68-69.

²²³ Natalie Drolet, ‘Domestic Workers and Sub-Decree 190 :“Time to Protect Cambodia’s Migrants”’ (Legal Support for Children and Women (LSCW) 2013) p.30-32 <http://ticambodia.org/library/wp-content/files_mf/1452587009DomesticWorkersandSubDecree190.pdf> accessed 5 August 2016.

²²⁴ *ibid* p.5.

²²⁵ Domestic labour laws do of course not apply to workers abroad, however, it can reveal that domestic work might not be fully acknowledged as “work” in Cambodia in a similar way as is the case in Malaysia.

development tool including reintegration programmes for returning migrants.²²⁶ Even though the policy also set out to regulate recruitment agencies, there is an absence of significant sanctions that could act as deterrents.²²⁷ The Sub-decree No. 190^{228, 229} regulates the ‘Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies’ and is the most important document on labour migration. Following are some key concerns not or inadequately addressed in Sub-decree 190: falsifying documents for workers under the legal recruitment age is not addressed²³⁰; the requirements regarding information about recruitment and employment and the contents of contracts²³¹ are not sufficiently detailed to afford decent protection²³² and there is no obligation to provide copies of the contracts to workers²³³; recruitment agencies are given authority to carry out health tests²³⁴ but no guidelines or standards are defined regarding ‘informed consent, confidentiality [...] post-test counseling’²³⁵ or ‘discriminatory testing, including pregnancy or HIV testing’²³⁶; working hours and periods of rest are not indicated²³⁷; issues surrounding wages, such as regularity of payments, payments in kind, minimum wage or salary deductions are missing²³⁸; the responsibility for ensuring the provision of social security and health and safety is passed on to recruitment agencies, who, even if they are willing, have little scope for action because of limited Malaysian legislation to this regard²³⁹; no minimum standards for

²²⁶ Tunon and Rim (n 200) p.9.

²²⁷ Poudyal and Varia (n 134) p.78.

²²⁸ Sub-decree No. 190 on the Management of the Sending of Cambodian Workers Abroad Through Private Recruitment Agencies 2011.

²²⁹ Sub-decrees in Cambodia are a type of subordinate legislation often for areas not covered by law. They are not legally binding but might foresee legal consequences in case of breach Drolet (n 223) p.6.

²³⁰ *ibid* p.8-9.

²³¹ Neither for the job placement service contract whit the recruitment agency nor the actual employment contract. For example it is stated that the labour contracts must give *specific information* on working and living conditions but does provide a definition or specify any minimum standards. *ibid* p.11-12.

²³² *ibid*.

²³³ *ibid* p.10.

²³⁴ as required by Malaysia prior to receiving foreign domestic workers *ibid* p.14.

²³⁵ Poudyal and Varia (n 134) p.79.

²³⁶ Drolet (n 223) p.14-15.

²³⁷ *ibid* p.15.

²³⁸ *ibid* p.16-17,20.

²³⁹ *ibid* p.17.

decent living conditions during the training prior to departure²⁴⁰ or guidelines for performing inspections of training centres are set out²⁴¹; access to complaints mechanisms against employers abroad are inadequate and regress from the previous sub-decree whilst stipulation for solutions for conflicts between workers and recruitment agencies are very unclear²⁴²; confiscation of travel documents by agencies or employers is not dealt with²⁴³; and neither confinement or abuse, may it be physical, sexual or psychological, both in training centres and by employers²⁴⁴, nor monitoring of the place of employment²⁴⁵ are addressed at all.

In summary, it can be said that this decree does not provide sufficient protection for workers and even regresses from its predecessor Sub-decree 57²⁴⁶ which it replaced.²⁴⁷ Although some gaps are filled by prakas and circulars^{248, 249} this should not stall the adoption of comprehensive and legally binding laws covering Cambodian migrant workers, including domestic workers.²⁵⁰ During the creation of Sub-decree No. 190, civil society and other important stakeholders were excluded from the process²⁵¹. In order to achieve legislation ensuring far-reaching protection of migrating workers, extensive dialogue with relevant national and international organisations will be necessary.²⁵²

Despite close cooperation with international bodies such as the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), the ILO and the International Organization for Migration (IOM), limited resources and lack of

²⁴⁰ *ibid* p.18.

²⁴¹ *ibid* p.22.

²⁴² *ibid* p.23.

²⁴³ *ibid* p.18.

²⁴⁴ *ibid* p.19.

²⁴⁵ *ibid* p.22.

²⁴⁶ Sub-decree No. 57 on the Export of Khmer Labor to Work Overseas 1995.

²⁴⁷ Drolet (n 223) p.24.

²⁴⁸ Prakas and circulars are regulations subordinate to sub-decrees and not legally binding either. *ibid* p.6.

²⁴⁹ For example Prakas 108 on Education of HIV/AIDS, Safe Migration, and Labor Rights for Cambodian Workers Abroad and Circular, 2647 on Directing Recruitment, Training, Transferring and Management of Cambodian Migrants to Work Abroad which covers debt bondage, forced labour etc.*ibid* p.5-6.

²⁵⁰ *ibid* p.7.

²⁵¹ Poudyal and Varia (n 134) p.78.

²⁵² *ibid* p.94.

coordination amongst ministries hinder progress in the protection of migrant workers.²⁵³ Implementation and monitoring of existing policies are not efficient.²⁵⁴ Ineffective law enforcement, corruption, intimidation and weak complaints procedures lead to impunity of recruiters who commit human rights abuses.²⁵⁵

4.1.3 Bilateral agreements and international framework

In 2011, following reports of abuse by recruitment agencies and in Malaysia²⁵⁶, the Cambodian government officially announced a ban²⁵⁷ on domestic workers migrating to Malaysia.²⁵⁸ At the time, NGOs were optimistic that this signified the will for improved legislation and better protection for migrant workers²⁵⁹ whilst there were also concerns that some agencies were ignoring the ban and that women were still migrating into domestic employment in Malaysia through irregular routes. Labour migration is also a chance for women to contribute to their poor families and undocumented migrants may enjoy even less protection of their rights.²⁶⁰

Notwithstanding the ban, many Cambodian women continue to carry out domestic work in Malaysia. The Cambodian government states their numbers at around 8000²⁶¹ in 2015. New workers arrived through irregular routes, some remained voluntarily and there are allegations that the Cambodian embassy coerced some to stay. Other women's whereabouts were unknown. At the same time, the reports about abuse, exploitation and torture remained well documented. "Cambodia wants to gain the benefits of its people

²⁵³ *ibid* p.82.

²⁵⁴ *ibid* p.82-83.

²⁵⁵ *ibid* p.84-86.

²⁵⁶ Reports included forced detention and underaged recruitment by agencies – one belonged to the wife of a high-ranking member of police; cases of abuse in Malaysian employers' homes, including suspicious deaths; allegations of gang rape committed against a woman who fled abuse David Boyle and May Titthara, 'Maid Ban Finally Complete' *Phnom Penh Post* (21 October 2011) <<http://www.phnompenhpost.com/national/maid-ban-finally-complete>> accessed 29 July 2016.

²⁵⁷ 'Sorachor No. 11 on the Prohibition of the Recruitment, Training and Transferring of Cambodian Migrant Domestic Workers, 2011, Royal Government of Cambodia'.

²⁵⁸ Drolet (n 223) p.2.

²⁵⁹ *ibid*.

²⁶⁰ Poudyal and Varia (n 134) p.77.

²⁶¹ other estimates are much higher Chhay Channyda and Alice Cuddy, 'Malaysia Maid Pipeline Resumes' *Phnom Penh Post* (11 December 2015) <<http://www.phnompenhpost.com/national/malaysia-maid-pipeline-resumes>> accessed 29 July 2016.

going overseas and sending back remittances, but then the government is not prepared to do anything substantive to help them.” said the deputy director of the Asia division at Human Rights Watch, referring to the lack of support for traumatised returnees.²⁶²

In December 2015, the Cambodian Labour Ministry announced the long awaited signing of a Memorandum of Understanding (MOU) for domestic workers between Cambodia and Malaysia. Another MOU regulating the sending of migrant workers generally was signed as well. Human rights groups are concerned about the lack of information they received regarding the agreement. They have accused the Cambodian government of watching inactively whilst domestic workers kept moving into Malaysia whilst the ban was in place and bemoan a missed opportunity to put pressure on the Malaysian government. Local and international organisations doubt that the MOU includes major improvement and fear that implementation will be lacking on both sides.²⁶³

Following a State visit of the Cambodian Prime Minister to Malaysia, it was reconfirmed that the ban on migrant domestic workers will be lifted but it was also reported that some details are still not finalised. Therefore, the opportunity for Cambodian domestic workers to travel to Malaysia as documented migrants through legal routes is thought not to restart until 2017. By June 2016, there was still no copy of the MOU made available to NGOs and workers’ rights groups are concerned about the seriousness of protection it will afford.²⁶⁴

At a regional level, Cambodia is not member to the Colombo Process, with its Slogan ‘Migration for Prosperity: Adding Value by Working Together’.²⁶⁵ The 11 members are Asian labour-sending countries who come together to share experiences, strategies and good practices and use this platform for improved dialogue with labour-receiving

²⁶² May Titthara and Alice Cuddy, ‘The Shackles of Abuse’ *Phnom Penh Post* (26 September 2015) <<http://www.phnompenhpost.com/post-weekend/shackles-abuse>> accessed 29 July 2016.

²⁶³ Channyda and Cuddy (n 261).

²⁶⁴ Peter Zsombor, ‘Maids Unlikely to Reach Malaysia Before 2017’ *The Cambodia Daily* (8 June 2016) <<https://www.cambodiadaily.com/news/maids-unlikely-to-reach-malaysia-before-2017-113761/>> accessed 29 July 2016.

²⁶⁵ ‘The Colombo Process - Members and Ovservers’ (*The Colombo Process*) <http://www.colomboprocess.org/members_and_observers-1e-5.html> accessed 30 July 2016.

countries.²⁶⁶ It also aims to protect migrant workers, for participating countries to obtain the maximum development benefits from labour migration and to monitor progress.²⁶⁷

Internationally, Cambodia has not ratified the ILO Domestic Workers Convention and did neither participate in the negotiations nor vote on it although it is member to the Core Labor Standards of the ILO.²⁶⁸

The country also infringes on UN Conventions it is party to. For example, forced confinement as experienced by domestic workers in recruitment centres and at employers' homes, violates the ICCPR's right to liberty and freedom of movement provisions and the IESCR sets out the right of everyone to enjoy 'the highest attainable standard of physical and mental health'.²⁶⁹ The general discrimination female domestic workers face on grounds of their gender, go against several articles of CEDAW. A concrete example is the testing for pregnancy carried out by recruiters prior to departure.²⁷⁰ Cambodia has also ratified the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women²⁷¹ which allows individuals or groups to submit complaints regarding violations against human rights set out in CEDAW with the aim for the committee to give recommendations to the State.²⁷²

²⁶⁶ 'The Colombo Process - Objectives' (*The Colombo Process*)

<http://www.colomboprocess.org/About_the_Colombo_Process_Objectives-5a-3.html> accessed 30 July 2016.

²⁶⁷ Dovelyn Rannveig Mendoza, Christine Aghazarm and Graziano Battistella, 'Labour Migration from Colombo Process Countries - Good Practices, Challenges and Way Forward' (International Organization for Migration (IOM) 2011) p.11

<http://publications.iom.int/system/files/pdf/colomboprocessstudy_final.pdf> accessed 6 August 2016.

²⁶⁸ Poudyal and Varia (n 134) p.82,90.

²⁶⁹ *ibid* p.90.

²⁷⁰ 'Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, Entered into Force 3 September 1981) 1249 UNTS 13.' (n 47) art.11 2.

²⁷¹ 'Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (Adopted 6 October 1999, Entered into Force 22 December 2000) United Nations, Treaty Series, Vol. 2131, P. 83'.

²⁷² Drolet (n 223) p.32.

4.1.4 Conclusion on Cambodia

Cambodia's answer to the abuse of its overseas domestic workers was a ban on migration to Malaysia but this ban was not followed up by relevant law as workers' rights organisations first hoped. The existing legislation is weak and incomplete, it could however – if applied strictly and enforced rigorously – provide some protection for domestic workers. Furthermore, open and inclusive dialogue with civil society organisations during the creation of bilateral agreements could lead to genuine progress. It would show Malaysia that the Cambodian government is genuinely committed to improving working conditions for its citizens abroad. However, instead of fulfilling its obligations to protect its workers, the government forgoes its responsibilities and hopes for recruitment agencies to take on this role.

As HRW's women's rights researcher said: 'Cambodia has been eager to promote labor migration but reluctant to provide even the most basic protections for migrant women and girls.'²⁷³

4.2 Indonesia

4.2.1 Country evaluation and discussion of the circumstances of Indonesian migrant domestic workers

Indonesia's pro-poor growth after the 1997 Asian financial crisis was very slow and inequality continued to rise.²⁷⁴ Politics are still overshadowed by Suharto's authoritarian

²⁷³ 'Cambodia/ Malaysia: Domestic Workers Face Abuse - Extend Labor Protections to Migrant Women and Girls at Home, Abroad' (Human Rights Watch (HRW) 2011) p.1
<<https://www.hrw.org/news/2011/10/31/cambodia/malaysia-domestic-workers-face-abuse>> accessed 19 April 2016.

²⁷⁴ The Gini index according to the World Bank has more or less been continuously rising in Indonesia from 30.5% in 1984 to 35.6% in 2010. The World Bank, 'GINI Index (World Bank Estimate) | Indonesia' <<http://data.worldbank.org/indicator/SI.POV.GINI?locations=ID>> accessed 17 April 2016.
The Gini index measures the extent to which the distribution of income (or, in some cases, consumption expenditure) among individuals or households within an economy deviates from a perfectly equal distribution. A Gini index of zero represents perfect equality and 100, perfect inequality. OECD, 'Glossary of Statistical Terms - Gini Index Definition' <<https://stats.oecd.org/glossary/detail.asp?ID=4842>> accessed 30 July 2016.

regime²⁷⁵, corruption is rife and the government seems unable to make poverty a priority. However, there are some promising pro-poor policies and an active civil society which gives hope for this young democracy.²⁷⁶ Nevertheless, high unemployment rates persist, with young people hit especially hard. According to a 2013 ILO estimate the youth unemployment rate was over 20%.²⁷⁷

Indonesia is the largest supplier of domestic workers to Malaysia.²⁷⁸ Some Indonesian women, who come to Malaysia as domestic workers are fleeing extreme poverty but many go because with the higher earnings they can improve their lives at home, enable their children to go to school or contribute to medical bills of close ones.²⁷⁹ Furthermore, the lack of work and/or an acceptable income in Indonesia makes them look for employment far from home.²⁸⁰

Reasons for Malaysia to welcome domestic workers have already been discussed. Reversely, Malaysia is also seen as a particularly popular destination for Indonesians even though prospective domestic workers know that in other countries they can earn a better salary. Bahasa Indonesia, Indonesia's official language derives from Malay and it is a geographically close destination. Therefore, women often believe that the two countries are connected by a similar language and culture, including the state religion before their departure. However, Bahasa Indonesia has developed so that when an Indonesian speaks Malay in Malaysia, they immediately reveal themselves as foreign through their accent and body language.²⁸¹ This view of a common language and culture is often reinforced by the stakeholders involved in placing workers abroad so that women can arrive totally

²⁷⁵ Suharto ruled Indonesia as dictator from 1967 to 1998

²⁷⁶ Paul Mosley, *The Politics of Poverty Reduction* (Oxford University Press 2012) p.305-307.

²⁷⁷ Eveline Danubrata and Cindy Silviana, 'Rising Unemployment Piles up Problems for Indonesian President' *Reuters* (Jakarta, 20 June 2015) <<http://www.reuters.com/article/us-indonesia-unemployment-idUSKBN0P101D20150621>> accessed 17 April 2016.

²⁷⁸ see Table 3

²⁷⁹ Mariam Mokhtar, 'Dirty Work: Domestic Workers in Malaysia Face Abuse' [2014] *Aquila Style* <<http://www.aquila-style.com/focus-points/global-snapshots/dirty-work/85760/>> accessed 19 April 2016.

²⁸⁰ Anggraeni (n 2) p.179.

²⁸¹ *ibid* p.128-129.

uninformed about what to expect in their new life.²⁸² In reality, Malaysians often do not feel this cultural closeness. Indonesian domestic workers are rather seen as ‘cheaper and generally more compliant than their Filipino counterparts who are known to be more confident about their skills, hence more self-assertive.’²⁸³

Nowadays, the two countries’ cultures might not have much more similarities than cultures of other countries in the region. In the first period after reaching independence the two States still did feel a close relationship resting on ‘a common ethnic heritage and language’. Soon though, influenced through nation building and development policies these relations became more hostile.²⁸⁴ There is relatively little mutual business; however there is quite some competition for foreign investment. Undocumented migrants and the way they are treated are a constant bone of contention. Recent migration from Indonesia went mainly into unskilled jobs which Malaysians do not want to carry out. For men this is in construction and for women in domestic work, both areas are looked down at. This results in very little social interaction between the two nationalities outside employer – employee relationships.²⁸⁵

In 2008, Indonesian migrant workers sent home US\$ 8.2 billion in remittances.²⁸⁶ Women migrating into domestic work abroad play a crucial role towards this contribution to the Indonesian economy seen as in 2007 already 79 % of contract labour migrants were women, with a majority employed in domestic work.²⁸⁷ More recent numbers by the National Agency for Placement and Protection of Indonesian Workers Abroad (BNP2TKI) state US\$ 7.4 billion for 2013 in remittances and estimate that 80% of labour

²⁸² *ibid* p.151.

²⁸³ *ibid* p.128-129.

²⁸⁴ Elias (n 5) p.402.

²⁸⁵ Anggraeni (n 2) p.130.

²⁸⁶ ILO Jakarta Office, ‘Combating Forced Labour and Trafficking of Indonesian Migrant Workers’ (International Labour Organization (ILO) 2010) p.2

<http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-jakarta/documents/projectdocumentation/wcms_121298.pdf> accessed 19 April 2016.

²⁸⁷ Elias (n 5) p.398.

migrants are female domestic workers.²⁸⁸ According to the Indonesian embassy there were approximately 400,000 Indonesian domestic workers in employment in Malaysia in 2013 of which only around 50% held the necessary work and travel documents.²⁸⁹

Nevertheless, the Indonesian government has yet to step up its efforts to improve protection and reduce abuse and exploitation which pervades the whole migration process.²⁹⁰ Indonesian female domestic workers in Malaysia face a higher risk of labour exploitation, forced labour and trafficking compared to migrant workers in other sectors. The abusers are mainly recruitment agencies, employers or officials who collude with them. The most frequent practices as described by the ILO are:

- Entering into debt bondage because of excessive or illegal recruitment fees;
- Traveling with forged travel documents;
- Having their contract substituted for an inferior one;
- Being deceived about the work conditions;
- Having travel documents and salary withheld;
- Confinement; being prevented from communicating;
- Working excessive hours without any days off;
- Being subjected to physical or sexual abuse; and
- Experiencing the destruction of their ID, illegal harassment and extortion, detention and abuse by law enforcement agencies, employers and private agents.²⁹¹

Aside from physical and sexual abuse, living in the homes of their employers with little to no outside contact makes foreign domestic workers vulnerable psychological abuse as well. Employers use practices of intimidation and exert control by threatening them with

²⁸⁸ 'Southeast Asia - Migration News | Migration Dialogue - April 2014' (2014) Volume 21 Migration News <<https://migration.ucdavis.edu/mn/more.php?id=3906>> accessed 30 July 2016.

²⁸⁹ *ibid.*; These are estimates only; around the same time, the Malaysian Ministry of Human Resources spoke of a total of 180,000 documented migrant domestic workers employed in Malaysia. see 'Providing Better Protection for Indonesian Domestic Migrant Domestic Workers in Malaysia' <http://www.ilo.org/jakarta/info/public/pr/WCMS_421136/lang--en/index.htm> accessed 19 April 2016.

²⁹⁰ ILO Jakarta Office (n 286) p.2.

²⁹¹ *ibid.*

deportation. Malaysians attach low status with Indonesians in general and domestic workers in particular. This can manifest itself in the use of ‘denigrating, racist, and abusive language’ or in interfering with their religious customs.²⁹²

4.2.2 Domestic Law

The Indonesian Law No. 13 of 2003 on Manpower does not include (or rather implicitly excludes²⁹³) domestic workers whereas the Law No. 39 of 1999 on Human Rights²⁹⁴, or Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia, ‘[g]uarantees a number of basic human rights, political rights, civil rights, as well as economic and social rights. Inter alia, provides for freedom from forced labour [...] and women's rights’.²⁹⁵

However, the first law dealing directly with Indonesian emigrants was the Law on Placement and Protection of Indonesian Workers Abroad (Law No. 39/2004) or Undang-Undang Tentang Penempatan Dan Perlindungan Tenaga Kerja Indonesia Di Luar Negeri. It lays down that the placement of an Indonesian worker abroad ‘shall be based on integrity, equality of rights, democracy, social justice, gender equality and justice, anti-discrimination and against trafficking of persons’ and stipulates ‘the responsibilities of the Government including the obligation to regulate, develop, operate and supervise the recruitment and placement of Indonesian workers overseas and improving protection of Indonesians abroad’.²⁹⁶ This law details the duties of the Administering Agencies for Placement and Protection of Indonesian Workers Overseas short PJTKI (Perusahaan Jasa Tenaga Kerja Indonesia) which are the private agencies licensed to hire workers for overseas employment. Considering that PJTKIs have been sending workers abroad since

²⁹² Huling (n 116) p.647.

²⁹³ Smales et al. (n 31) p.38.

²⁹⁴ Law No. 39 of 1999 on Human Rights [Indonesia] 1999.

²⁹⁵ International Labour Organisation, ‘Abstract - Indonesia - Law on Human Rights (No. 39 of 1999).’ (*ILO - Database of national labour, social security and related human rights legislation*) <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=55808> accessed 20 April 2016.

²⁹⁶ International Labour Organisation, ‘Abstract - Indonesia - Law on Placement and Protection of Indonesian Workers Abroad (Law No. 39/2004) (Statute Book of the Republic of Indonesia of 2004 No. 13)’ (*ILO - Database of national labour, social security and related human rights legislation*) <http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=70915> accessed 20 April 2016.

1979, it is astounding that the first proper law regulating this process came only in 2004, especially considering the high revenues these overseas workers have been sending home; contributing to Indonesia's economy.²⁹⁷

Law No. 39 of 2004 has also set up the National Board for the Placement and Protection of Indonesian Overseas Workers (BNP2TKI). They are the governmental body overseeing the whole process and keeping records of workers going abroad.²⁹⁸ This is supposed to simplify the previous process which had to go through several government departments and was more costly and prone to mistakes. However, the 2004 law has made it compulsory for migrant workers to register with a PJTKI and for these agencies to process all documents²⁹⁹; thus private recruitment agencies have been made the only lawful route for labour migration.³⁰⁰ This has actually increased fees for the workers. Their salary can be withheld or reduced for four to six months in order to pay back these fees.³⁰¹ Similar to the situation in Cambodia, prospective migrant domestic workers are in debt from the start and they are effectively confined from the moment they start their compulsory training at one of the agencies' facilities. Mobile phones and any data of contacts they might have in Malaysia are confiscated.³⁰² The confinement in training camps, even though it goes against the fundamental right to freedom of movement, is 'explicitly allow[ed]' under 'Law 39/2004 and implementing legislation'.³⁰³

At the same time, irregular emigration has been criminalised through this law. The reasoning behind this criminalisation is that abuse and exploitation are often associated with 'illegality', however, the legal bases upon which migrant domestic workers have to rely are often in themselves exploitative and can lead to abuse.³⁰⁴

²⁹⁷ Anggraeni (n 2) p.181-186.

²⁹⁸ *ibid* p.197-199.

²⁹⁹ Smales et al. (n 31) p.39.

³⁰⁰ Killias (n 163) p.900.

³⁰¹ Smales et al. (n 31) p.39.

³⁰² Killias (n 163) p.901.

³⁰³ *ibid* p.901,note5.

³⁰⁴ *ibid* p.899-901.

4.2.3 Bilateral agreements and international framework

Malaysia and Indonesia have negotiated two bilateral agreements to detail the employment of domestic workers in the past; however, these Memoranda of Understanding (MOUs) are not legally binding for either State.³⁰⁵ In 2006, Indonesia and Malaysia signed a first MOU on the recruitment and placement of domestic workers. Following a mission to Indonesia, the United Nations Special Rapporteur on the human rights of migrants voiced concern that the MOU focused on recruitment procedures rather than workers' rights.³⁰⁶ He pointed out that standard labour protections were not ensured, measures against abuse were not included³⁰⁷ and responsibility for repatriation in abuse cases was not clarified³⁰⁸. Moreover, information about the existence of the MOU was not disseminated amongst migrant domestic workers and of especially grave concern was that employers were encouraged to confiscate workers' passports.³⁰⁹ He further expressed concerns about the commodifying use of language in the agreement and that the 'long, complicated and expensive documentation process' might increase irregular migration.³¹⁰

In 2009, Indonesia banned its citizens from migrating to Malaysia as domestic workers following a series of very serious cases of abuse including deaths. This left Malaysian households in a difficult situation because many rely on live-in workers to look after children or elderly persons and care for the house. Negotiations to come to a new agreement were taken up and NGOs were calling on the Indonesian government not to yield too easily and to ensure basic rights for its domestic workers abroad. In the meantime, Malaysia still gave work permits to Indonesians which made them more

³⁰⁵ Huling (n 116) p.654.

³⁰⁶ Special Rapporteur on the human rights of migrants, Jorge Bustamante, 'Addendum to the Report of the Special Rapporteur on the Human Rights of Migrants, Mission to Indonesia' (UN Human Rights Council 2007) A/HRC/4/24/Add.3 para.37 <<http://www.refworld.org/docid/46231fda2.html>> accessed 20 April 2016.

³⁰⁷ *ibid* para.38.

³⁰⁸ *ibid* para.41.

³⁰⁹ *ibid* para.38.

³¹⁰ *ibid* para.40(c).

vulnerable to abuse because their own state saw them as ‘illegal’ migrants.³¹¹ Nevertheless, the number of migrant domestic workers arriving in Malaysia decreased drastically and by the beginning of 2011, Malaysian households were desperately looking for domestic workers. Some estimate that up to 35,000 families were waiting to employ someone.³¹² During the labour shortage caused by the Indonesian ban, the Malaysian government tried several routes: Firstly, they sourced workers in other countries mostly from Cambodia which as we have seen also led to a ban. Secondly, they encouraged recruiters to circumvent the Indonesian ban and migrant workers were regularised in an amnesty. This was unsuccessful because women used the chance to leave households in order to seek better employment or returned home. Thirdly, there was a plan by the Malaysian Ministry for Women, Family and Community development to encourage locals to enter this line of employment as ‘home managers’. This was an utter failure because Malaysians were unwilling to carry out work that is excluded from labour protection, has low status and little pay and which is usually carried out by female migrants.³¹³ Rather than providing better protection against abuse and exploitation for migrant domestic workers or facing up to challenges of maternity leave and care for children and elderly, the Malaysian government hoped for a return of Indonesian domestic workers and tried to fill the gaps with cheap labour from other poor countries.³¹⁴

Finally, on 30th May 2011, a new revised Memorandum of Understanding was signed by the governments of Malaysia and Indonesia. However, many were disappointed that the two countries did not use this occasion to conclude an agreement which could have ensured real adequate protection of migrant domestic workers’ rights.³¹⁵ Interestingly, the finalisation of the MOU came at the time when Cambodia announced a ban on sending

³¹¹ Anggatira Gollmer, ‘Maidless in Malaysia’ *Deutsche Welle (DW)* (16 February 2011) <<http://www.dw.com/en/maidless-in-malaysia/a-6440941>> accessed 8 August 2016.

³¹² Elias (n 5) p.396.

³¹³ *ibid* p.397.

³¹⁴ The Malaysian government is for example trying to source domestic workers from East Timor see A Das (n 189).

³¹⁵ ‘Indonesia/Malaysia: New Pact Shortchanges Domestic Workers’ (Human Rights Watch (HRW) 2011) <<https://www.hrw.org/news/2011/05/31/indonesia/malaysia-new-pact-shortchanges-domestic-workers>> accessed 3 May 2016.

migrant domestic workers to Malaysia. Irene Fernandez³¹⁶, one of Malaysia's most prominent migrant and women's rights activists, called the agreement a public relations exercise in the wake of the ASEAN Summit.³¹⁷

The advances made in the 2011 MOU were one rest day per week (or payment in lieu) and the right to retain ones passport.³¹⁸ However, the Malaysian Human Resources Minister announced after that the rest day can be substituted by overtime and employers can hold the workers' passports '*for safety reasons*'³¹⁹(emphasis added). No other major changes were stipulated and no plans for altering relevant domestic legislation have been made.³²⁰ The recruitment fees remain high, which means the workers continue to pay back debt instead of earning full salaries over the first months of their employment³²¹ but wages are still not regulated which leaves most Indonesian domestic workers with income below the Malaysian national poverty line. Even though most reported cases of abuse include working excessive hours, no reference to limiting weekly working hours has been made.³²²

Irene Fernandez said the MOU was 'shameful' in the light of the adoption of the ILO Convention on Decent work for Domestic workers and denounced the lack of consultation with civil society or trade. She discouraged Indonesian women from migrating into domestic work in Malaysia and went as far as calling the 2011 MOU 'not only a disappointment but a continuum of an exploitative system designed to deny domestic workers their rights'.³²³

³¹⁶ Co-Founder and Executive Director of Tenaganita (Women's Force) <http://www.tenaganita.net/>

³¹⁷ Dr. Irene Fernandez, Tenaganita, *Signing of New MOU between Malaysia and Indonesia on Placement of Domestic Workers – An ASEAN Public Relations Exercise?* (18 November 2011), Press Statement <<https://www.facebook.com/notes/tenaganita-womensforce/statement-signing-of-new-mou-between-malaysia-and-indonesia-on-placement-of-dome/293349610687871>> accessed 4 June 2015.

³¹⁸ 'Southeast Asia - Migration News | Migration Dialogue - July 2011' (2011) Volume 18 Migration News <<https://migration.ucdavis.edu/mn/more.php?id=3700>> accessed 30 July 2016.

³¹⁹ Dr. Irene Fernandez, Tenaganita *Signing of New MOU between Malaysia and Indonesia on Placement of Domestic Workers – An ASEAN Public Relations Exercise?* (n 317).

³²⁰ *ibid.*

³²¹ deductions are not allowed to be more than 50% of the monthly wage anymore

³²² 'Indonesia/Malaysia: New Pact Shortchanges Domestic Workers' (n 315).

³²³ Dr. Irene Fernandez, Tenaganita *Signing of New MOU between Malaysia and Indonesia on Placement of Domestic Workers – An ASEAN Public Relations Exercise?* (n 317).

Indonesia could resort to a national legal framework that can be used to put pressure on labour receiving countries but the political was often lacking. The usage of terms such as “conveyance”, “servant” and “offered” in the 2006 MOU³²⁴ substantiates the feminist theory that MOUs are based on ‘gendered assumptions regarding innate ‘cheapness’ of migrant domestic work’ and the assessing of domestic work in terms of its economic value.³²⁵ During the 2009 ban, the chairman of the National Agency for the Placement and Protection of Overseas Labor (BNP2TKI) said: “We have to prioritize the nation's interests. We cannot afford to have our workers abused and beaten again.”³²⁶ This statement again strongly suggests that female domestic workers’ value as senders of remittances takes priority over their worth as humans with basic rights that need to be protected.

The dispute between Malaysia and Indonesia carries on despite the 2011 MOU. As will be shown further on³²⁷, Indonesia has declared – quite controversially for many labour-receiving countries – that by 2017, it will ‘phase out’ ‘formal systems of return migration’.³²⁸

Indonesia is member³²⁹ to the Colombo Process which commended its 2012 ratification³³⁰ of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) which has also set into motion amendments to the Labour Migration Law which will have to include protections of migrant workers and their families’ human rights.³³¹ It also takes part in several discussions and programmes on the improvement of the conditions of its migrant domestic workers for example

³²⁴ Special Rapporteur on the human rights of migrants, Jorge Bustamante (n 306) 40.(c).

³²⁵ Elias (n 5) p.400.

³²⁶ ‘RI Urges KL Not to Employ Illegal Maids’ *The Jakarta Post* (Jakarta, 14 September 2009) <<http://www.thejakartapost.com/news/2009/09/14/ri-urges-kl-not-employ-illegal-maids.html>> accessed 20 April 2016.

³²⁷ see Chapter 4.2.4

³²⁸ Elias (n 5) p.395.

³²⁹ ‘The Colombo Process - Members and Overseers’ (n 265).

³³⁰ ‘OHCHR Dashboard for Status of Ratification’ (n 57).

³³¹ ‘The Colombo Process - Country Information: Indonesia’ (*The Colombo Process*) <http://www.colomboprocess.org/country_information_view-16a-5.html> accessed 30 July 2016.

dialogues with Malaysia under the ILO Global Action Programme on Migrant Domestic Workers and Their Families and Tripartite Action for the Protection and Promotion of the Right of Migrant Workers in the ASEAN Regional (ASEAN Triangle) project.³³²

In light of the analysis above on the legal framework, it can be concluded that Indonesia violates several of the treaties it is party to. The ICRMW provides an absolute prohibition on the confiscation and destruction of passports of migrant workers and their family members.³³³ Indonesia does not allow the right to freedom of association which violates the UDHR³³⁴ and the ICCPR³³⁵; and the practise of curtailing the freedom of movement of workers infringes on the same sets of international standards^{336, 337}. Just and favourable working conditions are protected under the ICESCR³³⁸ and the UDHR³³⁹ but Indonesia fails to ensure these for its migrant domestic workers. Restricting women's rights on marriage and maternity as is again the case when domestic workers migrate to Malaysia under the MOU, is in violation of CEDAW.³⁴⁰ Right to family life and to privacy are safeguarded in the ICCPR³⁴¹ and the ICESCR³⁴² but these basic rights are not secured when women seek domestic employment in Malaysia because contact details of close

³³² *Providing Better Protection for Indonesian Domestic Migrant Domestic Workers in Malaysia* (3 November 2015), Press release <[http://www.ilo.org/jakarta/info/public/pr/WCMS_421136/lang--en/index.htm](http://www.ilo.org/jakarta/info/public/pr/WCMS_421136/lang-en/index.htm)> accessed 19 April 2016.

³³³ 'International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Adopted 18 December 1990, Entered into Force 1 July 2003) 2220 UNTS 3.' art.21.

³³⁴ 'Universal Declaration of Human Rights (Adopted 10 December 1948) Resolution 217 A (III)' (n 24) art.20.

³³⁵ 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' (n 28) art.22.

³³⁶ 'Universal Declaration of Human Rights (Adopted 10 December 1948) Resolution 217 A (III)' (n 24) art.13.

³³⁷ 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' (n 28) art.12.

³³⁸ 'International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted 16 December 1966, Entered into Force 3 January 1976) 993 UNTS 3.' art.7.

³³⁹ 'Universal Declaration of Human Rights (Adopted 10 December 1948) Resolution 217 A (III)' (n 24) art.23,art24.

³⁴⁰ 'Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (adopted 18 December 1979, Entered into Force 3 September 1981) 1249 UNTS 13.' (n 47) art11(2).

³⁴¹ 'International Covenant on Civil and Political Rights (ICCPR) (Adopted 16 December 1966, Entered into Force 23 March 1976) 999 UNTS 171.' (n 28) art.17,art.23.

³⁴² 'International Covenant on Economic, Social and Cultural Rights (ICESCR) (Adopted 16 December 1966, Entered into Force 3 January 1976) 993 UNTS 3.' (n 338) art.10(1).

ones together with their phones are confiscated and they are prevented from communicating freely or sometimes at all; furthermore they cannot be joined by family members. Government policies like bans on women's out-migration and practises by Indonesian recruitment agencies like detention in training centres are listed as human rights concerns in CEDAWs General recommendation on women migrant workers.³⁴³

Despite major shortcomings, the ratification of the ICRMW shows genuine commitment to improve migrants' rights. In its first general comment on migrant domestic workers, the CMW recommends that member States provide 'pre-departure awareness-raising and training'³⁴⁴ and recent developments seem to confirm that Indonesia is planning to provide information and quality skills training to prospective migrant domestic workers.

In 2014, the Indonesian Minister for Manpower and Transmigration announced that Indonesia is planning to ratify ILO Convention C189 concerning decent work for domestic workers.³⁴⁵ During the negotiations leading up to this milestone convention, Indonesia was one of the countries which after initial opposition to a legally binding document, decided in favour in the final vote.³⁴⁶ Civil society organisations continue to pressurise the government to uphold this promise. For example, the International Domestic Workers Federation (IDWF)³⁴⁷ has made Indonesia one of its priority countries in the campaign for the ratification of C189.³⁴⁸ If Indonesia signs C189, home and migrant

³⁴³ UN Committee on the Elimination of Discrimination Against Women, 'CEDAW General Recommendation No. 26' (n 50) para.10.

³⁴⁴ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (n 59) C. Recommendations to States parties.

³⁴⁵ Irham Ali Saifuddin, 'A Promise to Domestic Workers, after 10 Years' *The Jakarta Post* (Jakarta, 18 March 2014) <<http://www.thejakartapost.com/news/2014/03/18/a-promise-domestic-workers-after-10-years.html>> accessed 9 August 2016.

³⁴⁶ 'World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch' (n 73).

³⁴⁷ IDWF was only founded in 2013 succeeding the International Domestic Workers Network. The IDWF is the first formal international federation specifically for domestic workers. see 'Who We Are | International Domestic Workers Federation' (*International Domestic Workers Federation (IDWF)*) <<http://archive.idwfed.org/about.php>> accessed 10 August 2016.

³⁴⁸ *ibid.*

domestic workers would profit. The country would have to provide relevant national legislation and enjoy a stronger position in bilateral negotiations.³⁴⁹

4.2.4 Conclusion on Indonesia

Neither the first bilateral agreement from 2006, nor banning domestic workers' migration between 2009 and 2011 or the new revised 2011 MOU have brought significant improvements for Indonesian women working in domestic employment in Malaysia. Recently though, there seems to be a shift in Indonesia's attitude towards its huge foreign domestic workers' population. President Joko Widodo has announced to end migrant domestic labour for Indonesians worldwide. Women who are currently in domestic employment abroad and wish to remain can do so and their permits can be renewed but there will be no new recruits sent. The aim is for Indonesian workers to migrate into formal employment³⁵⁰ by 2018 and to create more job opportunities in Indonesia.³⁵¹

The Indonesian government is looking to finally make serious efforts to render the informal domestic employment sector more professional.³⁵² The idea is to improve the skills training in areas such as cooking, childcare and elderly care in order to provide skilled professionals. Indonesia's government also wants to stop the practise of domestic workers living in their employers' homes in order to reduce poor working conditions and unpaid overtime. Several countries currently require foreign domestic workers to 'live-in', including Malaysia. In the future, women are supposed to stay in dormitories and enjoy regular working hours and days off, including public holidays.

³⁴⁹ Irham Ali Saifuddin (n 345).

³⁵⁰ such as factory work and company employment see 'Indonesia to Prohibit Overseas Maids from 2017: Official' *CNA* (Jakarta, 17 May 2016) <<http://focustaiwan.tw/news/afav/201605170023.aspx>> accessed 30 July 2016.

³⁵¹ 'Indonesia to Stop Exporting Maids by 2017' *Asia One* (Indonesia, 16 May 2016)

<<http://apmigration.ilo.org/news/indonesia-to-stop-exporting-maids-by-2017>> accessed 30 July 2016.

³⁵² A Das (n 189).

The programme for these changes was already announced in 2012 as an answer to continuous abuse of Indonesian domestic workers but amidst the imminent enforcement, negotiations with receiving States will have to take place.³⁵³

4.3 Philippines

4.3.1 Country evaluation and discussion of the circumstances of Filipino migrant domestic workers

For over a decade, numbers have shown that the majority of Filipino labour migrants are domestic workers.³⁵⁴ At home workers continue to experience high un- and underemployment rates and around 25% of the population live on incomes below the national poverty line. In 2013 remittances sent home by Filipinos abroad were US\$22.5 billion.³⁵⁵ Since its independence in 1946, the Philippines have been plagued by corruption, political instability and high levels of poverty which the current government is trying to address. Nevertheless, the country has seen continuous economic growth. Nearly three quarters of the population are of working age and of those around 12 million work abroad, making the Philippines one of the largest labour-sending countries worldwide.³⁵⁶

³⁵³ Arlina Arshad and Joanna Seow, 'Indonesia Wants Live-out Deal for New Maids' *AsiaOne* (18 May 2016) <<http://news.asiaone.com/news/singapore/indonesia-wants-live-out-deal-new-maids>> accessed 9 August 2016.

³⁵⁴ PMRW/ILO, 'The Rights of Domestic Workers, A Primer on ILO Convention No. 189 (Domestic Workers Convention) and RA 10361 Domestic Workers Act' (Philippine Migrants Rights Watch (PMRW), International Labour Organization (ILO) 2014) ISBN-978-971-93759-6-8 p.5 <http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-bangkok/documents/publication/wcms_334260.pdf> accessed 27 June 2016.

³⁵⁵ 'Southeast Asia - Migration News | Migration Dialogue - April 2014' (n 288).

³⁵⁶ 'Philippines, Economy - The Philippines Is a Market That Investors Should Watch Closely' (*Oxford Business Group*, 1 April 2015) <<http://www.oxfordbusinessgroup.com/overview/got-be-real-favourable-demographics-and-improving-governance-make-philippines-market-investors-watch>> accessed 5 August 2017.

Most women who migrate into domestic employment from the Philippines are doing so in order to earn higher wages and contribute to their family's income.³⁵⁷ Their salaries as domestic workers abroad are more than women in common professions such as office workers, teachers or nurses usually receive at home.³⁵⁸ In comparison to women from other countries, Filipina domestic workers are often older and higher educated³⁵⁹ which contributes to their better working conditions; however, it does not in itself protect them from abuse and exploitation.³⁶⁰

The most common complaints are similar to those of migrant domestic workers from other countries. They include excessive working hours, not being paid the agreed wages and not being allowed to take their one day off per week. Furthermore, limitations of communication and confiscation of passports are also reported.³⁶¹

Malaysia is host to around 46,000 domestic workers from the Philippines.³⁶² English is one of the official languages in the Philippines where it is widely spoken³⁶³ and also a national working language in Malaysia where it is taught in schools and widely understood, especially in urban areas³⁶⁴. Therefore, the Filipino women have fewer problems with language barriers than Cambodians. Indonesians can encounter difficulties when they work for Chinese families.³⁶⁵ The fact that Filipina domestic workers are

³⁵⁷ PMRW/ILO (n 354) p.2.

³⁵⁸ 'Facts On Malaysia For Overseas Filipino Workers' (*The Website for OFWs, Filipino Immigrants Worldwide*) <<http://www.overseas-filipinos.com/facts-on-malaysia.html>> accessed 5 August 2016.

³⁵⁹ José Maria Ramirez-Machado, 'Domestic Work, Conditions of Work and Employment: A Legal Perspective' (International Labour Office (ILO) 2003) p.3-4 <http://www.ilo.org/wcmsp5/groups/public/-ed_protect/---protrav/---travail/documents/publication/wcms_travail_pub_7.pdf> accessed 6 August 2016.

³⁶⁰ PMRW/ILO (n 354) p.5-6.

³⁶¹ *ibid* p.2.

³⁶² Chew Heong Koh, 'Agencies to Deposit Bond for Philippines Maids' *Asia News Network* (Petaling Jaya, Malaysia, 21 May 2016) <<http://www.asianews.network/content/agencies-deposit-bond-philippines-maids-17582>> accessed 6 August 2016.

³⁶³ 'Listing of Language Information for English' (*Ethnologue - Languages of the World*) <<http://www.ethnologue.com/language/eng>> accessed 17 August 2016.

³⁶⁴ *ibid*.

³⁶⁵ The Chinese minority represents almost one quarter of the Malaysian population. 'Population Distribution and Basic Demographic Characteristic Report 2010 (Updated 2015)' (*Department of Statistics Malaysia Official Portal*, 7 May 2015) 6. Ethnic composition <https://www.statistics.gov.my/index.php?r=column/cthem&menu_id=L0pheU43NWJwRWVSZklWdzQ4TlhUUT09&bul_id=MDMxdHZjWTKlSjFzTzNkRXZcVZjd09> accessed 5 August 2016.

usually well educated and speak English well means that they are in high demand worldwide.³⁶⁶

Furthermore, Filipino domestic workers have a set minimum wage of US\$400.- which has to be upheld by Malaysian employers. This was confirmed by the Filipino Ambassador in Kuala Lumpur in the light of the ringgit's depreciation against the US Dollar in 2015 which meant an increase in wages for Filipinas from RM 1,200 to RM 1,700.³⁶⁷ A standard contract for migrant domestic workers from the Philippines provided by their home State also lays out other conditions and rights as will be detailed in the following chapter.

There are other factors which contribute to improved protection. The Philippine government supports projects which provide rights-education and legal assistance.³⁶⁸ Even though this cannot prevent abuse, women have some awareness of their rights before they arrive in Malaysia. Filipino law prescribes the establishing of shelters in areas with large migrant populations.³⁶⁹ In the embassy in Kuala Lumpur, domestic workers have access to the Philippine Overseas Labor Office (POLO) where they can find support for labour disputes 'such as those involving salaries and wages, violation of other terms and conditions of employment contracts, termination, and others'.³⁷⁰

A list of services provided by POLO is as follows:

- Counselling
- Conciliation/Legal Advice

³⁶⁶ International Labour Organisation (ed), *Domestic Workers across the World: Global and Regional Statistics and the Extent of Legal Protection* (ILO 2013) p.32.

³⁶⁷ Adrian Chan, 'Envoy: US\$400 per Month for Filipina Helpers Fixed Everywhere' *The Star Online* (Kuala Lumpur, 28 September 2015) <<http://www.thestar.com.my/news/nation/2015/09/28/minimum-wage-for-maids-envoy-us400-per-month-for-filipina-helpers-fixed-everywhere/>> accessed 5 August 2016.

³⁶⁸ International Labour Conference (n 66) para.306.

³⁶⁹ Kristine Angeli Sabillo, 'How Distressed Overseas Filipino Workers in Malaysia Find Their Way Home' *The Jakarta Post* (24 June 2015) <<http://www.thejakartapost.com/news/2015/06/24/how-distressed-overseas-filipino-workers-malaysia-find-their-way-home.html>> accessed 5 August 2016.

³⁷⁰ 'Services and Assistance - Service to Overseas Filipino Workers' (*Embassy of the Philippines Kuala Lumpur*) <<http://www.philembassykl.org.my/main/index.php/labor-services/services-and-assistance>> accessed 6 August 2016.

- Medical and Hospital Assistance, Representation and Onsite Visitations
- Provision of Temporary Shelter to Workers in Distress
- Skills Training, Capacity-Building and reintegration Services
- Special Operations (undertake relief and rescue operations to assist Filipino workers in distress'³⁷¹

If women's employment contracts are not fulfilled or if they are abused, they can seek assistance in their embassy and stay in the temporary shelter if necessary. The Migrant Workers Resource Development Center in Kuala Lumpur houses Filipino workers in distress but also doubles as a meeting place for Filipino workers' associations and serves as a skills training centre. Filipino migrants are invited to join classes and workshops offered by the embassy to enhance their employability in other areas when they move back home.³⁷²

4.3.2 Domestic Law

The Philippines are one of the largest sending countries of migrant workers but they have shown commitment for the protection of their citizens abroad. In 1995, they were the first Asian country to adopt a law specifically aimed at regulating 'policies of overseas employment and establish[ing] a higher standard of protection and promotion of the welfare of migrant workers [and] their families'³⁷³. Under this Act it also provided that all Filipino migrants shall receive legal assistance.³⁷⁴ The special recognition afforded to women and the need for gender-sensitivity is noteworthy.³⁷⁵

³⁷¹ *ibid.*

³⁷² Angeli Sabillo (n 369).

³⁷³ Republic Act No. 8042 - Migrant Workers and Overseas Filipinos Act 1995 (8042).

³⁷⁴ International Labour Conference (n 66) para.262.

³⁷⁵ PMRW/ILO (n 354) p.6.

The continuation of the focus on women's rights led to the passing of the Magna Carta of Women (MCW)³⁷⁶ in order to translate the Philippines international obligations under CEDAW into national law and thereby eliminate discrimination and uphold women's human rights.³⁷⁷ Through the MCW the government pledges to increase opportunities for women in the country to decrease the necessity for outward labour migration and to provide training to increase chances of returnees on the local labour market.³⁷⁸

The law requires also the appointment of Gender Focal Point Officers (GFPO) in embassies abroad. A round the clock service must be provided. These officers should ideally be women with a degree in women studies, several years of gender-based work experience and must undergo Gender and Development training including related issues such as migration or HIV. Also other foreign service staff are to receive some training on gender sensitive matters. It is also foresees that the Department of Labor and Employment guarantees that all migrant workers receive contact information about embassies and GFPOs in their training before departure.³⁷⁹

In October 2007, another step was taken towards regulating domestic work when the Philippines Senate adopted a Magna Carta for Household Helpers (Batas Kasamahay)³⁸⁰ in the Household Service Workers (HSW) Policy Reform Package. For migrant women, the most important provisions include a monthly minimum wage of US\$400.-, the prohibition of charging them placement fees and the official certification of training before departure.³⁸¹ However, a 2011 study showed that in reality, full wages did often

³⁷⁶ Republic Act No. 9710 - An Act Providing for the Magna Carta of Women Act 2009.

³⁷⁷ Philippine Commission on Women, 'Overview - Magna Carta of Women | Republic Act 9710' (*Philippine Commission on Women - National Machinery for Gender Equality and Women's Empowerment*) <<http://pcw.gov.ph/law/republic-act-9710>> accessed 11 August 2016.

³⁷⁸ Philippine, government agencies and inter-agency committees and Philippine, 'Consideration of Reports Submitted by States Parties under Article 73 of the Convention pursuant to the Simplified Reporting Procedure, Second Periodic Reports of States Parties Due in 2011 : The Philippines' (UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) 2014) Periodic report CMW/C/PHL/2 para.67 <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5347b51f4&skip=0&query=republic%20act%2010022>> accessed 2 August 2016.

³⁷⁹ Section 38 of The Magna Carta of Women (n 376).

³⁸⁰ International Labour Conference (n 66) para.97.

³⁸¹ PMRW/ILO (n 354) p.7.

only exist on paper and were not paid in full, placement fees were charged upfront or deducted from salaries and awareness of the package was low.³⁸²

The next ambitious project was to turn the Magna Carta for Household Helpers into hard law and in January 2013 the so called Domestic Workers Act (Batas Kasambahay) was passed.³⁸³

Important measures include:

- upholding the rights and dignity of domestic workers
- provisions for their protection
- the use of a formal contract that outlines the responsibilities of both the employer and employee and a mechanism for the settlement of disputes
- the setting of a minimum wage and its future adjustment
- the provision of compulsory social security benefits for domestic workers.³⁸⁴

With this legislation, ‘domestic [...] work is now recognized as a formal sector of labour’.³⁸⁵ This not least becomes clear in the change of language which already shows in the title of the law namely ‘An Act Instituting Policies for the Protection and Welfare of *Domestic Workers*’³⁸⁶ (emphasis added).

Additionally, the Labor Code of the Philippines³⁸⁷ also devotes a section (s.141) to Domestic Workers which provides a definition and some basic labour rights.³⁸⁸ Filipino domestic workers including those employed abroad are also covered by Workers’

³⁸² ‘Survey Research on the Effectiveness of the Household Service Workers (HSW) Policy Reform Package’ (Centre for Migrant Advocacy (CMA) 2011) p.4
<<https://centerformigrantadvocacy.files.wordpress.com/2012/06/household-service-workers-policy-reform-package.pdf>> accessed 11 August 2016.

³⁸³ Republic Act No. 10361 - An Act Instituting Policies for the Protection and Welfare of Domestic Workers 2013.

³⁸⁴ PMRW/ILO (n 354) p.3.

³⁸⁵ *ibid* p.21.

³⁸⁶ Domestic Workers Act (n 383).

³⁸⁷ Labor Codes of the Philippines- Book III - Conditions of Employment.

³⁸⁸ International Labour Conference (n 66) para.114.

compensation for employment and injuries and Retirement pension.³⁸⁹ For domestic workers based in the Philippines maternity leave provisions are in place.³⁹⁰

The 1995 Migrant Act was further developed and the up to date version is the Magna Carta of Overseas Migrant Workers 2010.³⁹¹ Efforts included for example trainings for officials in legal professions and State and employment services on amendments regarding measures against unlawful recruitment.³⁹² The Overseas Workers Welfare Administration (OWWA) as mandated by the Migrant Workers Act offers several services Filipino migrant workers such as an emergency repatriation fund, counselling and para-legal assistance for migrant workers and some insurances in case of death, injury, illness or disability related to employment abroad.³⁹³

4.3.3 Bilateral agreements and international framework

In terms of bilateral relations between the governments of the Philippines and Malaysia that concern domestic workers, minimum requirements have been stipulate to regulate employment of Filipina migrant employment situations. As already stated in Chapter 4.3.1 and 4.3.2, a minimum wage applies for Filipinas. Furthermore, they are entitled to a weekly day off, a minimum of 8 hours uninterrupted daily rest and their passports are not to be taken from them.³⁹⁴

The Philippines is a model country not only in regards to its domestic law but also in terms of international efforts regarding domestic workers. They took on a major role already throughout the negotiations leading up to the adoption of the landmark

³⁸⁹ *ibid* para.213 Table V.2.

³⁹⁰ *ibid* para.223 Table V.3.

³⁹¹ Republic Act No. 10022 - An Act Amending Republic Act No. 8042, otherwise known as the Migrant Workers and Overseas Filipinos Act of 1995 2010.

³⁹² Philippine, government agencies and inter-agency committees and Philippine (n 378) para.94.

³⁹³ International Labour Conference (n 66) para.215.

³⁹⁴ Women's Aid Organisation (WAO) (n 119) p.220.

Convention on Decent Work for Domestic Workers³⁹⁵ and were the second country to ratify C189.³⁹⁶

As shown in the chapter on the Philippines domestic law, they have adopted legally binding acts following their accessions to the ILO Domestic Workers Convention and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families in 1995 and the Convention on the Elimination of All Forms of Discrimination against Women.³⁹⁷

4.3.4 Conclusion on the Philippines

The Philippines have a comprehensive framework of laws and policies for the protection of its overseas domestic workers which also does not omit the gender specificities of this trade. It appears that the government is not lacking commitment. On the other hand, workers' rights to decent working conditions and correct pay are not easily translated into practice and cases of abuse still persist for Filipina workers as well. However, as will be investigated further in the following chapter, the efforts lead to definite differences in the situation they face whilst working in Malaysia.

The aim of Chapter 4 was to examine tendencies in labour sending nations' attitudes towards protecting domestic workers rather than to give an entirely exhaustive overview on the three home States. This will aid the analysis of the circumstances foreign domestic workers from different countries encounter in Malaysia and the impact their home States have.

³⁹⁵ PMRW/ILO (n 354) p.2.

³⁹⁶ International Labour Organisation, *Domestic Workers across the World* (n 366) p.47.

³⁹⁷ Local laws followed swiftly after acceding to the ICRMW in 1995, the Migrant Act was passed in the same year and the Domestic Workers Act 2013, followed the ratification of ILO Convention 189 within less than a year. In terms of CEDAW which the Philippines joined already in 1981 it took considerably longer for the State to arrive at passing the Women's Charter in 2009.

5. Comparative study – differences between Cambodian, Indonesian and Pilipino DWs in Malaysia

The Convention concerning Decent Work for Domestic Workers³⁹⁸ was adopted at the 100th session of the International Labour Conference in June 2011 and entered into force in September 2013 after the Philippines was the second country to ratify the Convention. Neither Malaysia nor Cambodia or Indonesia have ratified it,³⁹⁹ even though Indonesia's government stated the intention to do so in 2014.⁴⁰⁰ Nevertheless, the Convention was adopted with a majority of countries voting in its favour⁴⁰¹ and together with the Recommendations concerning Decent Work for Domestic Workers⁴⁰², it constitutes the first comprehensive international set of norms for the regulation of this field of work carried out by such a large number of women.

5.1 Assessment of differences in circumstances of domestic workers

In the following, some of the articles of the ILO Domestic Worker Convention will be used as a framework to draw a comparison of the circumstances Cambodian, Indonesian and Filipino women find themselves in when they migrate to Malaysia as domestic workers.

5.1.1 Protection from abuse, harassment and violence⁴⁰³

As discussed in Chapter 3 and 4, all domestic workers risk abuse in Malaysia. Numbers of abuse cases are hard to obtain as they are not officially recorded by governments.

³⁹⁸ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74).

³⁹⁹ 'ILO Ratifications of C189 - Domestic Workers Convention' (n 85).

⁴⁰⁰ see Chapter 4.2.3

⁴⁰¹ 'World Report 2012: A Landmark Victory for Domestic Workers | Human Rights Watch' (n 73) p.2.

⁴⁰² 'Domestic Workers Recommendation (Adopted 16 June 2011) R201, ILO' (n 79).

⁴⁰³ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.5.

Embassies and NGOs have some numbers but there seem to be no comprehensive statistics which allow a comparison by country of origin and severity of cases or type of abuse. However, in the following it will become clear that in many areas of domestic workers' rights in Malaysia, differences can be found according to nationality which can either ameliorate or aggravate their situation and therefore influence the risk of exploitation and abuse. As previously discussed, these abuses include 'excessively long hours of work with no rest days, non-payment of wages, poor living conditions [...] psychological, physical, and sexual abuse, and restrictions on freedom of movement and communication'.⁴⁰⁴

If domestic workers dare to flee abusive employers and what happens when they manage to do so, depends largely on their home countries. Provided with little information and stripped of private contacts, Cambodian domestic workers often have only their recruitment agencies to turn to. Reportedly though, agents do often act against the workers' best interest.⁴⁰⁵ Their government does not ensure that they are provided with the necessary information and even if they manage to get to their embassy, it does not operate a shelter for abused women as other embassies do and the lack of resources and training mean that in some cases they even return workers to agencies or employers. As it stands, the Cambodian government tries to pass on responsibilities to agencies rather than fulfil its obligations for the protection of its citizens.⁴⁰⁶ Indonesian women can find themselves in similar situations where they feel that there is no way out for them and therefore they remain with abusive employers.⁴⁰⁷ The contracts negotiated by the Filipino government set out that employers are obliged to 'treat the worker in a just and humane manner and to refrain from physical violence under all circumstances'. Indonesian women have no such provisions in their contracts.⁴⁰⁸

⁴⁰⁴ Poudyal and Varia (n 134) p.56.

⁴⁰⁵ see Chapter 4.1.1

⁴⁰⁶ Poudyal and Varia (n 134) p.69-71.

⁴⁰⁷ Human Rights Watch (HRW), 'Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia' (2004) Vol. 16 p.28.

⁴⁰⁸ *ibid* p.62.

Cambodian women get very limited support from their embassy in Malaysia and they have no counselling service in place⁴⁰⁹ but also when they return home, there are no services to support victims of abuse. There are harrowing stories of relatives who cannot deal with traumatised returnees and some families have even resorted to chaining them up in the house so they would not harm themselves or scare the neighbourhood.⁴¹⁰ By empowering victims through providing adequate services and taking them serious already in Malaysia, some of the long term effects of abuse can be alleviated. The Philippines provide relatively comprehensive services including pre departure information as well as counsel and shelter at their Malaysian embassy.⁴¹¹ Women interviewed at the shelter agreed that making friends and being able to exchange their stories of abuse and experiences makes them feel happier and more secure. The embassy also provides services for a speedy resolution of disputes between the workers and the agencies so that the women can return home as quickly as possible.⁴¹²

5.1.2 Fair terms of employment, decent living and working conditions and respect of privacy⁴¹³

The mandatory contracts between Filipina domestic workers and their employers, set out in detail terms and conditions of employment⁴¹⁴ and the Philippines' Domestic Workers Act stipulates the right to privacy shall be respected by the employer and access to communication provided.⁴¹⁵ That is no guarantee that these conditions are provided by employers but the Philippine government negotiated a work contract for its overseas domestic workers with the Malaysian government that has better provisions than

⁴⁰⁹ Poudyal and Varia (n 134) p.71.

⁴¹⁰ Titthara and Cuddy (n 262).

⁴¹¹ see Chapter 4.3.1

⁴¹² Angeli Sabillo (n 369).

⁴¹³ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.6.

⁴¹⁴ PMRW/ILO (n 354) p.24-26.

⁴¹⁵ 'Philippines Enact New Law Protecting Domestic Workers - Developments in Law and Practice 2013' (International Labour Office 2013) p.2 <http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_211052.pdf> accessed 14 August 2016.

contracts of other women.⁴¹⁶ Furthermore, Cambodian and Indonesian women do often not receive a copy of their contracts nor information about their working conditions and the restriction of communication is common practise. Indonesian domestic workers also reported that their contracts were exchanged when they arrived in Malaysia and the new contracts' conditions were more disadvantageous.⁴¹⁷

5.1.3 Written job offers and contracts specifying minimum terms and conditions, enforceable in the receiving country and receipt of a copy of said documents⁴¹⁸

Indonesians usually sign contracts but do neither receive copies nor adequate information on the contents or the chance to show it to someone for advice.⁴¹⁹ Similarly, Cambodians do not get copies of the contracts they signed and are only advised of obligations they have to fulfil but not that employers also have to meet duties towards them.⁴²⁰ As mentioned in the previous chapter, the Philippine government, has negotiated a standard contract with Malaysia which affords them with stronger protections than the standard contract used for Indonesians and others.⁴²¹ The extra provisions set out are regarding minimum wage, mandatory rest times and days and monthly payment of wages in cash. Further the custody of passport, flights to and from Malaysia, health care services, and help with sending remittances home.⁴²²

⁴¹⁶ Human Rights Watch (HRW) (n 407) p.62.

⁴¹⁷ see Chapter 4.1.1 on Cambodia and Chapter 4.2.1 for Indonesia

⁴¹⁸ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.7, art.8.

⁴¹⁹ Human Rights Watch (HRW) (n 407) p.28.

⁴²⁰ Poudyal and Varia (n 134) p.29-30.

⁴²¹ Human Rights Watch (HRW) (n 407) p.62.

⁴²² *ibid* p.62, Appendix B+D.

5.1.4 Provisions concerning the live-in situation of domestic workers required in Malaysia, confinement in the employers' homes during rest and leave periods and the confiscation of passports

The convention stipulates that domestic workers should be able to choose whether or not to live in their employer's home. Malaysia obliges migrant domestic workers to 'live-in'.⁴²³ Cambodia does not seem to disagree with this requirement whereas the Indonesian government has recently called for an end to this practise and wants workers to live in shared accommodations away from their employers.⁴²⁴ The Philippines' Domestic Workers Act applies to live-in and live-out workers.⁴²⁵ Most importantly though Filipinas' contracts ensure their entitlement to a weekly day off which they can use to leave the house.⁴²⁶

As discussed in Chapter 4, Malaysian law actually prohibits the confiscating of passports. In practise though this is not enforced and Indonesian and Cambodian domestic workers are mostly required to give their travel documents up to employers or agencies and only Filipinas usually hold their passports.⁴²⁷ A Malaysian NGO who assists migrants reported that out of 41 abuse cases of Cambodian domestic workers they handled between January and August 2011 none had been allowed to keep their passports.⁴²⁸

5.1.5 Equal treatment with other workers regarding hours of work, overtime pay, daily and weekly rest and annual leave

Migrant workers in Malaysia are covered by the employment act whereas domestic workers are excluded from most provisions.⁴²⁹ However, the Philippine government through its Domestic Workers Act and its obligatory standard contracts for its overseas

⁴²³ see Chapter 3.2.2

⁴²⁴ Arshad and Seow (n 353).

⁴²⁵ 'Philippines Enact New Law Protecting Domestic Workers - Developments in Law and Practice 2013' (n 415) p.2.

⁴²⁶ *ibid* p.3.

⁴²⁷ Human Rights Watch (HRW) (n 407) p.62.

⁴²⁸ Poudyal and Varia (n 134) p.56.

⁴²⁹ see Chapter 3.2.1

domestic workers stipulates daily rest periods and maximum working hours, a day off per week (minimum 24 consecutive hours) and details provisions regarding annual leave.⁴³⁰ In the 2011 MOU between Indonesia and Malaysia, a weekly rest day is foreseen but this has not been implemented.⁴³¹ The MOU between Cambodia and Malaysia has not been made public.⁴³²

5.1.6 Minimum Wage

Malaysia has first introduced a minimum wage law in 2012 and this was reviewed in 2016; both provisions explicitly exclude domestic workers regardless if they are nationals or not.⁴³³ Again, the Philippines have found their own solution. They have regulated minimum wages for domestic workers within the country but also prescribed a general worldwide minimum wage for their domestic workers abroad. Cambodia and Indonesia do not have a law concerning minimum wage covering their domestic workers⁴³⁴ and they are usually paid between 400 and 600 Malaysian Ringgit a month⁴³⁵ whereas Filipinas receive around RM1,700.⁴³⁶ The ILO has reported tendencies that domestic workers' wages differ according to their nationality.⁴³⁷ Some Cambodians for example were told by agents not to ask about salary payment and that they will get the money after they complete their two-year employment term.⁴³⁸ In 2015, during negotiations reviewing the 2011 MOU, Indonesia proposed to raise wages for its domestic workers in Malaysia to

⁴³⁰ 'Philippines Enact New Law Protecting Domestic Workers - Developments in Law and Practice 2013' (n 415) p.3.; Human Rights Watch (HRW) (n 407) Appendix D.

⁴³¹ see Chapter 4.2.3

⁴³² see Chapter 4.1.3

⁴³³ 'New Minimum Wage to Kick-Start on July 1' (Putrajaya, Malaysia, 2 May 2016) <<http://www.themalaymailonline.com/malaysia/article/new-minimum-wage-to-kick-start-on-july-1>> accessed 10 August 2016.

⁴³⁴ International Labour Conference (n 66) para.140 Table IV.1.

⁴³⁵ Poudyal and Varia (n 134) p.12. some more recent newspaper articles mention that the Indonesian domestic workers' salary could also be RM700 or RM800 but do not give any sources for these statements

⁴³⁶ see Chapter 4.3.1

⁴³⁷ International Labour Conference (n 66) para.24.

⁴³⁸ Poudyal and Varia (n 134) p.58.

RM1,200⁴³⁹ but Malaysia's Human Resource Minister publicly stated that that was 'too high' and that Malaysia 'sought [...] detailed justification in writing from the Indonesian government'⁴⁴⁰. To date this issue has not been resolved.⁴⁴¹

5.1.7 Social security and maternity protection⁴⁴²

As discussed in some detail in Chapter 3.2.1 and 3.2.2, Malaysia excludes domestic workers from domestic labour laws and considers it *illegal* for migrant workers to be or become pregnant, withholds or revokes work permits of pregnant migrant women and requires regular testing to this regard. The Migrant Workers Committee sees gender specific restrictions because of pregnancy and pregnancy testing without informed consent as discriminatory practises and recommends that all States revoke such practises.⁴⁴³ Sending countries cannot change Malaysian legislation but they can negotiate terms in bilateral agreements⁴⁴⁴ and ensure that domestic workers are included in their own laws on social security. For example, the Philippines' Overseas Workers Welfare Administration was created to offer several social services to its domestic worker population abroad⁴⁴⁵ and the country's maternity leave legislation also covers domestic workers whereas Cambodia and Indonesia do have no such provisions.⁴⁴⁶

⁴³⁹ 'Indonesia Wants Maids to Be Paid RM1,200' *Free Malaysia Today* (29 May 2015) <<http://www.freemalaysiatoday.com/category/nation/2015/05/29/indonesia-wants-maids-to-be-paid-rm1200/>> accessed 14 April 2016.

⁴⁴⁰ Richard Riot, 'Proposed Increase in Maid Salary Too High' *Free Malaysia Today* (Kuala Lumpur, 1 June 2015) <<http://www.freemalaysiatoday.com/category/nation/2015/06/01/riot-proposed-increase-in-maid-salary-too-high/>> accessed 14 April 2016.

⁴⁴¹ see Chapter 4.2.3

⁴⁴² 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.14.

⁴⁴³ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (n 59) para.61.

⁴⁴⁴ For example, Viet Nam achieved some social security coverage for its workers in a bilateral agreement with Malaysia in 2013. International Labour Conference (n 66) para.214.

⁴⁴⁵ see Chapter 4.3.2

⁴⁴⁶ International Labour Conference (n 66) para.223 Table V.3.

5.1.8 Recruitment process including private employment agencies – prevention of abuse, licensing and prohibition of deducting fees from salaries⁴⁴⁷

Despite some regulation of the private recruitment agency sector in all three labour sending States, Cambodian and Indonesian migrant domestic workers face a lot of abuse on the hands of recruiters. Chapter 4 dedicated considerable space to the discussion of these abuses and practices which also increase the risk of abuse during work placements. Especially Cambodia severely lags behind⁴⁴⁸ and needs to overhaul its migration policy and introduce some comprehensive binding legislation.⁴⁴⁹ However, also Indonesia has major issues to face in this regard despite its laws dealing with the recruitment process.⁴⁵⁰ It needs to be seen if Indonesia's plans by the government to convert the domestic work sector into a higher skilled profession will show some improvements in this area.⁴⁵¹ The Philippines are considered a model with its tighter regulations designed to control the recruitment agencies by making it obligatory to seek authorization from the Philippine Overseas Employment Administration (POEA) before placing workers abroad. POEA also provides rights awareness trainings to prospective domestic workers and 'recruiters have been prosecuted in the Philippines, even when the abuse happened overseas'.⁴⁵²

5.1.9 Effective access to courts and complaint mechanisms⁴⁵³

Malaysia's immigration laws make it extremely difficult to seek redress for migrant domestic workers.⁴⁵⁴ However, the Philippines are the only country which provides a

⁴⁴⁷ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.15.

⁴⁴⁸ see Chapter 4.2.1

⁴⁴⁹ see Chapter 4.1.2

⁴⁵⁰ see Chapter 4.2.2

⁴⁵¹ see Chapter 4.2.4

⁴⁵² 'Trafficking in Person Report - June 2011' (Department of State United States of America) p.28 <<http://www.state.gov/documents/organization/164452.pdf>> accessed 7 June 2016.

⁴⁵³ 'Domestic Workers Convention (Adopted 16 June 2011, Entered into Force 05 September 2013) C189, ILO' (n 74) art.16.; 'Domestic Workers Recommendation (Adopted 16 June 2011) R201, ILO' (n 79) para 21.(1)(e).

⁴⁵⁴ see Chapter 3.2.2

speedy conciliatory process for quick resolution of disputes with recruitment agencies. Whilst the case is being processed, the agencies are suspended. This means that the cases, typically about breaches of contract such as not enough rest periods, excessive hours of work or lack of food are usually resolved within two weeks and women can return home quickly.⁴⁵⁵ Furthermore, legal advice is provided by the Philippine Overseas Labor Office.⁴⁵⁶ The Cambodian embassy lacks the capacity and will to provide decent services to all domestic workers who need their support and there are no policies in place which clearly regulate the resolution of labour disputes.⁴⁵⁷ Even though the embassy usually supports workers in retrieving withheld passports or unpaid wages, in some cases women were returned to agencies even in cases of possible criminal charges. HRW was made aware of three rape cases where the survivors were sent back to the agencies. The embassy is on the one hand working together with Malaysian NGOs to improve its services but also sometimes interferes when rights organisations want to take on cases.⁴⁵⁸

5.1.10 Bilateral agreements⁴⁵⁹

As discussed in Chapter 4, all three home States have negotiated bilateral agreements with Malaysia.⁴⁶⁰ However, Cambodia⁴⁶¹ and Indonesia⁴⁶² have not made the contents of their MOUs public which makes it difficult to assess their effectiveness and implementation whereas the Philippines make information about agreements available online.⁴⁶³

⁴⁵⁵ Angeli Sabillo (n 369).

⁴⁵⁶ see Chapter 4.3.1

⁴⁵⁷ Poudyal and Varia (n 134) p.68.

⁴⁵⁸ *ibid* p.68-69.

⁴⁵⁹ 'Domestic Workers Recommendation (Adopted 16 June 2011) R201, ILO' (n 79) para.20.(2).

⁴⁶⁰ see Chapters 4.1.3, 4.2.3 and 4.3.3

⁴⁶¹ Zsombor (n 264).

⁴⁶² Piyasiri Wickramasekara and International Labour Office, *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* (Document and Publications Production, Printing and Distribution Branch (PRODOC) of the ILO 2015) p.24.

⁴⁶³ *ibid*.

5.1.11 Cost of repatriation⁴⁶⁴

The contracts of Filipino domestic workers in Malaysia specify that the costs for returning back home at the end of the contract should be borne by the employer. The contract stipulates that they have to be paid an economy class plane ticket to the Philippines.⁴⁶⁵ Standard contracts which the Malaysian government applies to other nationalities do not include such a provision.⁴⁶⁶

5.1.12 Other differences

Interestingly, Malaysia requires employers of Filipino domestic workers to earn a minimum salary of RM10,000 whereas to hire women from other countries, this threshold is only RM3,000.⁴⁶⁷ Furthermore contracts of Philippine workers also request employers to provide access to health care and to help them send remittances home in regular intervals.⁴⁶⁸

5.2 Impact of home State behaviour on domestic workers in Malaysia

Malaysia seems immune to pressures from labour sending countries in terms of changing its legislation to better protect migrant domestic workers. However, it was shown that home States' behaviour does impact the circumstances of foreign domestic workers in Malaysia. Domestic workers from the Philippines are better situated regarding working and living conditions, rest periods, freedom of movement, payment and other aspects of their employment. Their decision to endure or flee abuse is facilitated by several factors such as higher rights awareness, access to support from their embassy including clear return policies. Their day off makes it easier to meet other domestic workers and to build

⁴⁶⁴ 'Domestic Workers Recommendation (Adopted 16 June 2011) R201, ILO' (n 79) para.22.

⁴⁶⁵ Human Rights Watch (HRW) (n 407) Appendix D.

⁴⁶⁶ *ibid* Appendix C.

⁴⁶⁷ 'Useful Information for Filipinos in Malaysia' (*Embassy of the Philippines Kuala Lumpur*) Conditions for Issuing Visit Pass <<http://www.philembassykl.org.my/filcom.htm>> accessed 6 August 2016.

⁴⁶⁸ Human Rights Watch (HRW) (n 407) p.62.

up local networks which is crucial in passing on information and sharing experiences. This can reduce the feeling of power- and hopelessness described by women who have no ways of communicating or meeting with others in work situations that leave them hidden from the outside world. Malaysia requests employers to prove an income more than three times higher if they want to employ a Filipina domestic worker, presumably so that they can afford to pay the higher wages.

Indonesia is currently using a different route which includes a renewed ban on legal migration of domestic workers. However, the Indonesian NGO Migrant Care has criticised this move because it does not tackle the root causes of abuse or provide adequate protection of domestic workers but cuts official routes for Indonesian women to seek employment abroad.⁴⁶⁹ If Memoranda of Understanding regulating women's migration are based on ideas that migrant women are cheap and unskilled labour to be had by receiving countries and at the same time brave contributors to families and economy back home by sending remittances⁴⁷⁰ these bilateral agreements are bound to disrespect women's actual needs as workers and deepen discrimination and vulnerabilities. Migrant Care's director said about the universal ban that it is 'fuelled by misguided patriarchal view'.⁴⁷¹ When formal ways of migration are cut off – as is the case when Indonesia and Cambodia apply bans on domestic workers' emigration – but no alternative employment opportunities are created, people find other routes to go abroad. Irregular migration is being criminalised⁴⁷² on the one hand and on the other abuse and exploitation is being associated with undocumented migration.⁴⁷³

The president of the Malaysian NGO Women's Aid Organisation sees 'class consciousness and xenophobia [...] as the strongest reason[s]' for abuse of domestic

⁴⁶⁹ Teh Wei Soon, 'Malaysians And Their Maids: A Mutual But Unequal Relationship' *Malaysian Digest* (27 February 2015) <<http://www.malaysiandigest.com/opinion/543453-malaysians-and-their-maids-a-mutual-but-unequal-relationship.html>> accessed 12 August 2016.

⁴⁷⁰ Elias (n 5) p.400.

⁴⁷¹ Teh Wei Soon (n 469).

⁴⁷² Malaysia criminalises undocumented migrant workers see Chapter 3.2.2; and Indonesia made it 'illegal' when women emigrated during the ban see Chapter 4.2.2

⁴⁷³ Killias (n 163) p.899.

workers⁴⁷⁴ and ‘racial stereotypes play a role both in the abuse of domestic workers and in the selection of migrant workers over local citizens.’⁴⁷⁵

When home States show strong support for their overseas workers and strengthen their position, this also impacts their circumstances because it affects how they are viewed. Filipinas are seen as better skilled workers and more aware of their rights which increases their social status compared to other nationalities seen as ‘cheaper and more compliant’.⁴⁷⁶ An official from the Philippine embassy in Malaysia said in 2012 that the demand for Filipino domestic workers was increasing since 2009 because they are well trained and speak English well,⁴⁷⁷ although after the devaluation of the Malaysian Ringgit in 2015 made recruitment agencies complain that the higher wages tied to the US Dollar meant that Filipinas were harder to place.⁴⁷⁸

⁴⁷⁴ Anggraeni (n 2) p.156.

⁴⁷⁵ Ehrenreich and Hochschild (n 6) p.108.

⁴⁷⁶ Anggraeni (n 2) p.128-129.

⁴⁷⁷ ‘Report: PHL Embassy in Malaysia Tightens Rules for Domestic Helpers’ *GMA News Online* (8 September 2012) <<http://www.gmanetwork.com/news/story/273114/news/pinoyabroad/report-phl-embassy-in-malaysia-tightens-rules-for-domestic-helpers>> accessed 18 August 2016.

⁴⁷⁸ Christine Cheah, ‘Filipino Maids Must Be Paid Minimum US\$400’ *The Star Online* (12 May 2015) <<http://www.thestar.com.my/news/nation/2015/05/12/filipino-maids-must-be-paid-minimum-us400/>> accessed 18 August 2016.

6. Conclusion

Female migrant domestic workers are faced with a uniquely wide range of causes for discrimination. The Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families identifies ‘traditional roles, the gendered labour market, the universal prevalence of gender-based violence and the worldwide feminization of poverty and labour migration’⁴⁷⁹ as specific to this group.

The recent adoption of the Domestic Workers Convention and inclusion in the discussions by UN treaty bodies show that the international community has acknowledged the need to address these issues. As discussed in Chapter 2, there are plenty of comments and recommendations that can be used as guidelines to establish fair working conditions free from abuse and exploitation for female migrant domestic workers.

However, even though Malaysia has been criticised by NGOs and international organisations as well as labour sending countries they are unwilling to tackle the widely reported cases of exploitation and abuse faced by their migrant domestic worker population. Malaysia wants to encourage its own women to enter the labour market in high skilled work but at the same time, supports the traditional roles women are supposed to fulfil as mothers and carers. When they are unable to combine those two functions, the State does not provide public services but expects families to find their own solutions. Additionally, the government actively depicts migrant workers as security threat⁴⁸⁰ and continuously portrays domestic workers as non-skilled by insisting on calling them maids, servants or helpers. This contributes to a culture of xenophobia and sexism which institutionalises and normalises abuse and exploitation.

Advances in the appalling record Malaysia displays in this regard would improve its relationship with neighbouring countries and its international image. In the long run

⁴⁷⁹ Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (n 59) para.60.

⁴⁸⁰ ILO Regional Office for Asia and the Pacific (n 18) p.2-3.

though, migrant women's situation can only truly improve if root causes of discrimination are confronted. I believe that this would also improve the situation for Malaysian women and further the development of the country in more general terms.

In the absence of Malaysia entering relevant international treaties or creating domestic legislation to respect, protect and fulfil migrant domestic workers' human rights, the logical step is to look towards their home States. The main objective of this paper was to analyse if the three largest groups of migrant domestic workers, namely Cambodia, Indonesia and the Philippines, are facing different circumstances in Malaysia and how this might be impacted by their home States' behaviour.

All female migrant domestic workers in Malaysia are subject to a lack of fundamental rights and protections set within patriarchal structures which is based not only on their low status as foreigners but also on the low value of domestic work itself and its association with women's work which is unskilled and not classed as real work in the sense that other paid work is viewed as deserving some respect. Limited access to decent remuneration in the home countries and a scarcity of employment opportunities in other sectors abroad lead women from poorer countries to enter into the highly feminised field of domestic work.

Through the examination of different aspects of this work, it became clear that there are differences in how Cambodian, Indonesian and Filipino domestic workers are seen and treated in Malaysia and that they can be attributed to the attitudes home countries display.

Cambodia and Indonesia need to put into place comprehensive legislation and ensure its implementation. Both countries violate their obligations under international human rights law which they have ratified and neither has shown real commitment by adopting the ILO Convention on Decent Work for Domestic Workers. Bilateral negotiations with Malaysia are tainted by gendered assumptions and female domestic workers or relevant rights organisations are not invited to discussions or allowed to view drafts or even finished agreements. Moreover, responsibilities are also not fulfilled on their own territory. When

women are abused by recruitment agencies before they leave their home States, they usually face no prosecution. There are no services provided for returning workers to facilitate their reintegration. Both States have repeatedly pledged their willingness and commitment to protect their female migrant domestic worker population but have failed to do so.

Indonesian women make up by far the largest group of migrant domestic workers in Malaysia and have endured abuse and exploitation for a long time. Their home country has for the third time in a decade announced a ban on sending female domestic workers abroad, this time not only limited to Malaysia but a general moratorium. In the past, this was not accompanied by policies initiating significant changes and hence failed to put enough pressure on Malaysia's government to ensure major improvements for Indonesian domestic workers employed there. The bans and inadequate legislation regarding recruitment agencies instead encouraged irregular migration. It remains to be seen if that will be different this time.

Cambodian workers only entered the scene to a significant extent when Malaysia faced domestic work shortages caused by Indonesia's 2009 ban. For such a poor country, remittances sent by overseas workers are a welcome means to alleviate poverty and strengthen the home economy. However, Cambodian domestic workers are confronted with unfavourable working conditions, abuse and exploitation. In response, the Cambodian government followed Indonesia's lead and in 2011 introduced a ban on women migrating into domestic employment in Malaysia; although this was apparently not very strictly enforced. At the end of 2015, finally the governments of Cambodia and Malaysia announced the completion of a Memorandum of Understanding regulating domestic employment between the two countries. Official routes of migration are about to reopen in 2017 but no information on the agreement's contents has been made public. Considering Indonesia's failure to improve the protection of its workers in this way, it is doubtful that Cambodia will have more success.

The Philippines on the other hand are one of the countries with the most progressive laws on domestic work worldwide and also extend a set of comprehensive policies to overseas domestic workers. They introduced a minimum wage and negotiated standard employment contracts including a weekly day off and the right to keep one's own identity documents for their workers in Malaysia and provide services and protection before, during and after work placements. Filipinas are usually better educated from the onset and this is complemented with skills training and rights awareness programmes. All these factors play an important role in empowering workers and can give them the necessary tools to help themselves or ask for support if they need it. In a country like Malaysia where so little awareness and protection is afforded by the local government and its institutions, this cannot ensure that Filipinas are safe from exploitation and abuse but it obviously has a positive effect on their situation.

In conclusion, it can be stated that there are differences in the circumstances of Cambodian, Indonesian and Filipino migrant domestic workers in Malaysia and that they are at least to a certain extent attributable to their home States behaviour. That Malaysia fails its obligations towards migrant women entirely is clear but if sending countries do take their responsibilities serious they can affect positive change.

The fight is not over. We need to go back home. We need to campaign.

We cannot be free until we free all domestic workers.⁴⁸¹

⁴⁸¹ Myrtle Witbooi, former domestic worker and women's rights activist from South Africa celebrating the adoption of the ILO Domestic Workers Convention

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Abstract

Foreign Domestic Workers in Malaysia: A comparative study of the situation of migrant domestic workers from Cambodia, Indonesia and the Philippines

Irene Brettner-Litherland

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The continuous high demand for migrant domestic workers in Malaysia comes hand in hand with abusive working and living conditions for foreign women coming to work in this field. Reports include treatment that amounts to forced labour and domestic servitude. The aim of this paper is to compare the situation of female migrant domestic workers in Malaysia depending on their nationality and what the contributing factors are if such differences exist; specifically, what role home States' behaviour plays.

Core United Nations documents were examined to show the existing international human rights framework for migrant domestic workers and which of the discussed countries are member States to relevant treaties. Indonesians and Filipinas make up the majority of migrant domestic workers in Malaysia but due to recent labour shortages Cambodian women have started to enter the country in higher numbers. Therefore, these three groups have been chosen for this comparative study.

The state of employment of foreign domestic workers in Malaysia was analysed to show what protection they can expect from their host country. It became apparent that Malaysia fails to guarantee the most basic human rights to migrant domestic workers. Then evaluations of the three home States' legal provisions and other approaches on ensuring safe and favourable work conditions for their citizens when they migrate as domestic workers were carried out.

This literature review enabled a comparative study of the conditions and circumstances of migrant domestic workers from Cambodia, Indonesia and the Philippines throughout the migration process to Malaysia. The findings were that there are differences in the

circumstances and conditions that surround the migration cycle of migrant domestic workers and that these can be attributed at least partly to their home States' behaviour. Filipina domestic workers in Malaysia experience better working conditions and easier exit routes in case of abuse than their counterparts from Cambodia and Indonesia.

This can be traced back to the efforts made by the Philippine government. Using the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the United Nations Convention on Migrants' Rights (ICRMW) and the ILO Domestic Workers Convention (C189) the country created a comprehensive programme including domestic legislation, policies and training designed to improve the migration process bearing in mind the gender specificities of this field of work.

Indonesia has for the third time announced a ban on regular migratory routes for domestic workers to Malaysia after two consecutive bilateral agreements failed to ensure comprehensive protection against exploitation and abuse due to the lack of effective laws or policies underpinning the processes. Cambodia has not yet introduced binding legislation in this regard and their existing policies lack implementation. It has recently announced the completion of a Memorandum of understanding with Malaysia regulating domestic work. However, the negotiations were kept behind closed doors and workers' rights groups doubt its effectiveness.

migrants, female migrants, domestic work, female migrant domestic workers, abuse, exploitation, protection, decent working conditions, Malaysia, Cambodia, Indonesia, Philippines

Zusammenfassung

Ausländische Hausarbeiterinnen in Malaysia: Eine Vergleichsstudie der Situationen
migrierter Hausarbeiterinnen aus Kambodscha, Indonesien und den Philippinen

Irene Brettner-Litherland

August 2016

Die hohe Nachfrage nach ausländischen Hausangestellten in Malaysia geht einher mit missbräuchlichen Wohn- und Arbeitsbedingungen, bis hin zu Zwangsarbeit und Sklaverei ähnlichen Zuständen. Das Ziel dieser These ist es Situationen von weiblichen Hausangestellten aus verschiedenen Heimatländern zu vergleichen und zu untersuchen welche Faktoren diese Unterschiede beeinflussen; speziell welche Rolle das Verhalten der Heimatstaaten spielt.

Einschlägige Dokumente der Vereinten Nationen wurden untersucht um den existierenden Rahmen internationaler Menschenrechte zum Thema HausarbeitsmigrantInnen zu definieren und zu zeigen welche von den hier relevanten Ländern sie unterzeichnet haben. Indonesierinnen und Philippinerinnen machen die Mehrheit migrierter Hausangestellter in Malaysia aus, aber aufgrund von kurzlichem Arbeitskräftemangel, kommen auch mehr Arbeiterinnen aus Kambodscha ins Land. Daher wurden diese drei Gruppen für diese vergleichende Studie ausgewählt.

Es wurde analysiert welchen Schutz ausländische Hausangestellte von ihrem Gastland erwarten können und es wurde augenscheinlich, dass Malaysia nicht einmal die fundamentalsten Menschenrechte für sie garantiert. Danach wurden die Heimatländer untersucht, um deren Vorgehen zum Schutz ihrer Staatsbürger die als Hausangestellte emigrieren zu durchleuchten. Diese Literaturanalyse ermöglichte eine Vergleichsstudie der Bedingungen von migrierten Hausangestellten aus Kambodscha, Indonesien und den Philippinen während ihres ganzen Migrationsprozesses nach Malaysia.

Die Ergebnisse bestätigen, dass Unterschiede bestehen und dass diese, zumindest teilweise, auf das Verhalten der Heimatstaaten zurückzuführen sind. Philippinerinnen haben in der Regel bessere Erfahrungen während des Migrationszyklus als ihre Kolleginnen aus Kambodscha und Indonesien. Gründe dafür sind die effektiveren Bemühungen der Philippinischen Regierung. Durch die erfolgreiche Implementierung von den internationalen Übereinkommen zur Beseitigung jeder Form von Diskriminierung der Frau (CEDAW) und zum Schutz der Wanderarbeitnehmer und ihren Familienangehörigen (ICRMW) sowie des Abkommens zum Schutz von Hausangestellten (Internationale Arbeitsorganisation – ILO, C189) in nationales Recht und begleitende Strategien, die auch, die geschlechtsspezifischen Besonderheiten dieses Arbeitsfeldes nicht außer Acht lassen, wurden die Arbeitsbedingungen für philippinische Hausangestellte in Malaysia verbessert.

Indonesien hat zum dritten Mal in Folge einen Stopp regulärer Migrationsrouten für Hausangestellte nach Malaysia angekündigt, nachdem bilaterale Abkommen in der Vergangenheit keine Verbesserungen der missbräuchlichen Zustände erbrachten. Dies war jedoch hauptsächlich darauf zurückzuführen, dass Indonesien keine dementsprechenden, unterstützenden Maßnahmen ergriff. Kambodscha hat bis jetzt keine verbindlichen Rechtsvorschriften bezüglich emigrierender Hausangestellter eingeführt. Der Abschluss eines bilateralen Übereinkommens mit Malaysia wurde vor kurzem bekanntgegeben. Da die Verhandlungen hinter verschlossenen Türen stattfanden und die Inhalte nicht veröffentlicht wurden, bezweifeln Arbeitsrechtsorganisationen seine Wirksamkeit

Migranten, Migrantinnen, migrierende Hausangestellte, Hausarbeit, Missbrauch, Ausbeutung, Schutz vor Ausbeutung, menschenwürdige Arbeitsbedingungen, Malaysia, Kambodscha, Indonesien, Philippinen