

# Cambodian Domestic Workers in Malaysia:

Challenges in Labor Migration Policy and Potential  
Mechanisms for Protection

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Elizabeth A. Léone

## **Cambodian Domestic Workers in Malaysia:**

### **Challenges in Labor Migration Policy and Potential Mechanisms for Protection**

#### **I. Introduction**

Decades of political turmoil and war have left Cambodia with an unstable economic infrastructure that cannot effectively deal with the high unemployment that plagues the country's population of over 14 million people.<sup>1</sup> As of 2007, over 60% of the population was under 25<sup>2</sup> with 250,000 to 300,000 Cambodians entering the workforce per year.<sup>3</sup> Besides agriculture, the garment industry and tourism are main avenues for employment within Cambodia.<sup>4</sup> Although the garment industry is the largest industry in Cambodia, the number of jobs remains around 350,000 in total.<sup>5</sup> In addition to the push factors of high unemployment and a large number of unskilled workers, nearby Malaysia is a nation experiencing high economic growth with a huge demand for unskilled/low-skilled labor that pays higher wages for these types of jobs compared to other countries in the region.<sup>6</sup> As a result, many unemployed and under-skilled Cambodians are migrating to Malaysia, particularly for domestic work.

This paper will look at the challenges facing young Cambodian women who migrate to Malaysia as domestic workers. Section I will discuss the causes leading to the labor shortage in Malaysia and the difficulties in regulating this particular informal sector. The recruitment agency system for Cambodians is also detailed as well as the current working conditions for Cambodians

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<sup>1</sup> CIA World Factbook: Cambodia. Retrieved July 24, 2011. Available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/cb.html>

<sup>2</sup> International Organization for Migration, *Situation Report on International Migration in East and South-East Asia* 12, Regional Thematic Working Group on International Migration Including Human Trafficking (2008). [Hereinafter IOM Report].

<sup>3</sup> Chan Sophal, *Review of Labour Migration Management, Policies and Legal Framework in Cambodia* 5, ILO Asia-Pacific Working Paper Series (May 2009).

<sup>4</sup> IOM Report, *supra*, n 2.

<sup>5</sup> Sophal, *supra* at 6.

<sup>6</sup> *Id.* at 1.

in Malaysia. Section II will look at current legal mechanisms in place for workers, covering the domestic laws of Cambodia and Malaysia as well as international covenants, including a detailed analysis of the brand new Convention on Domestic Workers, adopted in June of 2011. Section III provides a case study of the Philippines where government regulation of the labor migration system has led to increases in remittances, worker protection and higher remuneration. Section IV concludes with recommendations for strengthening the labor migration system for Cambodians working in Malaysia.

#### A. Labor Shortage in Malaysia

Beginning in the 1980s, Malaysia's economic growth<sup>7</sup> has been cited as an emerging success story along with the 'Tiger Economies' of Japan, Korea, Singapore, and Hong Kong.<sup>8</sup> Malaysia's rising income and relatively well-educated population created occupational mobility and many low-skilled jobs to be performed by migrants. Part of Malaysia's success is due to foreign direct investment, particularly from Japan and Singapore,<sup>9</sup> as well as development of industrial sectors and demographics resulting from the Baby Boom generation.<sup>10</sup> Additional reasons for Malaysia's labor shortage include standard of living increases coupled with an increased *reservation wage* for low-skilled jobs – the lowest wage a worker will accept for a particular job.<sup>11</sup> The current economic climate in Malaysia means that skilled citizens look for work in Singapore and Taiwan<sup>12</sup> leaving plenty of service-oriented employment that the growing middle class sector would prefer not to perform. Chief among these jobs is domestic work. The burgeoning middle

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<sup>7</sup> Geoffrey Ducanes and Manolo Abella, *Labor Shortage Responses in Japan, Korea, Singapore, Hong Kong and Malaysia: A Review and Evaluation* 7, ILO Asian Regional Program on Governance of Labor Migration, Working Paper No. 2 (January 2008).

<sup>8</sup> *Id.* at 1.

<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.* at 1.

<sup>11</sup> *Id.* at 2. A reservation wage is not the same as a government mandated 'minimum wage.'

<sup>12</sup> *Id.* at 8.

class of Malaysia sees an average annual income of \$8100 (USD) which is enough to afford a cheaply-paid domestic worker.<sup>13</sup>

So far, the primary means of tackling Malaysia's labor shortage has been through migration from neighboring or nearby countries. In 2003, Malaysia's workforce was 22% migrants<sup>14</sup> which was the second highest percentage in the region. Over 98% of migrant workers in Malaysia are low-to-semi skilled and nearly 18% of legal migrants in the country were domestic workers.<sup>15</sup> The initial need for domestic workers in Malaysia was met by migrants from neighboring Indonesia, but as reports of abuse by Malaysian employers rolled in, the Indonesian government began barring its citizens from migrating in June of 2009. The number of domestic workers in Malaysia went from 270,000 to 220,000 after the ban<sup>16</sup> and Cambodian workers began to fill in the gap.

Indonesia and Malaysia have since crafted a memorandum of understanding<sup>17</sup> concerning domestic workers but rights groups say this bilateral labor agreement does not go far enough. For example, although the new agreement provides for one day of rest per week and the end to the practice of Malaysian employers confiscating domestic worker passports, a minimum wage standard remains elusive and exorbitant recruitment fees are still in place.<sup>18</sup> Despite Indonesia's status as an economic power in its own right<sup>19</sup> the country was unable or unwilling to negotiate for basic protections of its domestic workers in Malaysia. However, even in Indonesia domestic workers are not considered formal workers entitled to basic protections such as minimum wage and adequate working conditions which may have made arguing for such protections in Malaysia

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<sup>13</sup> Liz Gooch, *A Cry for More (Domestic) Help in Malaysia*, New York Times, (February 23, 2011).

<sup>14</sup> V. Kanapathy, *High-skilled Versus Low-skilled Labour Migration: Managing a Complex Agenda in Malaysia*. Paper prepared for the Institute of Strategic and International Studies (Malaysia). (2005).

<sup>15</sup> Ducanes, *supra* at 38.

<sup>16</sup> Gooch, *supra*, n. 13.

<sup>17</sup> The agreement was reached in May of 2011.

<sup>18</sup> Human Rights Watch, *Indonesia/Malaysia: New Pact Shortchanges Domestic Workers* (May 31, 2011).

<sup>19</sup> Indonesia is a member of the G20 and has the largest economy in Southeast Asia.

all the more difficult.<sup>20</sup> The plight of Indonesian domestic workers and the Indonesian government's response in bilateral negotiations highlights the challenge of protecting domestic workers who migrate out. Arguably, once the Indonesian-Malaysian agreement regarding domestic workers was renegotiated, the Cambodian government lost a lot of leverage in negotiating with Malaysia regarding its own domestic workers.

## B. Challenges in Regulating Domestic Work

The International Labor Organization (ILO) states that at least 53 million people are employed as domestic workers worldwide but acknowledges that the number could be as high as 100 million or more.<sup>21</sup> Domestic work is often a large part of developing countries' GDP<sup>22</sup> in the form of remittances.<sup>23</sup>

Domestic work has historically been seen as a problematic sector to regulate for several reasons. The work itself takes place inside the employer's household (outside of the public sphere) and does not generate tangible profits for the employer. Domestic work is usually performed by women and girls and not seen as "real" employment in the traditional sense. These factors have led to domestic work being *de jure* and *de facto* excluded from most domestic labor law protection and thus this sector is informally regulated by norms that lie outside of the state.<sup>24</sup> Undervaluing of work performed, in-kind payment for remuneration and lack of minimum wage are other factors that have made governments reluctant to tackle any type of regulation or reform

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<sup>20</sup> Malaysia also does not recognize domestic workers as part of the formal economy.

<sup>21</sup> See ILO Press Release, *100th ILO annual Conference decides to bring an estimated 53 to 100 million domestic workers worldwide under the realm of labour standards*, published June 16, 2011; and Shaila Koshy, *ILO Adopts Standards for Domestic Workers*, The Star (Malaysia), (June 20, 2011).

<sup>22</sup> ILO Press Release, *supra* n. 21.

<sup>23</sup> For example, Cambodia's remittances went from 0.34 GDP in 1996 to 3.23 GDP in 2005. Sophal, *supra* at 6, Table 4. Remittances in general surpass development aid and foreign direct investment. International Fund for Agricultural Development, *Sending Money Home: Worldwide Remittance Flows to Developing Countries*, available at <http://www.ifad.org/events/remittances/maps/> (2007).

<sup>24</sup> ILO, *Decent Work for Domestic Workers*, Report IV(1), International Labor Conference, 99th Session (2010).

for domestic work.<sup>25</sup> As a result, international and domestic laws do not provide for maximum weekly working hours for over 56% of domestic workers worldwide.<sup>26</sup> About 45% of all domestic workers do not receive a weekly day of rest.<sup>27</sup> These are but a few examples of exploitation that underscore the need to create effective regulation in the labor migration system.

### C. Legal Migration – The Recruitment Agency System

#### i. Recruitment Process of Cambodians Seeking Work in Malaysia

The bureaucratic machinery involved in Cambodian domestic worker migration to Malaysia includes several agencies and organizations: the Ministry of Labor and Vocational Training (MoLVT), Ministry of Foreign Affairs, Ministry of the Interior, the Association of Cambodian Recruitment Agencies (ACRA) as well as partner NGOs and IGOs. A Cambodian wishing to migrate to Malaysia usually responds to advertisements placed by recruitment agencies for jobs that have been approved beforehand by MoLVT. Prospective domestic workers must then submit certain documents to the recruitment agency, including identification cards, birth certificates which state the candidates' age of 21<sup>28</sup> or older, and a family registry book.<sup>29</sup> The acquisition of these documents adds to the costs workers incur. Not all applicants have these documents and potential workers from the provinces must use local brokers. These brokers (and sometimes sub-brokers) get commission from recruitment agencies for each worker which adds

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<sup>25</sup> Id.

<sup>26</sup> ILO, *Questions and Answers on the Convention Concerning Decent Work for Domestic Workers*, interview with Manuela Tomei, Director of the ILO's Conditions of Work and Employment Programme. (June 21, 2011). [Hereinafter ILO Q & A].

<sup>27</sup> Id.

<sup>28</sup> This is a requirement from the Malaysian government. The Asia Foundation, *Cambodia's Labor Migration: Analysis of Legal Framework* 31 (April 2011). [Hereinafter TAF Report]. There has been discussion on lowering the age in an effort to increase migrant domestic worker numbers but rights groups are against this idea as it places even more vulnerable women and girls in precarious positions. IRIN Asia, *Cambodia: Trafficking Domestic Workers to Malaysia* (March 17, 2011). [Hereinafter IRIN DW].

<sup>29</sup> Sophal, *supra* at 25-26.

more costs to this already expensive process.<sup>30</sup> Additional fees include a medical exam, passport, training and transportation – these are all factored in to the costs that the domestic worker must reimburse the recruitment agency with the first few months’ salary once overseas.<sup>31</sup>

Once a potential worker has provided this documentation there are generally three contracts for the worker to sign: a *service contract* or guarantee agreement between the recruitment agency and the worker in which the worker agrees to complete training or else repay the expenses,<sup>32</sup> a *loan agreement* for recruitment fees to be paid by the worker, and an *employment contract* between the worker and the recruitment agency<sup>33</sup> or employer in Malaysia.<sup>34</sup>

According to the Asia Foundation’s 2011 report on Cambodian labor migration, recruitment agencies are "unilaterally responsible for the worker from recruitment to the commencement of their employment, which includes transporting the workers to pre-departure training and overseas, and providing food and accommodation during training."<sup>35</sup> Recruitment agencies are regulated formally by MoLVT and informally by ACRA, whose membership extends to 24 of the 34 recruitment agencies in Cambodia.<sup>36</sup> An Bunhak, the chairman of ACRA, describes the organization’s mandate as providing legal protection for member agencies, finding new employment sectors to develop, and providing input on various labor migration-related policy.<sup>37</sup> ACRA also has a non-binding Code of Conduct for its members which covers the entire

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<sup>30</sup> Id.

<sup>31</sup> Id. at 26.

<sup>32</sup> TAF Report, *supra* at 19.

<sup>33</sup> Sophal, *supra* at 19.

<sup>34</sup> TAF Report, *supra* at 18.

<sup>35</sup> Id. at 11.

<sup>36</sup> Personal interview with ACRA Chairman An Bunhak conducted on July 11, 2011. [Hereinafter Bunhak Interview].

<sup>37</sup> Id.

migration process from recruitment to reintegration.<sup>38</sup> In order to operate legally in Cambodia, recruitment agencies must submit a surety of \$100,000 (USD) to be used for employees with legitimate claims of compensation but in practice this bond has not yet been used to pay out worker claims.<sup>39</sup>

Cambodian recruitment agencies work with partner employment agencies in Malaysia. According to Bunhak, recruitment agencies will set up an interview on Skype or Yahoo Messenger between the Malaysian employer and the Cambodian domestic worker utilizing translators. If there is a ‘fit’ between employer and worker, the recruitment agencies will then forward the domestic worker’s documents to the Malaysian agency for processing through Malaysian immigration.

## ii. Problems Within the Recruitment System for Cambodian Domestic Workers

The next step in the migration process is for the worker to attend skills workshops at one of the training centers run by recruitment agencies. This training can last anywhere from three to six months.<sup>40</sup> Many workers are heavily chaperoned by agency staff and are often physically confined to the training center building. Reports of physical abuse, overcrowding, nearly round-the-clock work and passport confiscation have been reported at recruitment centers.<sup>41</sup> The Asia Foundation notes that recruitment agencies are

profit-driven companies with an incentive to immediately earn enough to cover the cost of the surety. As such, it is in their interests to ensure that the costs of

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<sup>38</sup> In the amended Sub-Decree 57 which governs labor migration, the Code of Conduct will be compulsory for all member agencies. In addition, all registered recruitment agencies will be required to become members of a recruitment association. ACRA is the only such agency in Cambodia at this time. The amended sub-decree is expected to be promulgated by September 2011, according to the Ministry of Labor. Bunhak Interview.

<sup>39</sup> TAF Report, *supra* at 10-11. As of September 2010. Id at 47.

<sup>40</sup> Personal interview with Va Ros, Cambodia National Coordinator of UN Women, conducted on July 4, 2011.

<sup>41</sup> See David Boyle and Mom Kunthea, *Escaping Hard Labor: Maids In Malaysia Return*, Phnom Penh Post (April 13, 2011) and IRIN DW, *supra* n. 28.

transport, training and accommodation are as low as possible in order to maximize the profit.<sup>42</sup>

Unfortunately, many of the reports of abuse have occurred to underage workers who have falsified birth records. Identity fraud for age is often initiated by the broker,<sup>43</sup> although it is unclear how many parents are involved in falsifying documents for workers who are actually minors.

Despite the many recorded claims of abuse by recruitment agency staff, ACRA has only suspended one member agency for unspecified claims.<sup>44</sup> Chairman Bunhak states that ACRA's review process only starts when the association either receives a police report or hears about a possible violation on the news or through NGOs. ACRA works with the monitoring arm of MoLVT to investigate claims against recruitment agencies and relies on MoLVT support to suspend a member agency in violation.<sup>45</sup> ACRA currently does not have a practical or effective mechanism for monitoring recruitment agency practices and ferreting out possible violations.

According to Bunhak, ACRA coordinates with the police and partner NGOs in order to provide domestic workers-in-training with a pre-departure orientation seminar (PDOS). The purpose of this workshop is to inform workers of their basic rights by law, what to do if problems arise in Malaysia, and which organizations to contact for help.<sup>46</sup> Unfortunately, the reality is that once in Malaysia, Cambodian domestic workers must deal with employment agencies that are not staffed with Cambodians or anyone who speaks Khmer. These employment agencies exist to serve the interests of Malaysians seeking maids, so there is an inherent conflict of interest when problems between worker and employer arise. A domestic worker experiencing

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<sup>42</sup> TAF Report, *supra* at 11.

<sup>43</sup> *Id.* at 15.

<sup>44</sup> Bunhak Interview, *supra* n. 36.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

issues with an employer can also seek assistance at the nearest Cambodian embassy or consulate but as it stands now, there are no labor attachés who specialize in employment issues. According to Bunhak, some Cambodian recruitment agencies actually visit Malaysian employers to ‘inspect’ working conditions but resources are lacking and very few employers are actually scrutinized.<sup>47</sup>

Once an employment contract is fulfilled or a worker leaves a job for whatever reason, the worker must be repatriated back to Cambodia. Cambodian Sub-Decree 57 states that recruitment agencies must inform MoLVT 45 days before worker is repatriated. If a domestic worker is returning within the terms of the employment contract, repatriation expenses are supposed to be paid for by the employer or the recruitment agency which the latter will probably deduct from worker's wages. In practice, Malaysian employers generally do not pay for repatriation expenses. No real mechanisms exist for a Cambodian domestic worker to pursue a claim against an employer in Malaysia.<sup>48</sup>

#### D. Current Conditions in Malaysia for Cambodian Domestic Workers

Vuthy Hour, a Deputy Director General in Cambodia’s Ministry of Labor and Vocational Training (MoLVT) states that there are 120,000 Cambodian migrant workers overseas now, mainly in Thailand, Malaysia and the Republic of Korea.<sup>49</sup> Of these, about 20,000 Cambodians are now employed as domestic workers in Malaysia,<sup>50</sup> up from just over 10,000 Cambodians in January 2008.<sup>51</sup>

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<sup>47</sup> Bunhak interview, *supra* n. 36.

<sup>48</sup> TAF Report, *supra* at 43.

<sup>49</sup> Personal interview with Vuthy Hour, Deputy Director General of Department of Employment and Man Power at MoLVT, conducted on July 11, 2011. [Hereinafter Hour Interview].

<sup>50</sup> IRIN DW, *supra* n. 28.

<sup>51</sup> Sophal, *supra* at 5.

The continuous lack of basic protections has left domestic workers extremely vulnerable to abuse, especially for migrant domestic workers who are employed in another country, cannot speak the language, and are unfamiliar with cultural norms. Migrant domestic workers usually cannot avail themselves of protection afforded nationals such as social security and health care schemes. While many NGOs in Cambodia and Malaysia provide services to domestic workers returning from abusive situations in Malaysia, Vuthy Hour at MoLVT insists that less than 1% of Cambodian domestic workers have any problems with their Malaysian employers.<sup>52</sup>

Despite Mr. Hour claims, Cambodian domestic workers in Malaysia have reported overcrowding and unhygienic conditions in training centers,<sup>53</sup> long working hours, little rest time, discrimination, as well as "no free weekends/annual leave, and a deep sense of loneliness and homesickness."<sup>54</sup> Cambodian domestic workers are often prevented from leaving the house of their employ and have their passports confiscated.<sup>55</sup> They are paid less than their Philippine and Malaysian counterparts,<sup>56</sup> or have their wages withheld indefinitely.<sup>57</sup> In addition, Malaysian law allows employers to terminate or cancel a work contract, leaving migrant domestic workers stranded in the country illegally.<sup>58</sup> Although the age to migrate as a domestic worker is 21, Malaysian human rights NGO Tenaganita notes that Cambodian girls as young as 14<sup>59</sup> are showing up seeking help from abusive employment situations.<sup>60</sup>

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<sup>52</sup> Hour Interview, *supra* n. 49.

<sup>53</sup> IRIN DW, *supra* n. 28.

<sup>54</sup> UNIFEM, *Cambodian Women Migrant Workers: Findings from a Migration Mapping Study*, Regional Program on Empowering Women Migrant Workers in Asia (June 2006).

<sup>55</sup> TAF Report, *supra* at 39.

<sup>56</sup> *Id.* at 40.

<sup>57</sup> Gooch, *supra* n. 13.

<sup>58</sup> Human Rights Watch, *supra* n. 18 and TAF Report, *supra* at 44. Once an employer terminates a contract, workers must leave the country or face deportation if they remain.

<sup>59</sup> Some rights groups are reporting girls as young as 13. IRIN DW, *supra* n. 28.

<sup>60</sup> Gooch, *supra* n. 13.

Another problem that Cambodian domestic workers in Malaysia face when seeking help is the presence of the Rela Corps, a volunteer civil paramilitary corps about 500,000 strong. The Rela Corps is larger than the military and police combined and conducts 30 to 40 raids a night.<sup>61</sup> The Rela Corps is authorized to carry out duties related to immigration policy by verifying documents, launching investigations, and detaining anyone suspected of being in Malaysia illegally.<sup>62</sup> The Malaysian government's official stance is that illegal migrants are the number two problem facing the nation, behind drugs.<sup>63</sup> The Rela Corps has been accused by Human Rights Watch (HRW) and other groups of abusing their power by extorting money, stealing goods, and shipping migrant workers, legal and otherwise, off to detention camps.<sup>64</sup> Being detained by the Rela Corps is a huge concern for Cambodian domestic workers as detained migrants are often trafficked back into Malaysia.<sup>65</sup>

While conditions for Cambodians migrating to Malaysia are far less than ideal, there are some laws in place that could potentially be used now to ameliorate the abuses in the labor migration system.

## **II. Legal Mechanisms in Place for Cambodian Migrant Domestic Workers**

### **A. Cambodian Domestic Law**

Currently, Cambodia has few laws that directly govern migration of domestic workers. In fact, Cambodian labor law does not cover domestic workers or provide protection to Cambodian migrant workers.<sup>66</sup> The main relevant law, Sub-Decree 57, only regulates recruitment agency

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<sup>61</sup> Seth Mydans, *A Growing Source of Fear for Migrants in Malaysia*, New York Times (December 10, 2007.)

<sup>62</sup> Human Rights Watch, *Malaysia: Disband Abusive Volunteer Corps* (May 9, 2007).

<sup>63</sup> Mydans, *supra* n. 61.

<sup>64</sup> Human Rights Watch, *supra* n. 62.

<sup>65</sup> Mydans, *supra* n. 61.

<sup>66</sup> TAF Report, *supra* at 51.

practices on a general level. Promulgated in 1995 and overseen by MoLVT, the Sub-Decree provides that written employment contracts should spell out employment terms;<sup>67</sup> however, no minimum standards are enumerated.<sup>68</sup> A revision to Sub-Decree 57 is currently being reviewed by MoLVT with the assistance of the ILO and is expected to be promulgated by September 2011.<sup>69</sup> The details of the revision are still somewhat secret; however, at a minimum the revision is expected to increase regulation of recruitment agencies and provide for labor attachés in Cambodian embassies.<sup>70</sup> Other domestic laws that govern labor migration include Prakas 108 which provides for MoLVT inspections of recruitment agencies,<sup>71</sup> Sub-Decree 38 which governs contract liability,<sup>72</sup> and Sub-Decree 39 which provides for expedited and reduced-fee passport processing for migrant workers.<sup>73</sup>

Several provisions in the Law on Suppression of Human Trafficking and Sexual Exploitation (LSHTSE, 2008) could potentially cover victims of labor migration abuses. Article 8 of the LSHTSE contains language that criminalizes the *removal* of persons using, among other methods, *deception* or *enticement*. While intent or resulting exploitation is not an element of this crime, the removal does have to result in the victim's placement under a third person's control. Unlawful removal for exploitation is aggravated when the victim is a minor,<sup>74</sup> or taken across an international border.<sup>75</sup> In addition, persons who help transport or receive victims for the purpose

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<sup>67</sup> Sub-Decree 57 (Cambodia), Article 9.

<sup>68</sup> One exception: workers are to accrue 1.5 paid holiday time per month. Sub-Decree 57 (Cambodia), Article 10.

<sup>69</sup> Hour Interview, *supra* n. 49.

<sup>70</sup> *Id.*

<sup>71</sup> Prakas 108 (Cambodia), Article 5. TAF Report, *supra* at 27.

<sup>72</sup> TAF Report, *supra* at 19.

<sup>73</sup> *Id.* at 33. Note that there is not enough staff to process these passports, so it actually costs more in bribes to expedite them.

<sup>74</sup> Law on Suppression of Human Trafficking and Sexual Exploitation (Cambodia), Article 10.

<sup>75</sup> *Id.* Article 11.

of exploitation are guilty of human trafficking.<sup>76</sup> Attempted crimes are also criminalized<sup>77</sup> and accomplices and legal entities whose agents are guilty of trafficking are also criminally liable.<sup>78</sup>

Cambodia's Penal Code, promulgated in 2009, contains several provisions that could, theoretically at least, be used to prosecute labor migration violations. Brokers and recruitment agencies that engage in abusive practices against domestic workers could be prosecuted for taking away a minor,<sup>79</sup> confinement and other forms of liberty deprivation,<sup>80</sup> or maintaining working conditions that are "incompatible with human dignity."<sup>81</sup> Violations involving minors could be prosecuted using provisions that address dangerous working conditions for minors<sup>82</sup> or deprivation of food and care that threatens the health of a person under the age of 15.<sup>83</sup> Fraud, forgery and falsification of documents are covered by several provisions within the Penal Code and could be used to prosecute brokers or other recruitment agency staff in cases where identification has been altered to hide a domestic worker's minority age.<sup>84</sup> One final 'catch-all' provision that could be used in recruitment violation prosecution is Article 383 concerning "taking advantages from weaknesses."<sup>85</sup>

The Civil Code (2007) also provides a basic tort of negligence that could render recruitment agencies liable if it is foreseeable that their unreasonable behavior could cause harm.<sup>86</sup> This might apply if recruitment agency staff entices a potential worker to sign a contract

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<sup>76</sup> Id. Articles 17-20.

<sup>77</sup> Id. Article 4.

<sup>78</sup> Id. Article 4.

<sup>79</sup> Penal Code, Article 327 (Cambodia 2009).

<sup>80</sup> Id. Article 253.

<sup>81</sup> Id. Article 274.

<sup>82</sup> Id. Article 339.

<sup>83</sup> Id. Article 337.

<sup>84</sup> See Penal Code, Articles 377, 626, 628-31, and 636-38.

<sup>85</sup> TAF Report, *supra* at 21.

<sup>86</sup> Civil Code, Article 742 (Cambodia 2007).

that the worker does not understand.<sup>87</sup> In addition, Article 349 regarding ‘abuse of circumstance’ is the civil code equivalent of the Penal Code Article 383 in that it can assign liability to a contractual party that uses its social or economic power to another party’s disadvantage.<sup>88</sup>

## B. Malaysian Law

According to Malaysian law, the employer who sponsors a worker from Cambodia is required to reimburse transportation costs between the two countries; however, this law does not apply to domestic workers.<sup>89</sup> The Immigration Act of Malaysia, (1959/63) allows employers to terminate workers’ contracts which forces migrant workers to immediately repatriate or face illegal immigration status.<sup>90</sup> Workers who remain in the country illegally face detention and other forms of punishment such as caning.<sup>91</sup> Malaysian immigration law also allows domestic workers to apply to the Malaysian government to pay repatriation expenses but there is no record of domestic workers actually utilizing this law.<sup>92</sup> While Cambodian migrant workers must bear the brunt of Malaysia’s immigration law, they do not benefit from any domestic labor law protections. In fact, Malaysia’s labor law does not cover domestic workers<sup>93</sup> and the Employment Act specifically excludes domestic workers from key protections such as maximum weekly work hours.<sup>94</sup>

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<sup>87</sup> TAF Report, *supra* at 21.

<sup>88</sup> *Id.*

<sup>89</sup> Procedures for Cambodian National for Employment in Malaysia (1999). TAF Report, *supra* at 33.

<sup>90</sup> IOM Report, *supra* at 15.

<sup>91</sup> TAF Report, *supra* at 34.

<sup>92</sup> *Id.* at 44.

<sup>93</sup> *Id.* at 39.

<sup>94</sup> Human Rights Watch, *supra*, n. 18.

In 2007, Malaysia promulgated an anti-human trafficking law which was amended in 2010 to include Ministry of Labor officers as enforcement agents.<sup>95</sup> This amendment clearly acknowledges the inherent link between labor exploitation and human trafficking, hopefully leading to an increase in rescuing victims.<sup>96</sup>

## C. International Covenants

### i. Primary Covenants

On June 16, 2011, the Convention on Domestic Workers<sup>97</sup> was signed at the 100th ILO conference. This brand new international instrument heralds an important step for human rights by not only acknowledging the plight of an oft-excluded group of workers, but providing them a mechanism for redress. Section II.D provides a detailed analysis of the convention.

### Convention on Migrant Workers (CMW)

Since 2003<sup>98</sup> this convention has been the primary international instrument covering domestic workers. While Cambodia has signed this particular convention,<sup>99</sup> Malaysia has not. Although the CMW provides fairly comprehensive protections for migrant workers, a separate convention for domestic workers was needed because domestic workers are often excluded from the definition of migrant workers. The Convention on Migrant Workers tends to work more effectively for migrants coming into a country rather than going out because the language of the

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<sup>95</sup> Tenaganita, *Anti-Trafficking of Persons and Anti-Smuggling of Migrants: A Primer on the 2007 Malaysian ATIP Act and Its 2010 Amendments* 22 (2010).

<sup>96</sup> Note that there have been serious concerns raised about the amendments conflating “migrant smuggling” with “human trafficking.” Human Rights Watch is especially concerned that human trafficking victims will be treated as undocumented migrants and subject to arrest, prolonged detention, deportation, and re-trafficking. See Human Rights Watch, *Malaysia: Revised Law Threatens Anti-Trafficking Efforts*, September 8, 2010. Available at: <http://www.hrw.org/news/2010/09/08/malaysia-revised-law-threatens-anti-trafficking-efforts>

<sup>97</sup> ILO Convention No. 189.

<sup>98</sup> Though ratified in 1990, the convention didn’t enter into force until 2003.

<sup>99</sup> Cambodia has not formally ratified this convention.

instrument mostly governs the conduct of state parties as host countries of foreign workers rather than state parties sending their workers abroad. Thus the protections in the convention are mainly designed for migrants in host countries rather than migrants' countries of origin.

The provisions of the convention cover migrant workers as well as their families and provide a host of general rights related to all phases of migration, including preparation for departure from the sending country up to repatriation from the receiving country.<sup>100</sup> Part III of the convention covers all migrant workers and their families regardless of their immigration status while Part IV only applies to documented migrants and family members. Among the relevant provisions: prohibitions against slavery, servitude and forced labor;<sup>101</sup> prohibitions against imprisonment or expulsion for failure to fulfil a provision in a work contract;<sup>102</sup> and prohibitions against the destruction or confiscation of identification documents by anyone other than authorized officials.<sup>103</sup> In addition, all migrant workers have the right to seek protection or assistance from their embassies or consular authorities,<sup>104</sup> and are to receive equal treatment in employment matters as other workers who are nationals of their host country.<sup>105</sup> Another important provision states that documented migrant workers should not lose their legal status of residency in the host country once an employment contract has been terminated before its expiration.<sup>106</sup> The convention also contains guidance for inter-state cooperation (i.e. bilateral or

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<sup>100</sup> Migrant workers are defined as workers remunerated in a State in which he or she is not a national; while the CMW covers some very basic rights in the workers States of origin, the instrument is promulgated mostly for the benefit of States of Employment.

<sup>101</sup> CMW Art. 11.

<sup>102</sup> CMW Art. 20.

<sup>103</sup> CMW Art. 21.

<sup>104</sup> CMW Art. 23.

<sup>105</sup> CMW Art. 25.

<sup>106</sup> CMW Art. 51.

multi-lateral labor agreements), obligations to provide services for migrant workers and their families, and state regulation of employment agencies.<sup>107</sup>

## ii. ILO Conventions

Specific International Labor Organization conventions also provide some additional mechanisms for migrant workers. The two most relevant are Convention No. 97 which covers equality and discrimination and Convention No. 143 which covers irregular migration in host countries.

Unfortunately, neither one of these conventions has been ratified by either Cambodia or Malaysia.<sup>108</sup> Convention No. 95 provides wage protections and has been ratified by Malaysia but not Cambodia. Convention No. 158 requires a reasonable notice period for employment contract termination but has not been ratified by either country. Convention No. 19 actually extends social security and equality of treatment among employees to domestic workers but has only been ratified by the Peninsular Malaysia region and Sarawak state. The limited ratification of these labor-specific conventions underscores the need for the ratification of the new Convention on Domestic Workers in both Cambodia and Malaysia.

## iii. Other Relevant Human Rights Instruments

In addition to international conventions that are employment specific, some basic human rights instruments can be broadly read to cover labor exploitation and Cambodian domestic workers. The Convention Against Torture (CAT) includes provisions prohibiting the use of cruel, inhuman or degrading treatment. The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains provisions regarding the rights to decent working conditions, social

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<sup>107</sup> CMW Arts. 64-66.

<sup>108</sup> ILO Convention No. 97 has been ratified by Malaysia Sabah only.

security, and trade unionization.<sup>109</sup> The International Covenant on Civil and Political Rights (ICCPR) prohibits slavery and forced labor while providing the right to freedom of association.<sup>110</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) provides for the enjoyment of civil, economic, social and cultural rights regardless of race, color, national or ethnic origin.<sup>111</sup> The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides for gender equality in employment.<sup>112</sup> And finally, the Convention on the Rights of the Child (CRC) provides for protection against economic exploitation.<sup>113</sup> Only CEDAW and CRC have been ratified by both countries; the other human rights instruments have been ratified by Cambodia only.<sup>114</sup>

#### D. New Domestic Workers Convention

The ILO Convention No. 189 on Decent Work for Domestic Workers was adopted by the 100th Annual ILO Conference on June 16, 2011.<sup>115</sup> This convention represents an important first step for domestic workers who have traditionally been excluded from domestic and international protections. Many of the previously established international instruments providing employee protections have not been ratified by Cambodia or Malaysia. In addition, the purpose of this convention is to create the political will necessary to promote domestic labor law that protects domestic workers. Cambodian representatives did not participate in the voting process for this

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<sup>109</sup> ICESCR Arts. 7-10.

<sup>110</sup> ICCPR Arts. 8 and 22.

<sup>111</sup> CERD Art. 5.

<sup>112</sup> CEDAW Art. 11.

<sup>113</sup> CRC Art. 32.

<sup>114</sup> Other human rights documents that cover domestic workers are: ICCPR General Comment No. 15: The Position of Aliens under the Covenant, CERD General Recommendation No. 30: Discrimination Against Non-Citizens, and CEDAW General Recommendation No. 26 on Women Migrant Workers.

<sup>115</sup> The companion ILO Recommendation No. 201 was also adopted as a non-binding guide for state parties' implementation of the Convention.

convention's adoption while the Malaysian government and employer representatives abstained.<sup>116</sup> This convention will come into force after two countries ratify it.

One of the main points of this convention is to recognize domestic workers as formal workers, allowing further dialogue with governments, NGOs, and other agencies. Gender-equality is a major focus of this convention as 83% - 92% of domestic workers are female.<sup>117</sup> Issues such as vulnerable groups, live-in worker privacy and accommodations are also addressed. Both the Convention and the accompanying Recommendation repeatedly stress the need for governments to work with NGOs and other social agencies that represent domestic workers in crafting policies that give full effect to the parameters contained in the provisions.

### Specific Provisions

The Preamble recognizes domestic work in its own right and notes that it has traditionally been “undervalued and invisible” while constituting a “significant portion of the national workforce” in under-developed countries.

Article 1 defines ‘domestic work’ and ‘domestic worker’ in terms of regular household work in an employment relationship which is key to formalizing the sector. Legitimizing the sector in this way reduces the stereotype of domestic workers as informal ‘family members’ who do not necessarily need proper remuneration, basic employment protections and decent working conditions that a formal employee might require.

Article 2 provides two broad exceptions to the definition of ‘domestic worker’ including “(a) categories of workers who are otherwise provided with at least equivalent protection;” and “(b) limited categories of workers in respect of which special problems of a substantial nature arise.” Neither the Recommendation nor the Committee Report detailing the discussions of the

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<sup>116</sup> ILO, *Final Record Vote on the Adoption of the Convention Concerning Decent Work for Domestic Workers*, International Labor Conference, 100th Session, Geneva (2011).

<sup>117</sup> ILO Press Release, *supra* n. 21 and ILO Q & A, *supra* n. 26.

convention draft provide any guidance on the types of workers that would be excluded from protection under section (b). The Committee Report does confirm that it is up to state parties “in consultation with social partners to determine the scope of exclusion for both sections.”<sup>118</sup>

Article 3 establishes fundamental principles of domestic worker protections including collective bargaining rights, elimination of forced and compulsory labor as well as “effective abolition of child labor.” This latter issue is especially important due to the frequency of underage Cambodian girls working as maids in Malaysia. The issue of minimum work age is also discussed in Article 4 which references ILO Convention No. 138 – Minimum Age Convention and ILO Convention No. 182 – Worst Forms of Child Labor Convention. While the latter instrument defines “child” as less than 18 years of age, neither convention gives any specific guidance on the minimum age for entering the workforce other than suggesting 15 years in general or 14 years for under developed countries.

Articles 5 and 6 lay out the basic rights to protection from abuse and require state parties to take measures to ensure effective protection. The latter article requires “fair” terms and “decent” conditions which are going to be highly subjective when viewed within the context of different work cultures. This potential subjectivity highlights the importance of negotiating bilateral labor agreements that actually spell out what these terms mean in context.

While Article 7 provides that state parties must ensure that workers understand their contracts which are to be effectuated “in accordance with national laws,” it is unclear whether it is the sending or receiving country’s laws which are to be understood. In practical terms, would this provision require the Malaysian government to ensure that Cambodian domestic workers understood their employment contracts vis-à-vis Malaysian laws? Or does the provision require

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<sup>118</sup> ILO, *Report of the Committee on Domestic Workers*, Provisional Record of the 100th Session, Geneva (June 2011). See paragraph 180, quoting representative of the Secretary-General.

that the Cambodian government ensure contracts are understood, and with which set of domestic laws? What happens when a host country's laws are less protective than a sending country, or the other way around? The Recommendation provides little guidance on this issue and simply encourages, in a general way, the cooperation of state parties through the use of bilateral and multilateral agreements.<sup>119</sup> Article 8 stipulates that written contracts are required for migrant domestic workers, however it carves out an exception for those who have 'freedom of movement' under bilateral or multilateral agreements or belong to a specific 'regional economic integration area.' Repatriation conditions are to be specified in all contracts.

Article 9 covers live-in accommodation, freedom of movement, and the ability of domestic workers to retain their passports and other documents in their possession. The Malaysian government has repeatedly allowed employers to confiscate passports<sup>120</sup> which is a violation of basic human rights norms.

Articles 10 through 12 cover basic working conditions such as the rights to a weekly rest period of at least 24 consecutive hours, the characterization of 'on-call' status as remunerable work hours, payment frequency minimums and limitations on in-kind remuneration. Article 11 provides domestic workers with minimum wage if it is available under national law; however, it does not address the *migrant* domestic worker's situation. For example, would domestic workers be entitled to minimum wage if available in their countries of origin but not their host countries?

Articles 13 and 14 call on state parties to provide safe and healthy working conditions and social security protections that are not less favorable as those enjoyed by other workers. However, these improvements can be applied progressively, as resources permit. Article 15 addresses recruitment and employment agency practices and requires state parties to establish

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<sup>119</sup> See ILO Recommendation No. 201, paragraph 26.

<sup>120</sup> See Gooch, *supra* n. 13 and IRIN Asia, *Indonesia-Malaysia: Abuse Case Highlights Need for Stricter Laws* (August 11, 2009).

complaint mechanisms for redress, legal protections against employer abuses in the host/receiving country, to consider ending bilateral or multilateral agreements when the receiving country does not comply with terms in cases of abuse and fraud, and to ensure that fees charged by employment agencies are not deducted from worker pay. Article 15 also stresses the need for consultation with organizations representing workers in order to fully implement these provisions.

The final two substantive provisions, Articles 16 and 17, discuss the establishment of access to courts or other tribunals. Article 16 establishes the broad right of “effective access to courts, tribunals, or other dispute resolution mechanisms” as enjoyed by other workers. Article 17 is a little more specific, requiring state parties to establish complaint mechanisms, labor enforcement, and inspection processes that balance the interests between the specialized nature of domestic work and household privacy.

### **III. Philippine Migration Regulation – A Case Study**

#### **A. Introduction to Philippine Migration**

The Philippines has a long history of labor out-migration and their government has been regulating labor migration for several decades. In 2003, remittances from Philippine overseas workers were estimated at \$7.6 billion USD<sup>121</sup> which represented 8.9% of the gross national product.<sup>122</sup> In 2006, overseas migrant workers constituted 9% of the Philippine population, or around 25% of the total workforce.<sup>123</sup> In 2007, Philippine remittances were estimated at \$15

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<sup>121</sup> IOM, *Labour Migration in Asia: Protection of Migrant Workers, Support Services and Enhancing Development Benefits, A Comparative Study of Pakistan, Philippines, and Sri Lanka* 36 (2005). [Hereinafter IOM Labor Migration Report].

<sup>122</sup> Ruth C. Gonzaga, *Overseas Filipino Workers (OFWs) Remittances: Compilation Practices And Future Challenges*, paper presented at the Conference of the International Association for Official Statistics (IAOS) (2006).

<sup>123</sup> Philippine Overseas Employment Administration, *Global Presences: A Compendium of Overseas Employment Statistics 2006* 51-52, Mandaluyong City: POEA (1996).

billion USD.<sup>124</sup> Studying the Philippines labor migration regulation system can provide some insight into the gaps that exist in Cambodia's under-developed labor migration sector.

## B. Philippine Regulation System

In 1995 the Philippine government promulgated the Migrant Workers and Overseas Filipino Act (the Act), in large part to deal with abuses by overseas employers.<sup>125</sup> The original intent of the legislation was for the government to control workers' placements by eliminating private recruitment agencies, thereby eliminating the profit motive.<sup>126</sup> Lack of government resources made this plan unworkable so the government resorted to a system of heavy regulation of private recruitment agencies with the aim of ensuring workers' rights.<sup>127</sup> Part of the Act required that recruitment agencies retain a majority Philippine ownership to ensure personal and subject matter jurisdiction in the country's court system.<sup>128</sup>

The Philippine Labor Code prohibits the direct hiring of Filipinos by foreign companies, and establishes the regulation of recruitment fees, minimum standards of employment, and sureties paid to the government by recruitment agencies.<sup>129</sup> Recruitment agencies can be fined or put out of business for violations of the labor code.<sup>130</sup> Labor exploitation that rises to the level of human trafficking is criminalized with penalties for up to life in prison.<sup>131</sup> Other features of the Act include expectations and baseline standards of the host country with respect to protection of workers' rights, repatriation of under-age workers, as well as monitoring and re-integration

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<sup>124</sup> Dovelyn Rannvieg Agunias and Neil G. Ruiz, *Protecting Overseas Workers: Lessons and Cautions from the Philippines* 3, Migration Policy Institute (September 2007). [Hereinafter MPI 2007 Report].

<sup>125</sup> *Id.* at 8-9.

<sup>126</sup> IOM Labor Migration Report, *supra* at 18.

<sup>127</sup> *Id.* at 19.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

mechanisms for returnees.<sup>132</sup> In addition, the Act established resource centers in the Philippine embassies of receiving countries, loans for migrant workers, legal assistance, and a scholarship fund for migrant workers and their descendants.<sup>133</sup>

The Philippine Overseas Employment Administration (POEA), formed in 1982, is the agency charged with handling migrant workers while still in the Philippines and is directly responsible for regulating labor migration and recruitment agencies.<sup>134</sup> The surety required by the Philippine government for recruitment agencies is \$40,000 (USD).<sup>135</sup> Recruitment agencies are responsible for a host of requirements such as ensuring equitable employment contracts, repatriation of workers, quality control in worker selection and negotiating favorable terms and conditions for employees.<sup>136</sup> Recruitment agencies are jointly and severally liable for contract violations along with the foreign employer.<sup>137</sup> Placement fees cannot be collected until the contract is signed by the worker and the contract has to list what each cost is for.<sup>138</sup> These fees are regulated by the POEA and can only be the equivalent of one month's salary. Recruitment agencies that follow the law are rewarded with positive evaluations, higher rankings on government approval lists, and have an opportunity to earn a "prestigious performer award" that comes with perks such as an automatic extension of their licenses, express processing, and pre-approved employment clearances.<sup>139</sup>

Minimum standards for Philippine overseas employment contracts include guaranteed wages for regular working hours, free transportation to and from the worksite, free food and

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<sup>132</sup> Id. at 20.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> As of 2005.

<sup>136</sup> IOM Labor Migration Report, *supra* at 25.

<sup>137</sup> Id. at 39. Recruitment agencies are treated as 'co-employers.'

<sup>138</sup> Id. at 27-28.

<sup>139</sup> Id.

accommodation, and fair or authorized causes for termination of employment.<sup>140</sup> In addition, overseas Filipino workers enjoy free medical care, one day a week of rest, and prevailing wage entitlements.<sup>141</sup> According to Philippine labor law, contract agreements can be *more* beneficial to workers but not less, in accordance with public policy and morals.<sup>142</sup> Overseas migrants from the Philippines pay a type of workmen's compensation insurance which covers illness, disability or death.<sup>143</sup> Overseas workers enjoy the benefit of a loan program designed to cover education for workers and their families.<sup>144</sup>

The Philippine government sets minimum standards for skills testing before they send a worker abroad,<sup>145</sup> including a PDOS before deployment which covers topics such as rights and duties regarding working conditions, health and safety issues, and the contact information for the nearest Philippine embassy or consulate.<sup>146</sup> Overseas workers are also instructed on where to go and how to get help if they are experiencing any problems with their employment situation.<sup>147</sup> In addition, information for these services is available online.<sup>148</sup> The PDOS is mandatory for all workers upon initial hire<sup>149</sup> and workers receive a certificate of attendance upon completion.<sup>150</sup> PDOS seminars are tailored to specific groups of workers and geographic locations, and the curriculum has to meet basic standards of uniformity. PDOS instructors are often comprised of staff from NGOs who are trained in certain areas of expertise.<sup>151</sup>

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<sup>140</sup> Id. at 34-35.

<sup>141</sup> Id.

<sup>142</sup> Id. at 35.

<sup>143</sup> Id. at 62.

<sup>144</sup> Id.

<sup>145</sup> Id. at 37.

<sup>146</sup> Id. at 31.

<sup>147</sup> Id.

<sup>148</sup> Id.

<sup>149</sup> Id. at 108.

<sup>150</sup> Id. at 109.

<sup>151</sup> Id.

PDOS seminars are housed under the Overseas Workers Welfare Administration (OWWA) which has shifted its focus from mandatory programs to welfare assistance.<sup>152</sup> These welfare programs are multi-sectoral in nature and include government agencies, workers' groups, recruitment agencies, and NGOs.<sup>153</sup> OWWA is also responsible for overseeing the workers fund which requires a mandatory \$25 (USD) membership fee from both overseas workers and employers and is the source of funding for their welfare programs.<sup>154</sup> This workers' fund receives no government funding and some argue that the fee should be increased to cover costs.<sup>155</sup> Employers and recruitment agencies are supposed to pay the membership fee but it is usually passed on to the worker.<sup>156</sup>

Philippine Overseas Labor Offices (POLOs) operate as field offices under the auspices of Philippine embassies.<sup>157</sup> These offices are staffed by labor attachés and help workers negotiate and settle disputes with their employers, as well as verifying documents of employers and employees.<sup>158</sup> In addition, Filipino Workers Resource Centers (FWRCs) operate in receiving countries with large numbers of Philippine workers providing a range of services including welfare assistance, legal assistance, registration of undocumented workers and other pertinent migration-related tasks.<sup>159</sup>

Compensation claims are heard by a quasi-judicial body, the National Labor Relations Commission (NLRC), led by a chairman and 14 commissioners. Labor arbiters hear cases which

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<sup>152</sup> Id. at 108. Repatriation of overseas workers is also under this agency's purview. MPI 2007 Report, *supra* at 15.

<sup>153</sup> IOM Labor Migration Report at 108. The OWWA board includes migrant representatives but they represent a minority and do not have a lot of power. MPI 2007 Report, *supra* at 21.

<sup>154</sup> MPI 2007 Report, *supra* at 6.

<sup>155</sup> Id. at 19.

<sup>156</sup> Id. at 12. Somewhat paradoxically, many workers are not OWWA members because they extend their contracts in the receiving country and do not renew their memberships.

<sup>157</sup> IOM Labor Migration Report, *supra* at 21.

<sup>158</sup> Id.

<sup>159</sup> Id.

can be appealed to the NLRC. These decisions can then be appealed to the Court of Appeals.<sup>160</sup> Complaints regarding employment can be filed in-country with POLO or back home with the NLRC.<sup>161</sup>

### C. Problems with Philippine Migration

Despite long-term comprehensive regulation, the Philippine labor migration system is still fraught with problems. Documented abuses of Filipina workers in the Middle East led the Philippine government to halt deployment of workers in 1988.<sup>162</sup> As a result, conditions for employment were made stricter by including such regulations as a 30-year age minimum requirement and a specialized PDOS. Middle East deployment resumed in 1997 but only to countries where workers' rights were protected.<sup>163</sup>

As of 2005, the Philippine government had negotiated 12 bilateral agreements with respect to labor migration.<sup>164</sup> Despite these agreements, government officials and NGOs noted an increase in labor violations by foreign employers.<sup>165</sup> Some labor migration experts note that perhaps Philippine law, though strong, is 'too cumbersome' which inhibits implementation of a violation monitoring system and consequently allows foreign employers to violate the law with impunity.<sup>166</sup> Recruitment agencies, though jointly liable for labor violations along with employers, are not suspended or excluded from doing business; however, foreign employers in violation may be prohibited from further hiring of Philippine workers.<sup>167</sup>

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<sup>160</sup> Id.

<sup>161</sup> Id. at 57.

<sup>162</sup> Id. at 43.

<sup>163</sup> Id.

<sup>164</sup> Id. at 57. The Philippines was a sending country for one of these agreements.

<sup>165</sup> Id. at 50.

<sup>166</sup> Id.

<sup>167</sup> Id. at 51.

Other criticisms of the Philippine labor migration regulation system include PDOS curricula being taught in languages other than that of workers leading to “lack of communication and comprehension,” and lack of support from Philippine embassy personnel who tended to favor employers.<sup>168</sup>

Critics of the Philippine labor migration system point to potential areas for improvement such as bolstering bilateral agreements with specific enforcement mechanisms and clear employment terms.<sup>169</sup> Streamlined bureaucracy, establishment of minimum standards for particularly vulnerable populations, elimination of the profit motive for recruitment agencies, and increased numbers of labor attachés are all ways the Philippine labor migration system could be ameliorated.<sup>170</sup>

In studying the Philippine labor migration regulation system, it is clear that consistent long-term regulation has helped Filipino workers achieve decent remuneration and working conditions overall. The Philippine government recognized the importance of labor migration remittances to its economy and promulgated an act specifically to deal with labor migration regulation with the aim of ameliorating abuses of its overseas workers. Government agencies were created and streamlined in order to handle the growing sector of migrant workers. In addition, baseline standards of worker protections were created and recruitment agencies are now strictly regulated. The Philippine Labor Code was updated to ensure workers’ rights and complaint mechanisms were established with accompanying penalties for violations by recruitment agencies and foreign employers. A workers’ fund was established that provides welfare, education, loans and other social services to both workers and their families. In addition,

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<sup>168</sup> Id. at 109.

<sup>169</sup> MPI 2007 Report, *supra* at 23.

<sup>170</sup> IOM Labor Migration Report, *supra* at 63-64.

resource centers have been established in receiving countries with large populations of Filipino workers.

The Philippine labor migration regulation system is not perfect but it does provide a guide for baseline regulation, guarantees and protections for workers of this important sector. As a result, labor migration remittances have grown and benefited the country's economy.

Philippine overseas domestic workers are often paid more than their counterparts and their employment contracts reflect standardized guarantees of relatively equitable terms and safe working conditions. The government's long-term commitment to labor migration regulation that protects Filipino workers has given it leverage in dealing with receiving countries.

#### **IV. Conclusion and Recommendations**

Clearly Cambodia is not in the same economic and political position as the Philippines.

Cambodia's 'official stance' acknowledges the lack of leverage in negotiating with receiving countries, especially one as economically powerful as Malaysia. According to Hour Vuthy at MoLVT, the Cambodian government usually just submits to a receiving country's requirements and interests because, he states, "legal migration is better than illegal migration."<sup>171</sup> MoLVT's plan is to gain more leverage in negotiations with receiving countries at a later date, but it is difficult to imagine this happening without the government's commitment to prioritizing basic rights and protections of its workers.

Although some changes to Cambodian domestic law favoring workers are on the horizon, much more could be done to ensure that Cambodian domestic workers in Malaysia are protected throughout the entire out-migration process.

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<sup>171</sup> Hour Interview, *supra* n. 49.

## A. Pre-Deployment Stage

MoLVT already has a limited database that tracks Cambodian workers employed in foreign countries. Enhancing this existing database provides an excellent resource for keeping track of workers throughout the migration process. This database could also prove useful in identifying abusive employers. Loans for migrant workers to finance the cost of legal out-migration should be provided by banks, NGOs who provide credit or other independent micro-finance organizations at little-to-no interest to remove the profit motive from recruitment agencies. In addition, stronger regulation of recruitment agencies is needed to keep abuses in check. With at least 100 recruitment agency training centers in Phnom Penh alone,<sup>172</sup> additional legislation is needed to eliminate the conflict of interest that has arisen from government officials who own these agencies.<sup>173</sup>

Standardization of employment contracts would provide a baseline for decent working conditions and remuneration. Indonesians and Cambodians in Malaysia earn \$133 to \$200 USD per month while Filipinas receive \$400 because of their government's regulations.<sup>174</sup> Malaysia has no minimum wage for domestic workers but states that remuneration below \$250 USD is below the poverty line.<sup>175</sup>

As Chan Sophal has noted, Cambodian migrant workers do not receive enough skills training, cultural training or information on their rights, expectations or complaint procedures.<sup>176</sup> Standardization of skills trainings and pre-departure orientation seminars would help ameliorate well-documented abuses faced by Cambodian domestic workers in Malaysia. Regular inspection

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<sup>172</sup> IRIN DW, *supra* n. 28.

<sup>173</sup> Hour Vuthy has said that strictly speaking, it is legal for government officials' wives to own recruitment agencies. *Id.*

<sup>174</sup> HRW, *supra* n. 18.

<sup>175</sup> *Id.*

<sup>176</sup> Sophal, *supra* at 20.

of recruitment agencies and work sites should not be left to a profit-driven association whose livelihood depends on continued contractual relationships with Malaysian employers.

Currently, labor migration is overseen in different aspects by various government agencies which lead to inefficiencies in regulation and inspection. For example, while MoLVT is the main agency in charge of out-migration, the Ministry of Foreign Affairs handles labor migration at the embassies while the Ministry of the Interior handles passport applications and human trafficking issues. Establishing MoLVT as the focal point for all out-migration issues could streamline the out-migration process.

#### B. Recommendations for Cambodian Domestic Workers While in Malaysia

According to the MoLVT, the soon-to-be promulgated Sub-Decree 57 contains provisions for the establishment of labor attachés in Cambodian embassies in Korea, Thailand and Malaysia.<sup>177</sup> Funding has not yet been procured; however, the MoLVT expects funding by 2012.<sup>178</sup> Labor attachés are expected to be trained by IOM staff.<sup>179</sup> Ideally, the establishment of labor attachés should streamline abuse complaint procedure, foster the administration of work site inspections, provide support for workers detained by the Malaysian government, and assist in repatriation.

According to An Bunhak, one of ACRA's goals is to establish an office in Malaysia where Cambodian migrant workers can stay upon premature termination of an employment contract.<sup>180</sup> However, it might be more effective for migrant workers fleeing abusive conditions to utilize the services of the Cambodian embassy or migrant worker NGOs. Recruitment

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<sup>177</sup> Hour Interview, *supra* n. 49.

<sup>178</sup> Id.

<sup>179</sup> Id.

<sup>180</sup> Currently, Cambodian migrant workers in this position can stay at the Cambodian embassy.

agencies currently have a vested interest in providing for Malaysian employers' needs over those of vulnerable Cambodian workers.

The establishment of Cambodian migrant community centers in Malaysia can serve as 'one-stop' focal points for workers in distress. Ideally, these centers would be staffed with Cambodians or Khmer speakers and could provide resources such as information on legal rights, cultural handbooks, and contact information for local NGOs that can provide assistance to Cambodian workers in need.

### C. Legal Mechanisms

In addition to adding and improving migration-related services, the Cambodian government should take measures to strengthen legal mechanisms already in place. For instance, the labor code should be amended to include domestic workers. This basic yet important change would formalize the sector and provide some protection to 120,000 Cambodian migrant workers, 20,000 of whom are employed as domestic workers in Malaysia.

Steps should be taken to ensure ratification of the new Convention on Domestic Workers. According to a decision by the Constitutional Council, ratified conventions do not need domestic implementing legislation.<sup>181</sup> Ratification of the convention would provide Cambodian domestic workers with baseline guarantees of safe working conditions, proper remuneration, complaint mechanisms and a host of other rights.

Bilateral labor agreements can play an important role in negotiating for better working protections between receiving and sending countries. Currently, Cambodia and Malaysia have a bilateral agreement related to migrant workers but it does not cover *domestic* migrant workers.<sup>182</sup>

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<sup>181</sup> TAF Report, *supra* at 26. Constitutional Council decision no. 092/003/2007 (July 10, 2007).

<sup>182</sup> TAF Report, *supra* at 39.

Some of the advantages of bilateral labor agreements are flexibility in timing and targeted scope (i.e. theoretically, a bilateral labor agreement could cover Cambodian domestic workers in Malaysia specifically) which could lead to clearer and greater specificity of protective terms. Bilateral labor agreements are commonly in use in Asia and can help establish long-term standards and best practices between sending and receiving countries. However, these advantages must be weighed against the realities of bilateral agreements between two countries of unequal economic power, such as Cambodia and Malaysia. While bilateral labor agreements could potentially help Cambodia gain more leverage in the long term, especially in terms of standardization of contracts and working conditions, Malaysia still does not necessarily have an incentive to provide for labor migration improvements – as evidenced by the lack of basic protections in Malaysia’s bilateral labor agreement with Indonesia (an economically powerful country) after the latter’s ban on sending domestic workers.

One legal mechanism that is essential is a solid, practical complaint mechanism that workers should be able to access at all stages of the labor migration process. One of the challenges in creating a robust complaint mechanism is the coordination of several labor interests and government agencies: laws must be strengthened to include domestic workers and delineate penalties for enumerated violations, inspections of recruitment agencies and foreign employers must be conducted with reasonable frequency by a third party (i.e. not a self-policing association), and a tribunal or other judicial forum must be made available for workers to submit complaints and receive redress.

Throughout all of these recommendations, the importance of including IGOs and NGOs in developing labor migration policies cannot be overstated. These organizations provide experience and expertise in a variety of ways, such as standardization of training curricula and

employment contracts, drafting of labor legislation, establishment of redress mechanisms and social services for domestic migrant workers in general. Unfortunately, a new draft Law on NGOs and Associations threatens to curtail these potential (and on-going) activities. Of particular concern are provisions that require NGOs to register with the government which has reserved the right to deny approval without a stated reason. In addition, barriers to registration of an organization were set high, requiring founding members of domestic NGOs and associations to be Cambodian nationals – all without creating a legal definition of ‘NGO.’ Other troubling provisions include prohibitions against ‘defamation’ and restrictions on freedoms of association: any activity performed by a non-registered organization or association (which is very broadly defined) is prohibited. Now in its third incarnation,<sup>183</sup> the draft law contains slight improvements such as a shorter registration period and requirements of notice for denials. With the Cambodian government ‘cracking down’ on criticism and expression of opposition,<sup>184</sup> NGOs must now operate with particular care in identifying problem areas and offering constructive solutions to labor migration issues.

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<sup>183</sup> As of July 29, 2011. See International Center for Not-For-Profit Law Legal Resource Center at <http://www.icnl.org/knowledge/ngolawmonitor/cambodia.htm>.

<sup>184</sup> Tom Lantos, Human Rights Commission Hearing on Cambodia, September 10, 2009. Testimony by Dr. Chhiv Kek Pung, President & Founder, Cambodian League for the Promotion & Defense of Human Rights (LICADHO).