

**The Legal Protection of Women Migrant Domestic
Workers: A Comparative Analysis of the Philippines
and Sri Lanka**

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Abstract

As two of the leading labour-sending states in Asia, the Philippines and Sri Lanka have come to increasingly rely on the foreign employment of women migrant domestic workers and the subsequent inflow of their remittances. This thesis examines whether both governments are prioritising a market-driven approach to migration above the protection of the rights of women migrant domestic workers at three distinct stages of the migration cycle: pre-departure, employment in the host country, and on return. In doing so, it assesses the extent to which their domestic legal frameworks are protecting such workers against rights violations and exploitation, on paper and in practice, by reference to standards established by three international conventions: the International Labour Organization's Decent Work for Domestic Workers Convention, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

This thesis uses a theoretical matrix comprising four different elements, which have intrinsic tensions: political economy with structural violence; and rights and gender. This matrix is employed to highlight the contradictory policy priorities evident in the overseas employment programme for women migrant domestic workers in the Philippines and Sri Lanka. The need to facilitate overseas employment to compete for a greater share of the global labour market conflicts with both governments' obligations to safeguard rights and gender protections under international law.

The thesis proposes that a gender-informed rights-based approach is crucial to effectively safeguard women migrant domestic workers against exploitation throughout the entire migration cycle. However, it questions whether the implementation of such an approach is achievable in the face of entrenched structural pressures that prompt sending states to promote labour export to the detriment of their commitments under international law. It identifies three transformative measures that can be used to pressure both states into taking on a more active role in protecting and defending the rights of women migrant domestic workers in an era of neoliberal globalisation.

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The idea for this thesis largely grew out of my Masters dissertation, which examined the protection of migrant domestic workers from forced labour in the United Kingdom following the implementation of the Modern Slavery Act in 2015. Through this, I came to realise the precarious nature of domestic work and the lack of legal protection afforded to such workers across the world.

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Abbreviations

ACTFORM	Action Network for Migrant Workers
ASEAN	Association of Southeast Asian Nations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DAWN	Development Action for Women Network
GR 26	General Recommendation 26
ICMW	The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IDWF	International Domestic Workers Federation
ILO	International Labour Organization
IMF	International Monetary Fund
IOM	International Organization for Migration
MDW	Migrant Domestic Worker
NGO	Non-Governmental Organisation
NRCO	National Reintegration Center for Overseas Filipino Workers
NZD	New Zealand Dollar
OWWA	Overseas Workers Welfare Administration
POEA	Philippine Overseas Employment Administration
POLO	Philippine Overseas Labour Office
RA	Republic Act
SLBFE	Sri Lanka Bureau of Foreign Employment
UN	United Nations
US	United States

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Introduction

The International Labour Organization reports that one in every twenty-five women workers worldwide is a domestic worker.¹ Approximately 40% of the world's domestic workers currently reside in the Asia-Pacific.² The vast majority of migrant women in Asia are working as temporary migrants in low-paid and precarious employment sectors, particularly domestic work.³ Thus, women migrant domestic workers (MDWs) have become a significant policy concern for affected governments and advocacy groups in the region, particularly in light of recurrent accounts in local and global media outlets of exploitation, gender-based violence, torture and death among many women MDWs.⁴ Yet, the majority of these violations go unreported and continue with impunity. The recognition and defence of their human and labour rights is therefore an urgent necessity.

Despite persistent stories of abuse, a number of sending countries rely on temporary labour migration as an indispensable cog in the wheel of their economic development.⁵ The Philippines and Sri Lanka are two of the leading labour-sending states of women domestic workers in Asia, as MDWs provide one of the largest sources of foreign exchange through their remittances sent home from abroad.⁶ They are both considered to be lower-middle-income countries by the World Bank with economies that have come to increasingly rely on the foreign employment of migrant

¹ Adelle Blackett *Everyday Transgressions: Domestic Workers' Transnational Challenge to International Labor Law* (Cornell University Press, 2019) at 2.

² M Rezaul Islam "Migrant Domestic Workers Left Out of Policy in Asia" (25 June 2016) East Asia Forum <www.eastasiaforum.org>.

³ Piyasiri Wickramasekera *Asian Labour Migration: Issues and Challenges in an Era of Globalization* (2002) International Labour Organization: Geneva. International Migration Papers No 57 at 12-16.

⁴ Richard Hall "Amnesty Decries 'Shameful' Treatment of Migrant Domestic Workers in Lebanon" *The Independent* (online ed, London, 23 April 2019) <www.independent.co.uk>; Chiara Giordano "Saudi Diplomat paid Domestic Filipino Worker 63p an hour, put buzzer around her neck and fed her leftovers" *The Independent* (online ed, London, 26 June 2019) <www.independent.co.uk>; Teresita Cruz del Rosario "Abuse of Foreign Domestic Workers Must End Now" *Al Jazeera* (online ed, Qatar, 20 February 2018) <www.aljazeera.com>.

⁵ Ryszard Cholewinski "International Labour Law and the Protection of Migrant Workers: Revitalizing the Agenda in the Era of Globalization" in John D.R Craig and S. Michael Lynk *Globalization and the Future of Labour Law* (Cambridge University Press, 2006) at 410.

⁶ International Monetary Fund *World Economic Outlook: Globalization and External Imbalances* (April 2005) World Economic Studies Division: Washington D.C. at 69.

workers, many of them ‘low-skilled’ women.⁷ Their growing dependence on remittances has given both countries an impetus to promote and facilitate the migration of women domestic workers through comprehensive legislative and institutional frameworks.

Notable differences also exist between how the Philippines and Sri Lanka approach the labour migration of women domestic workers. The Philippines is often depicted as the ‘model’ labour-sending state for having a mature labour export system to facilitate foreign employment. The significant demand for Filipina domestic workers in the global labour market enables the Philippines to mount a more forceful defence to protect domestic workers overseas by negotiating labour agreements with receiving states that, at least on paper, aim to enhance their rights.⁸

In contrast, temporary labour migration from Sri Lanka began much later than that from the Philippines, as did state attempts to regulate it. While the Sri Lankan government has closely shadowed and imitated the orientation of Philippine labour export policies, it has proceeded to adopt a more modest package of government provisions to protect migrant workers against abuse.⁹ Human capital disadvantages and lack of bargaining power with receiving states dissuades Sri Lankan government officials from intervening vigorously to defend the rights of domestic workers.¹⁰

This context gives rise to a common theme and the overriding research question posed by this thesis: to what extent are the rights of women MDWs in the Philippines and Sri Lanka protected by the legal frameworks of their home states, consistent with the standards for protection under international law?

⁷ Patrick R. Ireland “The Limits of Sending-State Power: The Philippines, Sri Lanka and Female Migrant Domestic Workers” (2018) 39 *International Political Science Review* at 322.

⁸ Jenina Joy Chavez and Nicola Piper “The Reluctant Leader: The Philippine Journey from Labor Export to Championing a Rights-Based Approach to Overseas Employment” in Evan Berman and M. Shamsul Haque (eds) *Asian Leadership in Policy and Governance* (Emerald Group Publishing, Bingley, 2015) at 336. See also, Jean Encinas-Franco “Overseas Filipino Workers as Heroes: Discursive Origins of the “Bagong Bayani” in the Era of Labor Export” (2015) 12 *Humanities Diliman* 56 at 58; Graziano Battistella “Governance of Labour Migration: Considerations from the Philippine Experience” (2012) 40 *Asian Journal of Social Science* 419 at 430; Benjamin San Jose “Achieving Human Security for Migrants: The Limits of State Policies and Migration-Development Initiatives” (2015) 1 *Journal of the Global South* 1 at 2.

⁹ Patrick R. Ireland “Explaining the Actions and Positions of the Sri Lankan and Philippine States in Defense of Their Female Migrant Domestic Workers” (23 August 2014) *Social Science Research Network* <www.ssrn.com> at 20.

¹⁰ Ireland, above n 7, at 330.

Objective of the Thesis

This thesis tests the proposition that the Philippine and Sri Lankan governments are prioritising labour export and extracting economic benefits from it in the form of remittances, above protecting the rights of women MDWs. In doing so, it assesses the extent to which their legal frameworks are protecting women domestic workers against rights violations and abuse by reference to standards established under international law. It relies on three international human and labour rights conventions as the foundation for a rights-based gender-informed framework and the benchmark for assessing the adequacy of the two governments' responses: the International Labour Organization's Convention No. 189 Concerning Decent Work for Domestic Workers (C189), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW).

The thesis uses a theoretical matrix comprising four different elements, which have intrinsic tensions: political economy, structural violence, rights and gender. This matrix is employed to highlight the conflicting and contradictory policy priorities evident in the overseas employment programme for women domestic workers in both the Philippines and Sri Lanka. There is an intrinsic tension between the need to expand and compete for a larger share of the overseas labour migration market, and at the same time implement their international law obligations to effectively safeguard MDWs against exploitation. I argue that tensions between the two lead to the subordination of a rights-based gender-informed approach in favour of neoliberal market interests. This imbalance creates the conditions for the exploitation of women domestic workers by recruitment agencies and employers throughout the migration cycle, which I describe as structural violence by *commission* and *omission*.

The thesis employs a comparative approach to draw parallels and contrasts between the national laws governing the protection of domestic workers in the Philippines and Sri Lanka. It does so in order to evaluate the factors that explain their different standpoints and practices, with a view to assessing where rights-based gender-informed protections are lacking and how this can be addressed. It examines the

standard of rights protection provided in each sending state during three separate and distinct stages of the migration cycle: pre-departure, employment in the host country, and on return. Different rights are at risk of violation at each phase of the migration cycle, thus the three stages require individual analysis.

Domestic Work: The Need for Protection

Domestic work is one of the oldest and most important occupations for millions of women around the world. It involves a multitude of tasks - including cleaning, cooking, shopping and laundry, as well as caring for children, the elderly and other household members in need of care - which women have traditionally shouldered in the home without pay.¹¹ The domestic work sector is women-dominated, as women make up 74% of the 11.5 million MDWs globally.¹² According to the International Labour Organization (ILO)¹³ and the International Organization for Migration (IOM):¹⁴

Migrant domestic workers are any persons moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family, engaged in a work relationship performing in or for a household(s).

Women MDWs are among the most vulnerable workers in the world. They are often overworked, underpaid and undervalued, while also the target of physical and sexual abuse and gendered forms of oppression.¹⁵ Labour exploitation of domestic workers is a major global issue. They are subjected to poor working conditions, low remuneration and little or no social protection, which stems from the non-recognition of domestic work as ‘work’ and its explicit exclusion from the scope of laws granting

¹¹ International Labour Organization *General Observation on the Equal Remuneration Convention 1951* (No 100) International Labour Organization: Geneva.

¹² United Nations “UN Agency Data on Labour Migration Shows 150 Million Migrants in Global Workforce” (online ed, 5 January 2017) <www.refugeesmigrants.un.org>.

¹³ International Labour Organization “Landmark Treaty for Domestic Workers Comes into Force” (2013) <www.ilo.org>.

¹⁴ Dina Ionesco and Christine Aghazarm *Gender and Labour Migration in Asia* (2009) International Organization for Migration: Geneva at 12.

¹⁵ International Labour Organization *Decent Work for Domestic Workers* (2010) International Labour Conference 99th Session: Report IV (1). International Labour Office: Geneva at 1.

employment protections to workers.¹⁶ For women migrant workers in particular, deceptive recruitment practices and precarious immigration policies further jeopardise their right to fair working conditions.

On a household level, the undefined nature of domestic work can often result in exploitation. Most other occupations include a precise job description, agreed responsibilities and working hours, whereas paid domestic work lacks a clear definition.¹⁷ The working hours and responsibilities for domestic workers are often unregulated and indeterminate. This is exacerbated by the nature of the workplace itself, since the majority of domestic workers live with their employers in the home and there is no physical distance between the workplace and the domestic worker's private space. The employer's expectation that the worker be available at all times to obey orders can cause problems when attempting to distinguish between the start and end of domestic employment.

The hidden nature of the household is a significant element contributing to the vulnerability of domestic workers. Since the household is not open for public scrutiny and inspection, compliance with the law in the private sphere of the home is difficult to monitor.¹⁸ This environment facilitates rights violations and situations of abuse against domestic workers by their employers. Their invisibility and isolation can in turn impede their ability to leave abusive conditions or to seek redress as they have limited access to information and support services.¹⁹

On a national level, domestic work is mainly concerned with the process of social reproduction, which is essential to the survival of the family and indispensable for the economy to function. This does not correspond with the concept of work in the capitalist system, defined as a production process that contributes to capital accumulation and exchange.²⁰ As Katz Rothman states, "when performed by mothers,

¹⁶ Martin Oelz, Angelika Muller and Rachel Preiser *Effective Protection for Domestic Workers: A Guide to Designing Labour Laws* (2012) International Labour Organization: Geneva at 2.

¹⁷ Shu-Ju Ada Cheng "Migrant Women Domestic Workers in Hong Kong, Singapore and Taiwan: A Comparative Analysis" (1996) 5 *Asian and Pacific Migration Journal* 139 at 141.

¹⁸ Asha D'Souza *Moving Towards Decent Work for Domestic Workers: An Overview of the ILO's Work* (2010) International Labour Organization Bureau for Gender Equality: Geneva at 17.

¹⁹ Human Rights Watch "Help Wanted: Abuses against Female Migrant Domestic Workers in Indonesia and Malaysia" (July 2004) Volume 16, No 9 at 12.

²⁰ Cheng, above n 17, at 140.

we call (domestic work) mothering ... when performed by hired hands, we call it 'unskilled'.”²¹ Consequently, many sending and receiving governments do not recognise domestic work as a form of employment, resulting in the exclusion of domestic workers from protective labour legislation despite representing a significant share of global wage employment. This can be described as the 'legislative precariousness' of domestic workers, referring to their heightened vulnerability to exploitation as a result of the inferior protection they receive in comparison to other workers.²²

On a transnational level, women migrant's position in the global labour market is constrained by gender and racial divisions of labour. The work they are offered is typically insecure, unregulated and concentrated in feminised sectors of the economy such as domestic work.²³ However, it is not only women who predominantly perform domestic work but women of a certain race, ethnicity, socio-economic class and nationality.²⁴ It is a combination of these attributes that shapes their vulnerability to exploitation and places such workers in the lower rungs of a gender segregated labour market in countries of origin and destination. Thus, the burden of inequality falls greatest on women domestic workers where poverty, the informal economy, weak employment regulation, racial and ethnic discrimination and violence are most pronounced.²⁵

Globalisation's neoliberal characteristics include the promotion and gradual implementation of market deregulation, privatisation, increased trade liberalisation and flexibilisation of employment. These characteristics have sought to encourage economic efficiency, productivity and competitiveness.²⁶ Attempts to compete in an

²¹ Barbara Katz Rothman *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York: Norton, 1989) at 43.

²² Einat Albin and Virginia Mantouvalou "The International Labour Organization's Convention on Domestic Workers: From the Shadows to the Light" (2012) 41 *Industrial Law Journal* 67 at 69.

²³ Tanja Bastia and Nicola Piper "Women Migrants in the Global Economy: A Global Overview (and Regional Perspectives)" (2019) 27 *Gender & Development* 15 at 18.

²⁴ Denise Paiewonsky "The Feminization of International Labour Migration" (2009) The United Nations International Research and Training Institute for the Advancement of Women: Working Paper No 1.

²⁵ Mary Cornish, Fay Faraday and Veena Verma "Securing Gender Justice: The Challenges Facing International Labour Law" in John D.R Craig and S. Michael Lynk (eds) *Globalization and the Future of Labour Law* (Cambridge University Press, 2006) at 378.

²⁶ Nalia Kabeer "Globalization, Labour Standards, and Women's Rights: Dilemmas of Collective (In)action in an Interdependent World" (2004) 10 *Feminist Economics* 3 at 14.

ever-expanding global economy have led many sending governments to eliminate labour standards and regulations that can be seen as barriers to trade, including legal protection for workers.²⁷ This has devastating impacts on already marginalised and unprotected employment sectors, particularly domestic work, from developing countries.

At the same time, despite women's rising labour market participation in advanced receiving nations, this has not been balanced by a parallel movement of men increasing their role within the home.²⁸ Consequently, there is a growing demand for the low-wage services of migrant women from poorer regions in the global South to perform household responsibilities and caregiving, otherwise known as the 'international division of reproductive labour.'²⁹ Globalisation has resulted in the commodification of women domestic workers as low-wage, docile and cheap labour,³⁰ perpetuating their subordinate status and intensifying social inequalities.

Theoretical Framework: Overview

Four elements comprise my theoretical matrix in a dualist tension: political economy with structural violence; and rights and gender. This thesis argues that a specific form of political economy theory gives rise to structural violence against women MDWs facilitated by both states' actions and omissions. This conflicts with the governments' obligations to safeguard rights and gender protections under international law throughout the entire migration cycle. The thesis explores how the Philippine and Sri Lankan governments' market-driven approach to migration and promotion of labour export exacerbates the vulnerability of women domestic workers to rights violations by recruiters and employers.

Political Economy Theory

²⁷ Serena Parekh and Shelley Wilcox "Feminist Perspectives on Globalization" in Edward N. Zalta (ed) *The Stanford Encyclopedia of Philosophy* (California: Stanford University Press, 2018).

²⁸ Katherine Kaufka "The Commodification of Domestic Care: Illegitimacy of Care Work and the Exploitation of Migrant Workers" (2003) 18 *Georgetown Immigration Law Journal* 159 at 163.

²⁹ Rhacel Salazar Parreñas "Migrant Filipina Domestic Workers and the International Division of Reproductive Labor" (2000) 14 *Gender & Society* 560 at 561.

³⁰ At 561.

The past few decades have witnessed a significant rise in the worldwide demand for paid domestic work, as well as an interest by governments and employers in a flexible, low-cost and temporary workforce. This has fuelled the number of women migrants leaving their home country to be employed as domestic workers overseas. I draw on critiques of neoliberal globalisation in acknowledging that the emigration of domestic workers is largely driven by material ‘push’ and ‘pull’ factors and the inequalities of the global labour market. However, I contend that the ‘hyper-globalisation’ thesis, which writes off the state as irrelevant and unable to govern international migration in the globalisation process, has gone too far.

Building on this, I employ realist political economy theory espoused by Myron Weiner to support the contention that the state plays an active and pivotal role in shaping international migration flows. Weiner considers global migration to be largely influenced by the actions and policies of states in both sending and receiving countries.³¹ However, Weiner principally focuses on the role of *host* nations and their perception of migrants as a potential threat to *national security*. I complement the realist approach with a tripartite typology proposed by Suzy K. Lee for theorising *sending state* interventions in labour migration as a *rights* issue.

Lee argues that sending state interventions can be categorised into three modalities: *accommodating*, *facilitating*, or *directing*.³² These interventions are differentiated by the ways in which they attempt to influence both the volume and direction of migration and remittance flows, but can co-exist. This thesis uses Lee’s typology to contend that the Philippine and Sri Lankan governments are key interventionist states. Both states employ all three modalities to encourage, promote and direct the migration of women domestic workers to new and growing markets to improve their competitive position vis-à-vis other states in the global economy.

Since the Philippine and Sri Lankan governments can intervene to ‘manage’ migration in this way, I argue that they are also able to play an instrumental role in promoting and protecting the rights of women MDWs. As Bassina Farbenblum points

³¹ Myron Weiner *The Global Migration Crisis: Challenge to States and to Human Rights* (New York: Harper Collins, 1995).

³² Suzy K. Lee “The Three Worlds of Emigration Policy: Towards a Theory of Sending State Regimes” (2017) 43 *Journal of Ethnic and Migration Studies* 1453 at 1454.

out, “every labour migration story begins and ends at home, in migrant workers’ countries of origin.”³³ Therefore, the protection of the rights of migrant workers can largely be achieved in this context. The challenge is how to pressure the sending state into acting differently, in order to shift its current market-driven approach to migration towards one that prioritises the rights and welfare of migrant workers.

Structural Violence Theory

I suggest that the protection of women MDWs by the Philippine and Sri Lankan governments in the form of rights-based gender-informed policies, consistent with their international law obligations, is constrained in the context of a migration system that focuses on the export and commodification of women migrants. Therefore, I employ structural violence theory to identify how the subordination of a rights-based approach in favour of a market-oriented approach to the regulation of migrant workers exacerbates their risk of exploitation and rights violations by recruitment agencies and employers overseas. Paul Farmer defines structural violence as societal arrangements embedded in the economic, political and legal organisation of our social world, which put individuals and populations in harm’s way.³⁴

For this thesis I prefer Andrew Gardner’s adaptation of structural violence, because it focuses squarely on the structural arrangements fostered by the state that cause, permit or encourage the production of violence experienced by migrant workers.³⁵ He conceives the mechanics of structural violence endured by transnational migrants “in terms of the forces, policies, arrangements and ideas that together orchestrate the interactions between foreign workers and citizens.”³⁶ Similarly, I examine whether women MDWs are being systematically disadvantaged and discriminated against as a result of market-driven institutions, policies and practices promoted by the Philippine and Sri Lankan governments.

³³ Bassina Farbenblum “Governance of Migrant Worker Recruitment: A Rights-Based Framework for Countries of Origin” (2017) 7 *Asian Journal of International Law* 152 at 183.

³⁴ Paul Farmer “An Anthropology of Structural Violence” (2004) 45 *Current Anthropology* at 305; Paul Farmer, Bruce Nizeye, Sara Stulac and Salmaan Keshavjee “Structural Violence and Clinical Medicine” (2006) 3 *PLoS Medicine* at 449.

³⁵ Andrew Gardner *City of Strangers: Gulf Migration and the Indian Community in Bahrain* (New York: ILR Press, 2010) at 161.

³⁶ At 51.

From this analysis, I conclude that structural violence is evident in the Philippines and Sri Lanka in two different forms: by *commission*, which involves the state actively enforcing regulations that restrict the rights of domestic workers, and by *omission*, which constitutes inaction by the state to implement migration policies and programmes to safeguard domestic workers against exploitation throughout the migration cycle.

Gender

In order to examine whether the Philippine and Sri Lankan governments are prioritising labour export and the accumulation of remittances, I question the extent to which gender is a factor considered by both states in the development of their legal frameworks pertaining to women domestic workers, as required by their international law obligations. I also assess whether those legal frameworks are discriminating against or protecting the rights of domestic workers in practice.

Since domestic service is an occupation dominated by women migrants, the lack of government scrutiny given to the private sphere constitutes a gender-specific problem. This occupation renders women more susceptible to various forms of violence and discrimination. Therefore, I contend that policies and programmes are required that are sensitive to the particular needs and capabilities of female migrants as distinct from male migrants. However, migration-related policies and regulations in countries of origin and destination still “frequently take men as the ‘norm’, ignoring women migrant’s interests, aspirations, and capacity to act independently.”³⁷ This impedes their ability to benefit from migration policies and programmes.

I acknowledge that a purely gender-centred analysis fails to capture the multiple and interrelated ways that women MDWs in the Philippines and Sri Lanka experience rights violations and discrimination. Therefore, this thesis also adopts an intersectional lens. Intersectionality constitutes an analytical framework derived from feminist theory that sees oppression as being situated at the intersection of various

³⁷ International Organization for Migration *Migration and Gender* (2008) Essentials of Migration Management: Developing Migration Policy Volume 2.10 at 6.

forms of subordination, including but not limited to gender, socio-economic class, ethnicity or race, nationality and migrant status.³⁸ This intersectionality places women migrants in situations of double or triple discrimination while heightening their vulnerability to abuse. I apply an intersectional approach to assess whether the legal frameworks in the Philippines and Sri Lanka adequately protect women MDWs against abuse on multiple identity grounds, or whether certain policies, programmes and laws support and maintain their vulnerability to exploitation.

Rights

The protective provisions outlined in the ILO's Domestic Workers Convention, the CEDAW and the ICMW are the reference points for the rights-based gender-informed approach of this thesis. I use these provisions to assess whether the legal frameworks in the Philippines and Sri Lanka are complying with international standards on paper, and in practice. The three Conventions interconnect by providing different forms of protection for women migrant workers. While the ICMW protects individuals, including migrant women, on the basis of their migration status, the CEDAW protects *all* women, including women domestic workers, against gender-based discrimination. The ILO's Domestic Workers Convention complements and strengthens the other two Conventions by affording specific protection to women MDWs, the provisions of which address their vulnerability as both migrants and women employed as domestic workers.

While, ideally, both sending states should implement a gender-informed rights-based approach in practice to regulate the migration of women domestic workers, this thesis considers whether such an approach is achievable in the face of structural pressures that prompt sending states to continue to promote labour export and prioritise a neoliberal approach to migration.

I argue that Simone Cusack's and Lisa Pusey's two-pronged principle of transformative equality has the potential to challenge some of the structural inequalities in the global labour market that sustain the vulnerability of women

³⁸ Sohoon Lee and Nicola Piper "Understanding Multiple Discrimination against Labour Migrants in Asia" (June 2013) International Policy Analysis at 1.

MDWs to exploitation. The first element of a transformative equality approach requires states to adopt measures “towards a real transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality.”³⁹ For example, to address common expectations that women conform to male-oriented power structures and institutions that entrench women’s disadvantage by failing to accommodate for their specific needs and differences. The second limb of their approach concerns “the modification of harmful norms, prejudices and stereotypes” that violate women’s rights. For instance, to address the stereotype of women as primarily responsible for childcare and domestic work, which remains undervalued and unregulated in the global labour market.

I propose that the advocacy efforts and political activism of civil society organisations are a crucial way to advance Cusack’s and Pusey’s two-pronged principle of transformative equality, by pressuring both states into reversing their current policy priorities and taking on a more active role in protecting the rights of domestic workers. I suggest that the role of migrant worker advocacy groups can be strengthened by first, strategically engaging and mobilising through regional consultative processes to bring migrant-oriented perspectives into higher-political dialogue and second, by using international law norms and monitoring mechanisms to strengthen their leverage and hold states accountable to their obligations.

Methodology: Overview

The theoretical framework has shaped key methodological approaches in the thesis. This methodology combines qualitative research methods, including individual and joint interviews and focus group discussion, with primary and secondary sources, including government legislation and scholarly articles. The semi-structured interviews and focus groups were conducted with representatives of the main migrant worker advocacy groups, international organisations and key government agencies in the Philippines, Sri Lanka and Hong Kong.

³⁹ Simone Cusack and Lisa Pusey “CEDAW and the Rights to Non-Discrimination and Equality” (2013) 14 Melbourne Journal of International Law 1 at 10.

Hong Kong was chosen as an additional fieldwork site to collect data about the experiences and treatment of Filipina and Sri Lankan domestic workers in a receiving country context. Interviewing advocacy groups and a Philippine government agency in Hong Kong allowed me to examine the extent to which the two sending governments are involved in protecting the rights of domestic workers once they are onsite in the host country, and how effective their regulations are in a different jurisdiction. It also provided a broader picture of the issues facing MDWs on a regional level in Asia, particularly since there is a large network of migrant worker advocacy groups based in Hong Kong to support the growing number of foreign domestic workers.

The interview and focus group questions were informed by the tensions across the four theories and structured according to the three separate stages of the migration cycle. In addition, the theoretical framework informed the analysis of the focus group and interview data, in order to assess the extent to which both governments are prioritising labour export and market-driven migration policies above rights-based and gender-informed protections under international law. Thematic analysis has been chosen as the most suitable data analysis method, which involves identifying and analysing key issues and themes amongst the answers from the participants. This enabled me to draw and examine connections between the empirical data and theoretical framework to answer my research questions.

Documentary analysis of primary and secondary sources was another data collection method used for this research. I examined primary legal resources at the domestic and international level including legislation, government regulations, official legal documents published by the governments of the Philippines and Sri Lanka and international human rights treaties. I supplemented this analysis with literature and submissions generated by scholars, advocacy groups and international organisations. I analysed official documents relating to the international legal instruments as well as reports and studies published by the ILO, the United Nations, the IOM and various academic institutions and research centres. I also relied on books, academic journals and newspaper articles.

Contribution of the Thesis to the Literature

This thesis identifies and addresses three gaps in the literature: first, the dearth of research surrounding violence in migration from the standpoint of structural violence against women domestic workers; second, the lack of scholarly attention towards the protection of migrant worker rights by labour-sending states in contrast to receiving countries; and third, an absence of research focusing on all three stages of the migration process, particularly the return and reintegration stage.

Structural Violence

The thesis uses structural violence theory as a means of exploring the institutional forms of violence carried out by labour-sending states against women MDWs. This is a significant contribution to the literature. Presently, research surrounding violence and migration often involves instances of direct violence, predominantly physical, sexual and psychological violence, either as a catalyst for migration or as an outcome of employment overseas. For instance, the United Nations (UN) has focused on the risk of gender-based violence to migrant women as a basis for policy development and to advise countries as to how to address such violence against women migrant workers.⁴⁰

In contrast, very little has been written about violence in migration from the standpoint of structural violence. Even less has been written with gendered components in mind from the perspective of women migrants. Wendy A. Vogt addresses the undocumented-migrant journey across Mexico as a site of intense violence, exploitation and profit-making within the logics of capitalism.⁴¹ She considers how human mobility is rooted in larger structural forces that systematically weaken the ability of people to live in their home communities with safety and justice. However, the article is confined to the particular experience of undocumented migrants in transit, as opposed to regular migrants in their country of origin or

⁴⁰ United Nations *2004 World Survey on the Role of Women in Development: Women and International Migration* (2006) United Nations: New York. A/59/287/Add.1/ST/ESA/294.

⁴¹ Wendy A. Vogt "Crossing Mexico: Structural Violence and the Commodification of Undocumented Central American Migrants" (2013) 40 *American Ethnologist* at 764.

destination. In addition, Vogt does not discuss the role of gender in understanding how structural forms of violence are reproduced at the local level.

Similarly, Andrew Gardner's research explores the experiences of workers from India who have migrated to the Kingdom of Bahrain under the kafala sponsorship system, which contractually links each labourer to a specific employer or institution. Gardner examines Bahrain's kafala system through the lens of structural violence to contend that it is "the keystone in the systemic and structural violence levied against foreign workers in the Gulf."⁴² In particular, he argues that the structural arrangements of the kafala system are a mechanism that allows the state and its citizenry to host and profit from the global economy. While this thesis utilises Gardner's formulation of structural violence, it differs in several ways by adopting a gender-informed lens and focusing on state-sanctioned structural violence experienced by women domestic workers in their countries of origin, rather than in the country of destination.

Praveena Kodoth is one of few scholars to have researched the situation of structural violence in the context of international labour migration and domestic workers. Kodoth examines India's emigration policy and its emphasis on restricting the mobility of women domestic workers to the Middle East, which has created conditions for exploitation and abuse in the migration process.⁴³ No comparable research focuses on structural violence by the governments of the Philippines and Sri Lanka against women MDWs. The theory in this thesis also extends Kodoth's analysis of structural violence committed by the state by differentiating the two forms of *commission* and *omission* at the three stages of the migration cycle. Therefore, this thesis addresses a significant knowledge deficit on an issue that has not yet been explored in the existing literature.

Labour-Sending and Receiving Countries

⁴² Gardner, above n 35, at 29.

⁴³ Praveena Kodoth "Structural Violence against Emigrant Domestic Workers and Survival in the Middle East: The Effects of Indian Emigration Policy" (2016) 28 *Journal of Interdisciplinary Economics* at 83.

The significant role of labour-receiving states in the migratory process is relatively well established, with the majority of studies of women MDWs typically focusing on the women themselves, their families and their treatment in host countries.⁴⁴ The literature review revealed West Asia as the most commonly researched host region.⁴⁵ The labour migration of women domestic workers into the Gulf, and the strict regulations imposed on them in countries such as Qatar, Saudi Arabia and Kuwait, continues to dominate existing literature in this area.⁴⁶

Less understood, however, are the functions performed by labour-sending states. The role of state institutions in sending countries remains a largely understudied area of inquiry, with the home-state protection of women MDWs failing to attract much scholarly attention. This neglect in the literature stems, in part, from the misperception that in a demand-driven system such as international labour migration, labour-sending states have less power and virtually no leverage to influence the permeability of national borders.⁴⁷ While accepting the basic tenets of neoliberal political economy, I reject the assumption that the only role sending states can play is to promote and facilitate labour export.

Rather, as Kristel Acacio contends, “sending states are not by any means passive actors ... and to some degree are able to intervene in labour migration matters.”⁴⁸ I use realist political economy theory and Lee’s tripartite typology to illustrate how the Philippines and Sri Lanka, as key labour-sending states, actively intervene to change and shape migration flows in ways favourable to their national interests. For instance,

⁴⁴ Daniel A. Bell and Nicola Piper “Justice for Migrant Workers? The Case of Foreign Domestic Workers in Hong Kong and Singapore” in Will Kymlicka and Baogang He (eds) *Multiculturalism in Asia* (Oxford University Press, 2005); Shirlena Huang and Brenda S.A. Yeoh “Maids and Ma’ams in Singapore: Constructing Gender and Nationality in the Transnationalization of Paid Domestic Work” (1998) 18 *Geography Research Forum* 21; Cheng, above n 17, at 139.

⁴⁵ Jennifer Turner “Exported and Exposed: Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates” (November 2007) Human Rights Watch.

⁴⁶ See, Ray Jureidini “Trafficking and Contract Migrant Workers in the Middle East” (2010) 48 *International Migration* at 142; Gwenann S. Manseau “Contractual Solutions for Migrant Labourers: The Case of Domestic Workers in the Middle East” (2006) 2 *Human Rights Law Commentary Journal*, University of Nottingham School of Law; Nasra M. Shah and Philippe Fargues “Migration in the Gulf States: Issues and Prospects” (2011) 20 *Asian and Pacific Migration Journal* at 267; Anti-Slavery International “Trafficking in Women, Forced Labour and Domestic Work in the Context of the Middle East and Gulf Region” (2006).

⁴⁷ Nana Oishi *Women in Motion: Globalization, State Policies and Labor Migration in Asia* (California: Stanford University Press, 2005) at 12.

⁴⁸ Kristel Acacio “Managing Labour Migration: Philippine State Policy and International Migration Flows, 1969-2000” (2008) 17 *Asian and Pacific Migration Journal* 103 at 122.

labour-sending states are increasingly playing a key role in the international migration of women domestic workers through restrictive policies that seek to prevent or discourage their overseas employment, in an attempt to protect them from abuse overseas.⁴⁹ Such policies raise tensions between the aim of protecting their rights in theory, and facilitating rights violations in practice, by pushing domestic workers into irregular and precarious migration channels.

In the past decade, studies on emigration policies governing women domestic workers have begun to emerge. However, such studies tend to focus mainly on the content of policies in one country alone.⁵⁰ Cross-national differences in emigration policies have rarely received much attention, despite the increase of origin-country government involvement in all stages of the migration process. Only one study, by Patrick Ireland, has carried out a cross-comparison of the actions taken by the governments of the Philippines and Sri Lanka to protect the rights of their nationals employed as domestic workers overseas.⁵¹ Ireland provides a broad historical overview of the political economy and migration regulations in place in both countries, as well as the contrasting positions of the Philippine and Sri Lankan governments with respect to MDWs.

However, Ireland's study does not analyse their domestic legal frameworks and fails to highlight where protection is lacking at each stage of the migration cycle. He also largely focuses on the obstacles limiting the ability of sending states to defend women MDWs, but does not provide a detailed discussion as to how both countries can overcome the problems highlighted. In contrast, this thesis draws attention to the pivotal role played by labour-sending states in terms of their ability to shape and influence migration flows and protect the rights of women domestic workers. It further differs from Ireland's study by suggesting measures to help overcome the barriers preventing the implementation of a rights-based gender-informed approach.

⁴⁹ Oishi, above n 47, at 61.

⁵⁰ See, Graziano Battistella and Maruja M.B Asis "Protecting Filipino Transnational Domestic Workers: Government Regulations and Their Outcomes" (July 2011) Philippine Institute for Development Studies: Discussion Paper Series No 2011-12; Sabrina Esufally "Sri Lanka: Domestic Workers – An Analysis of the Legal and Policy Framework" Decent Work for Domestic Workers Report No 1 (March 2015) Verité Research: Colombo.

⁵¹ Ireland, above n 7, at 322.

Finally, the IOM carried out a study in 2005 comparing the legal and structural frameworks for regulating the recruitment of migrant workers in the Philippines, Sri Lanka and Pakistan.⁵² However, the study is out-dated and focuses solely on the pre-departure and recruitment stage of the migration process. This thesis addresses a significant gap in the literature by providing an in-depth comparison and analysis of the regulations governing women domestic workers in the Philippines and Sri Lanka.

Stages of the Migration Process

A third knowledge deficit revealed by the literature review is research into the abuse faced by domestic workers during the *entire* migration process. Previous research has mostly focused on only one of the three stages of the migration cycle. For instance, a report by Dovelyn Agunias provides an in-depth analysis of the role of migrant worker recruitment agencies and each country's attempt to monitor and restrict recruiter operations.⁵³ Another report by the ILO examines and evaluates Sri Lanka's policy and regulatory framework on migrant worker recruitment to uncover gaps in law and practice.⁵⁴ However, by concentrating solely on the recruitment phase, the authors have overlooked other key stages involved in the labour migration cycle that give rise to different forms of abuse.

Existing research mainly concentrates on the second phase of migration – when domestic workers are onsite working in the host country. For example, a study by the ILO analysing the situation of Filipina domestic workers at home and in Hong Kong and Singapore focuses solely on the typical working conditions and common labour violations faced by domestic workers in the workplace.⁵⁵ In addition, a report by Jennifer Turner for Human Rights Watch examines the exploitation of Sri Lankan

⁵² International Organization for Migration *Labour Migration in Asia: Protection of Migrant Workers, Support Services and Enhancing Development Benefits* (2005) International Organization for Migration: Geneva.

⁵³ Dovelyn Rannveig Agunias "Running in Circles: Progress and Challenges in Regulating Recruitment of Filipino and Sri Lankan Labour Migrants to Jordan" (July 2011) Migration Policy Institute: Washington D.C. See also, Dovelyn Rannveig Agunias "Migration's Middlemen: Regulating Recruitment Agencies in the Philippines – United Arab Emirates Corridor" (2010) Migration Policy Institute: Washington D.C.

⁵⁴ International Labour Organization *Review of Law, Policy and Practice of Recruitment of Migrant Workers in Sri Lanka* (2019) ILO Labour Migration Branch: Geneva.

⁵⁵ Nicole J. Sayres *An Analysis of the Situation of Filipino Domestic Workers* (14 December 2007) International Labour Organization, Special Action Programme to Combat Forced Labour: Manila.

women domestic workers during pre-departure and while overseas in the Middle East.⁵⁶ Notably, both studies fail to examine their risk of exploitation during the return phase.

Of the three phases of the migration cycle, the final reintegration stage is the least explored in the literature and the weakest component in government's overseas employment programmes.⁵⁷ Reports focusing on return and reintegration have begun to emerge in recent years, such as a study by the Institute of Policy Studies analysing the reintegration experience of returnee migrants in Sri Lanka and the effectiveness of programmes and institutions in assisting returnee migrants.⁵⁸ A similar report by the ILO explores the return migration experience of Filipino workers and the legislative framework designed to reintegrate them.⁵⁹ This thesis addresses a current gap in knowledge by focusing on the protection of the rights of women domestic workers during *all three stages* of the migration process.

Structure of the Thesis

The thesis is divided into seven chapters with an introduction and conclusion. Chapter one examines the tensions between the four elements of the theoretical framework - political economy, structural violence, rights and gender - to highlight the conflicting policy priorities evident in the Philippine and Sri Lankan domestic legal frameworks. It uses political economy theory to assess the extent to which the policies and programmes in both sending states prioritise labour export to accumulate remittances, above the protection of women MDWs. It goes on to employ structural violence theory to examine how this market-oriented approach to migration predisposes domestic workers to rights violations by recruitment agencies and employers overseas. In light of this, I argue that an intersectional rights-based approach, centred on the norms and standards established by the ILO's Domestic Workers Convention,

⁵⁶ Turner, above n 45.

⁵⁷ Tess Bacalla "Reintegration: The Forgotten Side of Migration in ASEAN" (online ed, 29 April 2016) *Reporting ASEAN* <www.aseannews.net>.

⁵⁸ Suwendrani Jayaratne, Nipuni Perera, Neluka Gunasekera and Nisha Arunatilake "Returning Home: Experiences and Challenges – The Experience of Returnee Migrant Workers of Sri Lanka" (September 2014) Institute of Policy Studies Sri Lanka: Labour Economic Series No 17.

⁵⁹ Stella P. Go *The Philippines and Return Migration: Rapid Appraisal of the Return and Reintegration Policies and Service Delivery* (2012) International Labour Organization Country Office for the Philippines: Manila.

the CEDAW and the ICMW, is necessary to protect the rights of women MDWs. In order to pressure both governments' into implementing such an approach and reversing their current policy priorities, I rely on the principle of transformative equality, which combines systemic and normative reform.

Chapter two draws connections between the theoretical framework, the analytical distinction between the three phases of the migration cycle, and the collection of empirical data for the research. The first section sets out the overarching research questions to be explored by the thesis. The second section explains the rationale for treating pre-departure, employment overseas, and return as distinct phases of the migration cycle for the purpose of analysis and thesis structure. The third section details the methodological approach adopted by the thesis and focuses on the empirical research, including data collection methods, site selection, participant sampling, and data analysis. The chapter then outlines the question design used during interviews and focus groups, and how the questions were informed by the four elements of the theoretical framework and structured according to the three phases of migration.

The third chapter examines the international legal instruments: the ILO's Domestic Workers Convention, the CEDAW and the ICMW. These instruments set the standards against which to judge the adequacy of the legal protection governing the rights of MDWs in the Philippines and Sri Lanka. The chapter identifies the most relevant rights of domestic workers, as comprised in the conventions, which are most at risk of violation (i) before, (ii) during and (iii) after migration. I evaluate the strengths and weaknesses of the three conventions through the lens of the theoretical framework. In particular, I analyse the extent to which the conventions incorporate a gender and intersectional perspective and whether this rights-based framework can protect domestic workers against exploitation given the structural inequalities in the global labour market and competition between labour-sending states. I suggest that regional consultative processes, particularly the Colombo Process, have the transformative potential to facilitate collaboration rather than competition between sending states and thus represent a constructive supplement to current migration governance through formal international legal instruments.

Chapter four discusses the legal frameworks governing women MDWs in the Philippines and Sri Lanka and analyses the factors that led to their dependence on foreign employment and a remittance economy. Following this, it describes how the policies governing MDWs are implemented by introducing the institutional frameworks in both countries. The three main government agencies identified in the Philippines are the Philippine Overseas Employment Administration, the Overseas Workers Welfare Administration and the National Reintegration Center for Overseas Filipino Workers, and the two main institutions in Sri Lanka are the Sri Lanka Bureau of Foreign Employment and the Ministry of Foreign Employment. This chapter concludes by providing a country comparison to examine the reasons underlying the different legislative responses of both states, with an emphasis on the involvement of civil society organisations.

Chapter five focuses on the *pre-departure* stage of the migration process. It analyses the data collected during the fieldwork, as well as primary and secondary sources, to assess whether the legal frameworks in the Philippines and Sri Lanka are market-driven through the promotion of labour export to accumulate remittances, at the expense of rights protections for domestic workers under international law. In doing so, it first examines whether the legal frameworks are protecting MDWs from rights violations in accordance with international standards of protection on paper. It then focuses on three dominant issues impacting on the rights of domestic workers during the pre-departure stage: the inadequacy of training and education through pre-departure and post-arrival information seminars; restrictions on the migration of domestic workers, including the country-specific migration bans in the Philippines and the Family Background Report in Sri Lanka; and the failure to effectively regulate recruitment agencies, including recruiters charging illegal placement fees in the Philippines, and the practice of unlicensed sub-agents in Sri Lanka.

Chapter six discusses the leading rights violations experienced by women domestic workers in *receiving states*, as revealed by data collected during the fieldwork and secondary sources, in order to assess whether the legal frameworks in the Philippines and Sri Lanka are protecting the rights of MDWs. It examines two ways both states are attempting to address rights violations during employment overseas. First, through government assistance in the form of support services provided by embassies and

labour attachés in the host country, and second, through government negotiation in the form of bilateral labour agreements and memoranda of understanding. Both of these examples are relied on to support the contention that the two sending states are promoting overseas employment to obtain remittances, while failing to provide rights-based protections for domestic workers in receiving countries. It examines whether this inaction creates the conditions for recruiters and employers to more easily violate their rights, resulting in situations of structural violence.

Chapter seven outlines the rights of domestic workers safeguarded by the three international conventions during the *return phase* of the migration cycle, and examines the legal and institutional frameworks governing returnees in the Philippines and Sri Lanka. It focuses on three dominant issues impacting on their rights during reintegration: first, both governments' prioritisation of business-focused services for returnees to the detriment of psychosocial support; second, failure to provide migrant workers with information on return services and the legal mechanisms through which they can recover unpaid wages and report abuse; and third, a lack of coordination between government agencies, particularly in regard to sharing data on returnees. It employs the four elements of the theoretical framework to contend that the commitment of both states to protecting the rights of returnees under domestic and international law is subordinated to their focus on sending workers overseas and steering their remittances towards state priorities and programmes.

The conclusion draws on the findings and gaps in protection uncovered in each chapter to answer the key research questions posed by this thesis. It concludes that the two governments are failing to protect the rights of women domestic workers throughout each stage of the migration cycle. This supports the contention that both states are prioritising a market-driven approach in governing the migration of domestic workers, which creates the conditions for their systematic exploitation by recruitment agencies and employers overseas, resulting in state-sanctioned structural violence.

I suggest that the political activism and advocacy efforts of civil society, more active use of international law norms and their compliance mechanisms, and regional

consultative processes are three transformative measures that can be used to pressure the two governments into shifting their policy priorities and taking on a more active role in protecting and defending women MDWs. In particular, I argue that migrant worker advocacy groups have a crucial part to play by holding states accountable to their international law commitments, and by mobilising through global and regional consultative processes to demand a wholesale rejection of neoliberal globalisation.

Chapter One

Theoretical Framework

This chapter develops the four theoretical elements of the thesis: political economy, structural violence, rights and gender. This theoretical framework is employed to highlight the conflicting policy priorities evident in the Philippine and Sri Lankan governments' overseas employment programme for women domestic workers. In both countries, the need to promote labour export in order to compete for a larger share of the overseas labour migration market conflicts with the need to meet international law obligations to safeguard the rights and welfare of women MDWs.

The chapter uses *political economy* theory to examine the extent to which the Philippines and Sri Lanka promote and implement labour export policies to facilitate the overseas migration of domestic workers. While I cautiously endorse theories of neoliberal globalisation, which focus on the market-driven economic forces that frame migration flows, I reject the hyper-globalisation thesis that writes off the state as impotent and ultimately redundant. This thesis insists that there is still an important role for the labour-sending state in deciding policy, including on migration. Realist political economy theory is attractive because it recognises the agency of the state in the growth of remittance migration, although it has so far failed to fully appreciate the instrumental role of labour-*sending* states in shaping international migration through their labour export policies. In developing this argument, I employ a tripartite typology of sending-state labour migration regimes, as accommodating, facilitating, or directing, which allows for a systematic assessment of the different ways the governments of the Philippines and Sri Lanka intervene to manage the migration of women domestic workers.

Structural violence theory is then used to identify how the prioritisation of a market-oriented approach to migration by the two sending states creates the conditions for the exploitation of women domestic workers by recruiters and employers overseas. It highlights how the governments of the Philippines and Sri Lanka facilitate structural violence by *commission*, involving the active enforcement of regulations that restrict

the rights of MDWs, and by *omission*, which involves inaction to implement gender-informed rights-based policies to protect domestic workers against exploitation as required by their international law obligations.

Following this, I argue that a *rights-based gender-informed* approach is necessary to protect women MDWs against exploitation in response and resistance to the market-oriented approach to migration evident in both sending states, driven by commodification and neoliberal globalisation. Three international human rights conventions provide the reference point: the ILO's Domestic Workers Convention (C189), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). These Conventions, and their associated norms and standards, set the benchmark for assessing the standard of protection currently provided by the Philippine and Sri Lankan governments on paper and in practice.

In order to ensure that the Philippine and Sri Lankan governments prioritise the adoption and implementation of a gender-informed rights-based approach to protect women MDWs, as opposed to a market-driven one, I rely on Simone Cusack's and Lisa Pusey's two-pronged approach to transformative equality, which combines systemic and normative reform. The first category concerns the transformation of "institutions, systems and structures that cause or perpetuate discrimination and inequality", and the second involves "the modification or transformation of harmful norms, prejudices and stereotypes that violate women's rights."⁶⁰ I contend that this approach can highlight and challenge the often-invisible institutional structures that cause and perpetuate inequality and rights violations. This in turn will gradually create conditions to diminish state-sanctioned structural violence against women MDWs.

⁶⁰ Cusack and Pusey, above n 39, at 10.

1.1 Political Economy Theory

The existing literature on the political economy of international labour migration contains a multitude of contesting theories that seek to explain the dynamics that initiate, perpetuate and restrain the movement of migrant workers.⁶¹

Neoliberal Globalisation

The neoliberal globalisation thesis posits that economic globalisation has contributed to a ‘denationalisation’⁶² of economies. In the global South, this has been done primarily through neoliberal structural adjustment programmes imposed on troubled developing countries by international financial institutions, such as the International Monetary Fund (IMF) and the World Bank.⁶³ Joya Misra et al note how “neoliberal strategies argue that such programmes will lead to economic growth: without state interference, markets theoretically work more efficiently.”⁶⁴ The shift from import substitution to export-oriented industrialisation was a major component of the structural adjustment programmes, as were requirements for deregulation of labour markets, trade/financial liberalisation, labour flexibilisation and privatisation of industrial sectors.⁶⁵

These neoliberal policies are widely blamed for entrenching structural inequality and the ever-widening gap in income and employment opportunities between and within countries in the global North and South.⁶⁶ According to Stephen Castles, the economic retrenchment imposed by structural adjustment forced governments to

⁶¹ Douglas S. Massey, Joaquin Arango, Graeme Hugo, Ali Kouaouci, Adela Pellegrino and J. Edward Taylor “Theories of International Migration: A Review and Appraisal” (1993) *Population and Development Review* at 431; Eytan Meyers “Theories of Immigration Policy – A Comparative Analysis” (2000) 34 *International Migration Review* at 1245; Hein De Haas “Migration and Development: A Theoretical Perspective” (2010) 44 *International Migration Review* at 227; Russell King “Theories and Typologies of Migration: An Overview and a Primer” (2012) *Willy Brandt Series of Working Papers in International Migration and Ethnic Relations*: Malmö University.

⁶² Saskia Sassen “The State and Globalization: Denationalized Participation” (2004) 25 *Michigan Journal of International Law* 1141 at 1143.

⁶³ Joya Misra, Jonathan Woodring and Sabine N. Merz “The Globalization of Care Work: Neoliberal Economic Restructuring and Migration Policy” (2006) 3 *Globalizations* 317 at 319.

⁶⁴ At 318.

⁶⁵ At 319.

⁶⁶ Raúl Delgado Wise “Migration and Labour under Neoliberal Globalization” in Carl-Ulrik Schierup, Ronaldo Munck, Branka Likić-Brborić and Anders Neergaard (eds) *Migration, Precarity, and Global Governance: Challenges and Opportunities for Labour* (Oxford University Press, 2015) at 35-36.

abandon programmes designed to protect the living conditions of their nationals and to undertake austerity measures amid mounting debt. This resulted in labour informalisation, dismantling of welfare systems and cutbacks to health services, education and childcare.⁶⁷ Saskia Sassen details how the rise of care deficits and increased unemployment associated with austerity and adjustment programmes has been found to have adverse consequences for women in particular.⁶⁸ As the state withdraws social support and thereby passes on the costs of education, health care and other expenses, women have turned to foreign employment, especially care labour, as the most viable means by which they can secure quality food, care and a solid education for household members otherwise depleted by debt servicing.⁶⁹

The ‘push’ and ‘pull’ forces of temporary migration arise from this context.⁷⁰ The ‘push’ forces operate in economically underdeveloped areas and involve a strong pressure to emigrate in light of the high levels of unemployment, low-wages, lack of viable economic opportunities, poor quality of life and political instability.⁷¹ In contrast, ‘pull’ factors operating in developed nations include higher wages and standards of living, as well as greater employment opportunities than can be found in the migrant worker’s home country.⁷² The demand for cheap foreign labour is also a crucial pull factor for labour migration. In developed economies, ‘low-skilled’ migrant workers are typically recruited for ‘3-D’ jobs: dirty, dangerous and demeaning, which the domestic workforce often refuse to do because of the low-wages and poor working conditions.⁷³

Structural adjustment programmes shaped, and continue to shape, governments’ strategies. One of the major features of neoliberal globalisation in the Philippines and Sri Lanka has been the export of labour, as governments faced mounting public debt

⁶⁷ Stephen Castles “Globalization and Migration: Some Pressing Contradictions” (1998) 50 *International Social Science Journal* 179 at 180.

⁶⁸ Saskia Sassen “Women’s Burden: Counter-Geographies of Globalization and the Feminization of Survival” (2000) 53 *Journal of International Affairs* 503 at 511.

⁶⁹ Rhacel Salazar Parreñas *The Force of Domesticity: Filipina Migrants and Globalization* (New York University Press, 2008) at 51.

⁷⁰ Zahra Meghani *Women Migrant Workers: Ethical, Political and Legal Problems* (New York: Routledge, 2016) at 6.

⁷¹ Misra, Woodring and Merz, above n 63, at 319.

⁷² Neha Misra “The Push and Pull of Globalization: How the Global Economy makes Migrant Workers Vulnerable to Exploitation” (2007) 14 *Human Rights Brief* at 2.

⁷³ Laxman Singh Kunwar “International Migration and Development: Perspective from Origin Countries of Migrants” (2013) 15 *Economic Journal of Development Issues* 60 at 71.

and high unemployment levels largely as a result of structural adjustment policies.⁷⁴ Some globalisation theorists tend to underplay or even ignore the agency of the state in this process. Özgür Solakoglu, for example, suggests that the autonomy and sovereignty of the state are eroded by the existence of such international agencies that “have created a new economic order, which must be obeyed by nation-states.”⁷⁵

Other theorists recognise the agency of states but treat them as contributors to their own demise. Roopinder Oberoi observes the rise of the ‘competition state’, whereby a national and comprehensive government becomes less interventionist and more constrained by the rules of international economic regimes.⁷⁶ One effect is a ‘race to the bottom’ between sending states in terms of eroding labour standards, working conditions and wages,⁷⁷ particularly for ‘low-skilled’ and low-wage women MDWs. Benjamin San Jose suggests labour-sending states in Asia are in a structurally weak bargaining position to demand more rights for migrant workers as receiving countries can, and often do, approach other sending countries in the region who are prepared to accept lower wages and inferior working conditions for their migrant workers in order to gain a competitive edge.⁷⁸

Hyper-Globalisation

Some theorists go further, and see no future role for the nation-state in controlling its economy and governing international migration in the globalisation process.⁷⁹ The hyper-globalisation thesis, first coined by David Held et al, posits that transnational social and economic forces, ranging from the internationalisation of capital to the rise of intergovernmental organisations, are “constructing new forms of social

⁷⁴ Wen Liu “The Embodied Crises of Neoliberal Globalization: The Lives and Narratives of Filipina Migrant Domestic Workers” (2015) 50 *Women’s Studies International Forum* 80 at 82; Matt Withers and Janaka Biyanwila “Patriarchy, Labour Markets and Development: Contesting the Sexual Division of Labour in Sri Lanka” (2014) 3 *IIM Kozhikode Society and Management Review* 33 at 34.

⁷⁵ Özgür Solakoglu “Three Different Perspectives on the Role of the Nation-State in Today’s Globalized World” (2016) September Special Edition, *European Scientific Journal* 1 at 2.

⁷⁶ Roopinder Oberoi “Globalization and Governance: Initiating a Break from Bureaucratic Cage” (2010) 10 *Think India Quarterly* at 1.

⁷⁷ Colin Hay “Globalization’s Impact on States” in John Ravenhill (ed) *Global Political Economy* (5th ed, Oxford University Press, 2016) at 317.

⁷⁸ Benjamin San Jose “Achieving Human Security for Migrants: The Limits of State Policies and Migration-Development Initiatives” (2015) 1 *Journal of the Global South* 1 at 7.

⁷⁹ James F. Hollifield “Trade, Migration and Economic Development: The Risks and Rewards of Openness” (paper presented at Federal Reserve Bank of Dallas Conference, October 2006) at 249.

organisation that will eventually supplant traditional nation-states as the primary economic and political units of world society.”⁸⁰ Held argues that “since the national economy is increasingly a site of transnational and global flows, as opposed to the primary container of national socio-economic activity, the authority and legitimacy of the nation-state are challenged.”⁸¹ Ultimately, hyper-globalists contend that national governments have become increasingly unable to control what transpires within their own borders or to fulfil the demands of their own citizens by themselves.⁸²

According to Tun Myint, although hyper-globalists make an explicit claim about the demise of states in the global era, they “fail to offer a policy prescription for maintaining global order in their supposed single global market.”⁸³ More importantly for this thesis, Richard Woodward points out that the hyper-globalisation thesis ignores the extent to which the state has been “a critical agency responsible for unleashing and entrenching globalisation as part of a sustained political venture.”⁸⁴ Equally problematic, its “mono-centric view of globalisation ... is defined solely within the domain of economic activities.”⁸⁵ As Robert Gilpin argues, markets and economic forces alone cannot account for the structure and functioning of the global economy.⁸⁶

Therefore, while I accept that labour-sending states in the global South are at a structural labour market disadvantage, limiting their ability to negotiate with host states to protect the rights of workers abroad, I contend that hyper-globalists have gone too far by dismissing the role, relevance and influence of the labour-sending state. Rather, I agree with Robyn Rodriguez who posits that sending states have not

⁸⁰ David Held, Anthony McGrew, David Goldblatt and Jonathan Perraton *Global Transformations: Politics, Economics and Culture* (Stanford University Press, 1999) at 3.

⁸¹ At 4.

⁸² At 4.

⁸³ Tun Myint “Globalization and the Institutional Dynamics of Global Environment Governance” (2011) 18 *Indiana Journal of Global Legal Studies* 395 at 401.

⁸⁴ Richard Woodward “Money and the Spatial Challenge: Multi-level Governance and the ‘Territorial Trap’” in Andrew Baker, David Hudson and Richard Woodward (eds) *Governing Financial Globalization: International Political Economy and Multi-level Governance* (London: Routledge, 2005) at 44.

⁸⁵ Myint, above n 83, at 401.

⁸⁶ Robert Gilpin *Global Political Economy: Understanding the International Economic Order* (Princeton University Press, 2001) at 23.

withered away as passive actors in the process of globalisation, as elites at their helm have enthusiastically implemented policies to actually facilitate neoliberalism.⁸⁷

In doing so, the Philippine and Sri Lankan states have not only complied with the mandates of neoliberalism but crafted a neoliberal strategy of ‘labour brokerage’, comprised of “institutional and discursive practices through which they mobilise citizens and send them abroad to work for employers, while generating a ‘profit’ from migrants’ remittances” that become a source of foreign capital for the state.⁸⁸ The strategy of labour brokerage merely “perpetuates the conditions this policy claims to ameliorate and reinforces the IMF structural adjustment policies’ grip on Philippine and Sri Lankan underdevelopment” since remittances mainly go to debt servicing rather than to generating new local employment projects.⁸⁹ Thus, labour brokerage requires the “responsibilisation of citizens who are to directly bear the costs of neoliberal restructuring” and newly privatised services with the wages they earn abroad, as the state is absolved from having to provide social supports directly to its citizens.⁹⁰

This supports William Robinson’s contention that we are not witnessing the “death of the nation-state”, but rather have seen their transformation into neoliberal states.⁹¹ Robinson linked this transformation to the economic project of neoliberalism, which seeks and creates capitalist states that will legitimise policies to facilitate the total mobility of transnational capital.⁹² As a critical social institution, the sending state is undertaking restructuring to meet the needs of global capital not simply because it is ‘powerless’ in the face of globalisation, but “because a particular historical constellation of social forces now exists that present an organic social base for this global restructuring of capitalism.”⁹³ Therefore, I argue that the Philippines and Sri

⁸⁷ Robyn Rodriguez *Migrants for Export: How the Philippine State Brokers Labor to the World* (Minneapolis: University of Minnesota Press, 2010) at xvi.

⁸⁸ At x.

⁸⁹ Ligaya Lindio-McGovern “Labor Export in the Context of Globalization: The Experience of Filipino Domestic Workers in Rome” (2003) 18 *International Sociology* 513 at 518.

⁹⁰ Rodriguez, above n 87, at xix.

⁹¹ William I. Robinson *Promoting Polyarchy: Globalization, US Intervention and Hegemony* (New York: Cambridge University Press, 1996) 36.

⁹² Ligaya Lindio-McGovern *Globalization, Labor Export and Resistance: A Study of Filipino Migrant Domestic Workers in Global Cities* (London & New York: Routledge, 2012) at 14.

⁹³ Rodriguez, above n 87, at xvii.

Lanka play an instrumentalist role in imposing capitalist market dependence on their respective labouring populations.

However, in meeting the needs of global capital, the Philippines and Sri Lanka have taken different policy paths, largely influenced by the historical context of colonisation in both states.⁹⁴ For the Philippines, neoliberal strategies of the state have long been shaped by the colonial legacy of the United States (US), which produced the structural conditions and institutional arrangements for large-scale emigration since the early twentieth century and laid the groundwork for the contemporary labour brokerage system.⁹⁵ The phenomenon of Philippine-based labour recruiters and training programmes for overseas employment also find their beginnings in the colonial period. These institutional precursors would become instrumental in facilitating the Philippines' strong market position, as well as the global dominance and desirability of well-educated and English-speaking Filipino migrant workers today. This in turn determines the extent to which the state is able to intervene with host country officials to influence labour conditions and demand more rights for its migrant workers.

Similarly, the modern political economy of Sri Lanka cannot be understood independently of the historical structures of uneven development erected through colonial occupation by the Portuguese, Dutch and British, which set an influential precedent for capital accumulation by way of ethnic and gendered subordination.⁹⁶ Sri Lanka's anti-colonial identity post-independence occurred under articulations of nationalism and protectionism within a 'closed economy' model committed to import-substitution industrialisation.⁹⁷ This shift accounts for Sri Lanka's relatively late entry among Asian nations, including the Philippines, sending low-wage and temporary migrant labour to the Gulf. Severe restrictions were placed on temporary labour migration in Sri Lanka until the embrace of a liberalised economy and neoliberal reforms by the new pro-capital government in the late 1970s. Sri Lanka's delayed involvement in international labour migration, coupled with less educated and thus

⁹⁴ Discussed further in chapter four.

⁹⁵ Rodriguez, above n 87, at xvii.

⁹⁶ Matt Withers *Sri Lanka's Remittance Economy: A Multiscalar Analysis of Migration-Underdevelopment* (London: Routledge, 2019) at 34.

⁹⁷ At 35.

less desirable women migrant workers, accounts for its fragile position in the international labour market, lower bargaining power with host states, and motivation to introduce structural changes to train and ‘rebrand’ migrant workers in order to raise their ‘modest value.’⁹⁸

Though the Philippines has a distinct colonial history that accounts in large part for its development as a highly competitive labour brokerage state, Rodriguez notes how it is “becoming more evident that the brokerage of labour is a portable and mobile strategy that different labour-sending states are adapting to their own ends within the changing context of globalisation.”⁹⁹ This is particularly evident in the case of Sri Lanka and its development of legislative frameworks and institutional structures to regulate, market and facilitate the export of migrant labour.

Bringing the State Back In: Realist Approach

Building on this, I draw on realist political economy theory in arguing that sending states are involved in, as active managers and producers of, international migration flows. Realists consider the principal actors in the international arena to be states, which act in pursuit of their own national interests.¹⁰⁰ Myron Weiner is among the most prominent representatives of the realist political economy approach to international migration.¹⁰¹ His analysis starts from the consideration that global migration is largely influenced by the actions and policies of states in both sending and receiving countries. As a macroeconomic tool, migration can relieve unemployment and the costs of the welfare state, while improving the balance of payments primarily through remittances.¹⁰² Thus, labour-sending countries have strong political and economic incentives to promote migration.¹⁰³

⁹⁸ Ireland, above n 7, at 334.

⁹⁹ Rodriguez, above n 87, at 144.

¹⁰⁰ Eytan Meyers “Theories of International Migration Policy – A Comparative Analysis” (2000) 34 *International Migration Review* 1245 at 1263.

¹⁰¹ Weiner, above n 31.

¹⁰² Leila Simona Talani *European Political Economy: Issues and Theories* (2nd ed, London: Routledge, 2016) at 239.

¹⁰³ At 239.

The contentions made by this thesis largely correspond with Weiner's approach and its focus on the influence of the state. However, while Weiner does refer to the role of sending countries, his analysis primarily centres on the role of *host* nations and their perception of migrants as a potential threat to national security leading to conflict between sending and receiving states.¹⁰⁴ The influence and role of *sending* states in labour migration remains poorly specified and theorised, with theories grounded in social and economic forces that leave little room for political interventions.

Sending State Influence: A Tripartite Typology

The argument of realist political economy that the state remains important and retains agency is central to my analysis. This thesis borrows from those core insights, but applies them to the issue of international migration, with an emphasis on sending states. In developing this argument, I use the tripartite typology proposed by Suzy K. Lee for theorising sending state interventions in labour migration and illustrating how they participate in setting up new frameworks through which globalisation is furthered. Lee argues that sending state intervention can be categorised into three differentiated and hierarchical regimes: *accommodating*, *facilitating*, or *directing*.¹⁰⁵ These regimes are hierarchical in the sense that each successive set of interventions represents a deepening of attempts by nation-states to influence migration flows: accommodating regimes are the least interventionist, while highly interventionist directing regimes could also engage accommodation and facilitation.¹⁰⁶

This tripartite typology of sending state labour migration regimes provides a way to address the current gap in standard theories of migration. These theories have largely failed to consider the role of sending states and how governments can intervene to “change and shape migration flows away from the routes carved out by historical linkages.”¹⁰⁷ While recognising the impact of globalisation on migration flows – a process largely driven by economic ‘push’ and ‘pull’ factors and the inequalities of the global labour market – Lee draws attention to the ways sending states influence

¹⁰⁴ Weiner, above n 31; Myron Weiner “Security, Stability and International Migration” (1992-1993) 17 *International Security* at 91.

¹⁰⁵ Lee, above n 32, at 1454.

¹⁰⁶ At 1458.

¹⁰⁷ At 1454.

both the volume and direction of migration and remittance flows in order to assess their causes and impacts.¹⁰⁸ As ‘neoliberal states’, the Philippines and Sri Lanka have created new institutional arrangements necessary to neoliberal globalisation that improve their competitive position vis-à-vis other states in the global economy.

Accommodating regimes are identified as having minimum intervention in that governments refrain from policies that attempt to change migration flows directly, but rather adapt policies around existing migrants to maximise national gains from migration.¹⁰⁹ Examples of specific accommodating interventions include the establishment of a state agency dedicated to the management of labour export, the creation and regulation of financial institutions that facilitate remittances, and the development of projects that promote remittances.¹¹⁰ I demonstrate how the Philippine and Sri Lankan governments are influencing and promoting the flow of domestic workers through accommodating regimes by reference to their comprehensive institutional frameworks comprising a number of state agencies devoted to migration management. In addition, both governments utilise accommodating regimes through their pre-departure information seminars, which focus on the accumulation and investment of remittances.

Lee describes *facilitating* regimes as those in which governments enable migration flows through available channels and attempt to maximise the gains from, and minimise the costs of, migration.¹¹¹ They are similar to accommodating regimes as their policies refrain from attempting to change the direction of migration patterns formed by forces of globalisation, but they differ in that their interventions target the size of the flow by supporting migrant networks and helping to impose order through regulation and documentation.¹¹² Examples of such interventions include the regulation and coordination of recruitment agencies, the operation of recruitment services to connect employers with potential migrant workers, the provision of documentation (such as labour market qualifications for migrant workers), and the

¹⁰⁸ At 1454.

¹⁰⁹ At 1458.

¹¹⁰ At 1459.

¹¹¹ At 1461.

¹¹² At 1461.

gathering of data on migrant flows to support facilitating operations.¹¹³ Lee claims that the most common institutional form under which these interventions are organised is a single ‘labour export’ agency that either directly engages in or coordinates all of this work, such as the Philippine Overseas Employment Administration and the Sri Lanka Bureau of Foreign Employment.

Directing regimes represent the most extensive attempt by labour-sending states to influence migration. These regimes work to redirect or reshape migration flows away from channels established by migrant networks and towards new or growing markets.¹¹⁴ Lee observes how through directing regimes governments actively seek out opportunities for their migrant workers, research developments in labour market demand in the global economy, and initiate negotiations with receiving governments to gain access to those opportunities as they arise.¹¹⁵ They also engage in interventions that support the labour competitiveness of migrant workers, including the marketing of workers to foreign employers and the development of training and education programmes oriented to the changing needs of foreign labour markets. Lee adds that “while the use of any of these diversifying and competition-supporting interventions would characterise a sending state regime as directing, in the most effective cases, the whole package of interventions is used in concert.”¹¹⁶

Employing Lee’s tripartite typology, I contend that both the Philippines and Sri Lanka are interventionist sending states, as they engage in most of the accommodating, facilitating and directing interventions described by Lee. This thesis will illustrate how both countries engage in directing interventions to promote domestic workers to new and growing markets in receiving states. Their competition with other labour-sending states in international markets is further facilitated by a system of training and education that is tailored to support the competitiveness of Filipina and Sri Lankan domestic workers in overseas markets, administered by devoted agencies. The degree of political control exerted by labour-sending countries to ‘manage’ migration in this

¹¹³ At 1461.

¹¹⁴ At 1463.

¹¹⁵ At 1463.

¹¹⁶ At 1464.

way is a manifestation of the close relationship between the state and the interests of capital.¹¹⁷

Ultimately, I agree with Stuart Rosewarne's argument that the incorporation of women from the South into the global labour market would not have been as significant as it has been were it not for the active engagement of sending governments, such as those in the Philippines and Sri Lanka, "in developing the labour migration programmes that have submitted workers to the force of unregulated labour markets."¹¹⁸

Political Economy and Commodification

One further theoretical step is necessary to explain the invisibility of domestic workers as people and as women in states' export strategies. The growth in labour export policies and reliance on remittances from women domestic workers by both sending governments is premised on the commodification of female migrant labour. The classic conception of the commodification of labour can be traced back to the work of Karl Marx. In Marxist terms, commodification refers to the process of assigning market value to goods or services that previously existed outside of the market as a phenomenon embedded in social relations.¹¹⁹

Marx did not, however, consider reproductive work to be involved in commodity production. Because he argued that the value of a commodity can be traced to the labour-time of the worker engaged directly in the production of material commodities, Marx overlooks the labour necessary to (re)produce that worker which "constitutes a primary field of value production that serves capital accumulation."¹²⁰ The exclusion of reproductive work from the sphere of economic relations and its deceptive relegation to the sphere of the 'private', the 'personal', 'outside' of capital accumulation and, above all, 'the feminine', have made it invisible as work and have

¹¹⁷ Withers, above n 96, at 140.

¹¹⁸ Stuart Rosewarne "Trading on Gender: The Perversity of Asian Labour Exports as an Economic Development Strategy" (2012) 6 *Work Organisation, Labour & Globalisation* 81 at 89.

¹¹⁹ Karl Marx "The Fetishism of Commodities and the Secret Thereof" in Robert Tucker (ed) *The Marx-Engels Reader* (2nd ed, New York: Norton, 1978).

¹²⁰ Kelly Mulvaney "For what it's worth: An Examination of the Persistent Devaluation of 'Women's Work' in Capitalism and Considerations for Feminist Politics" (2013) 5 *Gender* 27 at 30-31.

naturalised its exploitation and absence of rights under the mask of traditional gender relations.¹²¹

The commodification of social reproduction in the context of global capitalism means that formerly unpaid domestic tasks by women become another medium for capital accumulation, transformed into precarious paid jobs in and outside of private households.¹²² Their provision of care – the service – has itself been commodified, purchased as hired help for wealthy urban households, or as an export of labour to the oil-rich economies of the Gulf,¹²³ while the very self of the female worker as ‘nurturer’ and ‘caregiver’ is also commodified. The inclusion of domestic work among other institutionalised activities governed by market norms did not alter either the undervaluation of reproductive activities or the unequal social valorisation of reproductive and productive labour.¹²⁴ On the contrary, it led to the establishment of a low-paid highly informal care sector, defined as ‘unskilled’ and largely governed by short-term flexible contracts.

Services, particularly those associated with care work, sustain life and enhance social and individual wellbeing.¹²⁵ But to be traded through contractual relationships between purchasers and suppliers on the global market, they must be commodified and have exchange value – a value that is understood in relation to other commodities only and the market forces that determine its monetary worth.¹²⁶ This requires an ideological transition that detaches services and their providers from their specific context and the social relations in which they are embedded,¹²⁷ and subjects them to a form and language that is “more marketized, individualized and linked to commodity logic.”¹²⁸ As labour-sending states, the Philippine and Sri Lanka’s prioritisation of

¹²¹ Silvia Federici “On Primitive Accumulation, Globalization and Reproduction” (10 September 2017) Frikktion <www.frikktionmagasin.dk>.

¹²² Friederike Beier “Marxist Perspectives on the Global Enclosures of Social Reproduction” 16 *TripleC* 546 at 547.

¹²³ Matt Withers and Nicola Piper “Uneven Development and Displaced Care in Sri Lanka” (2018) 66 *Current Sociology Monograph* 590 at 593.

¹²⁴ Zuzana Udhe “Social Bias within the Institution of Hired Domestic Care: Global Interactions and Migration” (2016) 16 *Civitas – Revista de Ciências Sociais* 682 at 686.

¹²⁵ Ann Stewart *Gender, Law and Justice in a Global Market* (Cambridge University Press, 2011) at 194.

¹²⁶ Karl Marx *Capital: Volume I* (Harmondsworth: Penguin, 1976 [1867]).

¹²⁷ Jane Kelsey *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (London: Routledge-Cavendish, 2008) at 13.

¹²⁸ Stephen Gill *Power and Resistance in the New World Order* (Basingstoke: Palgrave, 2003) at 117.

capital accumulation constitutes a “resistance to the acknowledgement of migrants’ human rights vis-à-vis their fictitious commodification as exploitable labour inputs.”¹²⁹

State-led emigration schemes in Asia commodify the region’s labour power as an export akin to manufactured products.¹³⁰ Rhacel Parreñas asserts that migrants are “commodities of the state whose production generates surplus value for both sending and receiving nations at the cost of their abject vulnerabilities as nationless citizens.”¹³¹ The labour export process in the Philippines and Sri Lanka illustrates this culture of migration and commodification, as domestic workers have become a source of profit at the expense of their rights and the state’s associated obligations to respect, protect and fulfil those rights under domestic and international law. This profit comes in the form of their remittances and state efforts to maximise remittances by supporting the competitiveness of domestic workers to overseas markets. It may be argued that the governments of the Philippines and Sri Lanka are exporting a ‘service’ and not ‘people’, but Lindio-McGovern contends that this “depersonalises labour export as if migrant workers are devoid of feelings and emotions and that they are not geographically transported away from their homes.”¹³²

The Philippine government in particular devotes considerable time and effort in positioning its domestic migrant labour force as a viable commodity in order to generate a competitive identity in the global economy.¹³³ Both the government and private sector actively construct the image of Filipina domestic workers in such a way as to increase their marketability and promote a certain type of worker that fulfils the demand of foreign employers. For example, workers are depicted and advertised as reliable, docile, competent and low-cost, with one brochure distributed by the Philippine Overseas Employment Administration describing Filipina domestic

¹²⁹ Matt Withers and Janaka Biyanwila “Patriarchy, Labour Markets and Development: Contesting the Sexual Division of Labour in Sri Lanka” (2014) 3 IIM Kozhikode Society & Management Review 33 at 40

¹³⁰ Annelies Cooper “Disempowered ‘Heroes’: Political Agency of Foreign Domestic Workers in East and Southeast Asia” (6 July 2011) E-International Relations <www.e-ir.info>.

¹³¹ Parreñas, above n 69, at 54.

¹³² Ligaya Lindio-McGovern “Alienation and Labor Export in the Context of Globalization” (2004) 36 Critical Asian Studies 217 at 222.

¹³³ James A. Tyner *Made in the Philippines: Gendered Discourses and the Making of Migrants* (London: Routledge Curzon, 2004) at 67.

workers as “well-trained and of sound temperament”,¹³⁴ which serves to mark their desirability as workers while at the same time devalue and legitimise their disposability as labour commodities.¹³⁵ Consequently, James Tyner contends that Filipina labour is “packaged, commodified, and advertised”,¹³⁶ as the purpose of such promotional material is to sell a higher value product: in this case, the Filipina domestic worker.

Ultimately, while it is acknowledged that sending state interventions alone are not responsible for international migration flows, I reject the suggestion of the hyper-globalisation thesis that the decreasing capacity of the nation-state prevents it from regulating migration because everything is economically and socially determined. This thesis contends that labour-sending states play an influential role in determining the direction and extent of migration and remittance flows, based on the commodification of reproductive labour.

1.2 Structural Violence

Structural violence refers to systemic ways in which state structures disadvantage or discriminate against individuals.¹³⁷ The theory of structural violence is employed to identify how the prioritisation of a market-oriented approach to migration creates the conditions for the exploitation of migrant workers by recruiters and employers overseas.

The concept of structural violence was first purveyed by Johan Galtung in 1969, as a way of connecting poverty and social inequality experienced by individuals to the mechanics of the global political economy.¹³⁸ Galtung perceives structural violence as policies and social practices realised in society through formal and informal structures (institutions) that enable, legalise and normalise illegitimate and unfair acts that

¹³⁴ At 67.

¹³⁵ Anna Romina Guevarra *Marketing Dreams, Manufacturing Heroes: The Transnational Labor Brokering of Filipino Workers* (Newark: Rutgers University Press, 2010) at 9.

¹³⁶ Tyner, above n 133, at 70.

¹³⁷ Matthew Sparke “How Research on Globalization Explains Structural Violence” (2016) University of Washington: Office of Minority Affairs & Diversity <www.washington.edu>.

¹³⁸ Johan Galtung “Violence, Peace, Peace Research” (1969) 6.3 *Journal of Peace Research* at 167.

seriously harm others.¹³⁹ Drawing on the work of Galtung, structural violence has featured prominently in the more recent work of Paul Farmer. Farmer defines structural violence as societal arrangements embedded in the economic, political and legal organisation of our social world, which put individuals and populations in harm's way.¹⁴⁰ Both of their analyses of structural violence “share a concern for power, inequality and the backdrop of a global, capitalist political economy that renders a particular terrain of suffering.”¹⁴¹

Explaining the distinction between structural and direct violence, Galtung concludes that direct violence includes recognisable perpetrators of violence, while structural violence does not have such an agent.¹⁴² Instead, the “violence is built into the structure and shows up as unequal power and consequently as unequal life chances”,¹⁴³ thus direct violence is an *event* and structural violence a *process*. This unequal distribution of power and resources systematically disadvantages those who do not hold as much, if any, power. Ultimately, structural violence has “exploitation as the centrepiece”,¹⁴⁴ whereby power is held in the hands of the few at the expense of the rights belonging to marginalised sectors of society.

Whilst drawing on aspects of both Galtung's and Farmer's formulations of structural violence, which focus on the constellation of forces that push individuals into situations of disadvantage and harm, I acknowledge the criticisms surrounding their wide-ranging definitions of structural violence. Fernando De Maio and David Ansell observe how there is no consensus in this literature about the origins of structural violence and no consistent explanation of the political and economic forces that drive inequality. This means that the perpetrators of structural violence remain obscured.¹⁴⁵

Therefore, I primarily use Andrew Gardner's adaptation of structural violence.

¹³⁹ Johan Galtung “Cultural Violence” (1990) 27.3 *Journal of Peace Research* at 291.

¹⁴⁰ Paul Farmer “An Anthropology of Structural Violence”, above n 34, at 305; Paul Farmer, Bruce Nizeye, Sara Stulac and Salmaan Keshavjee “Structural Violence and Clinical Medicine” (2006) 3 *PLoS Medicine* at 449.

¹⁴¹ Gardner, above n 35, at 6.

¹⁴² Galtung, above n 138, at 170.

¹⁴³ At 171.

¹⁴⁴ Galtung, above n 139, at 293.

¹⁴⁵ Fernando De Maio and David Ansell “As Natural as the Air Around Us: On the Origin and Development of the Concept of Structural Violence in Health Research” (2018) 48 *International Journal of Health Services* 749 at 754.

Gardner focuses squarely on the structural forces and legal arrangements fostered by the state that cause, permit or encourage the production of violence experienced by migrant workers.¹⁴⁶ He conceives the mechanics of structural violence endured by the transnational proletariat “in terms of the forces, policies, arrangements and ideas that together orchestrate the interactions between foreign workers and citizens.”¹⁴⁷ Gardner’s analysis focuses on the structural arrangement of the *kafala* (sponsorship) system, which he argues is the “keystone in the systemic and structural violence levied against foreign workers in the Gulf.”¹⁴⁸ Similarly, I focus on the role of the Philippine and Sri Lankan states in producing situations of structural violence through their institutions, policies and practices, which systematically disadvantage and discriminate against women MDWs.

In particular, I argue that the failure of both countries to implement protective migration policies, and preference for market-driven regulations, creates the conditions for the systematic exploitation of women domestic workers by recruitment agencies and employers. This is evidence of structural violence on behalf of the state. A situation is created where violence against women not only becomes part of the employment itself, but is also enabled by a “state-sanctioned, or constructed, context that allows and even furthers the violence.”¹⁴⁹

I use Lee’s tripartite typology, outlined earlier, to illustrate how the Philippine and Sri Lankan governments are continuing to promote the commodification of migrant workers by facilitating and directing the flow of women domestic workers to receiving states, despite deficient regulations to protect such workers against rights violations and exploitation. Gardner contends that “the ongoing exploitation of the foreign labour force is a necessity rendered by the neoliberal environment.”¹⁵⁰ This thesis argues that in the face of growing competition between labour-sending states in the global labour market, the governments of the Philippines and Sri Lanka are reluctant to enforce rights-based regulations that may result in a loss of labour demand and in turn remittances. Both states are heavily dependent on these

¹⁴⁶ Gardner, above n 35, at 161.

¹⁴⁷ At 51.

¹⁴⁸ At 29.

¹⁴⁹ Nicola Piper “Feminization of Labor Migration as Violence Against Women” (2003) 9 *Violence Against Women* 723 at 725.

¹⁵⁰ Gardner, above n 35, at 161.

remittances for foreign exchange.

Consequently, the Philippine and Sri Lankan governments' primary goal of achieving a greater share in the overseas labour market and an ascendant position in the global political economy, at the expense of the welfare of women domestic workers, fosters structural violence. This is because it directly heightens the vulnerability of women migrant workers to abuse throughout the migration cycle.

Structural Violence by Commission and Omission

Structural violence is pronounced in the Philippines and Sri Lanka as part of their government migration policies relating to women MDWs. It can take two different forms: by *commission* and by *omission*. Structural violence by *commission* involves the state actively enforcing regulations that restrict the rights of women MDWs, which in turn creates the conditions for their exploitation by recruitment agencies and employers overseas.

I suggest that this form of structural violence is pronounced in both sending states by way of policy restrictions on the migration of women domestic workers. Restrictions range from bans to certain receiving countries as seen in the Philippines, to bans on women with children under five years of age from migrating for domestic work as seen in Sri Lanka through the Family Background Report. I argue that such structural arrangements in the form of migration bans prompt domestic workers to migrate through irregular pathways fraught with risk. This facilitates the abuse these workers endure at the hands of unscrupulous recruiters and employers.

In addition, the commodification of domestic workers, outlined earlier, constitutes structural violence by commission because it allows for, and encourages, regulations enforced by sending states that restrict rights and discriminate against MDWs. Zygmunt Bauman highlights how once labour is commodified there is a new "disconnectedness that sets the labour capacity and its holders free to move, to be moved, and so to be put to different (more profitable) uses."¹⁵¹ Thus, the status of

¹⁵¹ Zygmunt Bauman *Wasted Lives: Modernity and Its Outcasts* (Cambridge: Polity Press, 2003).

domestic workers as mere economic commodities strips these women of the protective safeguards afforded to other individuals and groups of workers. This enables both labour-sending and receiving countries to dehumanise the domestic migrant workforce as an expendable resource whose social and legal protection is of little or no concern.¹⁵²

The governments of the Philippines and Sri Lanka also demonstrate structural violence by *omission*, which constitutes inaction by the state to protect the rights and welfare of women domestic workers. I contend that structural violence by omission is displayed by the Philippine and Sri Lankan governments' failure to provide gender and rights-based training and education for MDWs through pre-departure information seminars, and this failure renders workers more susceptible to rights violations. Another example is the failure of both sending states to provide sufficient government assistance in the form of trained labour attachés and gender-sensitive welfare officers to protect the rights of workers in receiving countries, while continuing to facilitate their overseas employment.

Overall, policies promoting labour export in the Philippines and Sri Lanka primarily benefit the economic interests of the state while inducing further suppression of labour rights, combined with low-wages.¹⁵³ Government regulations in the Philippines and Sri Lanka, derived from the export-oriented/neoliberal globalisation model, operate to inhibit rather than protect the rights of women MDWs. As a result, both sending states are failing to comply with their obligations under the Domestic Workers Convention, the CEDAW and the ICMW.

1.3 Rights

The lack of economic development and crucial role of remittances pose a dilemma for the Philippine and Sri Lankan governments, as they seek to reconcile the promotion of overseas employment with the protection of women MDWs against rights

¹⁵² Stuart Rosewarne "Globalisation and the Commodification of Labour: Temporary Labour Migration" (2010) 20 *The Economic and Labour Relations Review* 99 at 105.

¹⁵³ Dong-Sook S. Gills and Nicola Piper *Women and Work in Globalising Asia* (London: Routledge, 2002) at 4.

violations consistent with their international law obligations. I contend that contradictions between the two result in the subordination of a rights-based gender-informed approach in favour of a market-driven one.

1.3.1 Rights-Based Approach

A rights-based approach to the international migration of domestic workers is a conceptual framework that makes human rights and labour standards, defined by the relevant international instruments, the central premises of national migration legislation, policy and practice founded on the rule of law.¹⁵⁴ The ILO and the UN Special Rapporteur on the human rights of migrants are among those who have called for a rights-based approach to guide migration policymaking. According to Stefanie Grant, the essential principles and elements of a rights-based approach include:¹⁵⁵

The observance of international human rights norms, including equality and non-discrimination, standard setting and accountability, the recognition of migrants as subjects and holders of rights, the participation of communities and the integration of a gender and ethnic perspective.

Governments are the primary duty-bearers under a human rights framework with three overarching obligations: to *respect* rights, which means the government cannot violate rights enshrined in laws, policies and programmes; to *protect* rights, which involves the government preventing violations by others; and to *fulfil* rights, meaning that the government must take measures that move towards the realisation of rights.¹⁵⁶ As right-holders, migrant workers can claim rights recognised as legitimate entitlements, thus a rights-based approach emphasises the empowerment of those who are affected by policies and their participation in the decision-making process.¹⁵⁷

¹⁵⁴ Patrick Taran “Globalization, Migration and Labour: Imperatives for a Rights-Based Policy” (2011) 2 Journal of Globalization Studies at 58.

¹⁵⁵ Stefanie Grant “International Migration and Human Rights” (September 2005) Policy Analysis and Research Programme of the Global Commission on International Migration at 26.

¹⁵⁶ United Nations Population Fund *A Human Rights-Based Approach to Programming* (2010) United Nations: New York at 47.

¹⁵⁷ United Nations Population Fund *Rights into Action: United Nations Population Fund Implements Human Rights-Based Approach* (2005) United Nations: New York at 6.

1.3.2 *Rights and International Law*

In response to the vulnerability of domestic workers and the lack of legal protection governing such women in the workplace, a range of international regulations have entered into force to help address the deficit of domestic worker's rights. I rely on three international human rights conventions: the ILO's Convention No. 189 Concerning Decent Work for Domestic Workers (C189), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). Collectively, these international instruments set the overarching human rights standards for the promotion, protection and fulfillment of the rights belonging to women MDWs.

Through ratification of international human rights treaties and as Member States of the ILO, the Philippine and Sri Lankan governments are legally obligated to put in place domestic measures and legislation compatible with the requirements of the Conventions, and to ensure the provisions are implemented and enforced on paper and in practice. Thus, C189, the CEDAW and the ICMW provide the reference point for assessing both the standard of protection governing women MDWs by the two sending states and their market-driven approach to migration driven by neoliberal globalisation, which results in state-sanctioned structural violence. The three international conventions are outlined briefly below and examined in more detail in chapter three.

The first international human rights convention that this thesis relies on is the ILO's Domestic Workers Convention. The ILO adopted C189, and its supplementing Recommendation Concerning Decent Work for Domestic Workers (R201), in June 2011 at its International Labour Conference. Through this, the ILO has adopted a sector-specific, rather than migrant-specific, approach to labour standards. The Convention constitutes a political victory for women MDWs and advocacy groups by regulating an otherwise unregulated sector in the informal economy, whose workforce is primarily female, of which a considerable percentage are migrants.

The Philippines was the second country to ratify C189 in 2012, following mounting pressure from migrant worker advocacy groups.¹⁵⁸ In contrast, Sri Lanka has been much more reluctant to adopt any formalised international law instruments pertaining to domestic workers. In particular, the government of Sri Lanka has not yet ratified C189, although both countries are ILO Member States. As a Member State, Sri Lanka has a constitutional obligation under Article 19 of the ILO Constitution to report on non-ratified conventions. Therefore, I argue that the Convention can still be relied on as a reference point for assessing the response of the Sri Lankan government towards the protection of the rights of women MDWs.

The second international convention that this thesis relies on is the CEDAW. The CEDAW was the culmination of more than thirty years of work by the UN Commission on the Status of Women, a body established in 1946 to monitor the situation of women and to promote their rights. The Commission's work has been instrumental in bringing to light many of the areas in which women are denied equality with men. These efforts for the advancement of women have resulted in several declarations and conventions, of which the CEDAW is the central and most comprehensive document. Before the CEDAW came into effect in 1981, both the Philippines and Sri Lanka became signatories to the Convention in 1980 and ratified it the following year.

The CEDAW obligates states to take steps to eliminate discrimination against women on the basis of gender and to realise women's rights through equal access and opportunities. I specifically rely on the CEDAW General Recommendation No. 26 (GR 26) on Women Migrant Workers, which provides a bridge between the CEDAW's broad guarantee against discrimination and the unique needs of women migrant workers. GR 26 focuses on "the circumstances that contribute to the vulnerability and experiences of discrimination"¹⁵⁹ of women migrant workers.

¹⁵⁸ International Labour Organization *Domestic Workers: Activities and Campaigns for Ratification of ILO Instruments* (9 March 2012) Geneva: Switzerland <www.ilo.org>; Rex Varona "License to Exploit: A Report on the Recruitment Practices and Problems Experienced by Filipino Domestic Workers in Hong Kong" (October 2013) Alliance of Progressive Labour.

¹⁵⁹ United Nations Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008) UN Doc CEDAW/C/2009/WP.1/R [GR 26].

The third international human rights convention is the ICMW. The ICMW protects the basic human rights and freedoms of all migrant workers and members of their families, which must be acknowledged and actively defended by all states involved during the entire migration process. The Philippine government ratified the ICMW in 1995, followed by the Sri Lankan government in 1996. In addition to setting minimum obligations for the protection of migrant workers, the ICMW is a helpful tool for global migration governance. The Convention explicitly provides a framework for human rights based policymaking on migration, including women migrant workers.

In particular, after noting the omission of express references to domestic workers in a range of national and international frameworks of law, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families issued a General Comment in October 2009 to provide states with guidance on how to implement their obligations under the ICMW with respect to MDWs. Accordingly, I also use the General Comment No.1 on Migrant Domestic Workers when assessing the degree of protection provided to women domestic workers by the Philippine and Sri Lankan governments.

Overall, the three Conventions interconnect by promising different forms of protection for women migrant workers. While the ICMW protects individuals, including migrant women, on the basis of their migration status, the CEDAW protects all women, including women MDWs, against gender-based discrimination. The ILO's Domestic Workers Convention complements and strengthens the two Conventions by affording specific protection for women MDWs, the provisions of which address their vulnerability as both migrants and women employed as domestic workers.

1.3.3 *Contesting Rights*

While a focus on migrants' rights is recognised as providing a powerful language for activism, numerous feminist scholars have pointed out how the concept of 'rights'

itself is problematic and essentially paradoxical.¹⁶⁰ For example, international human rights treaties can sometimes reinforce injustice as well as undermine it by excluding certain workers from their ambit of protection.¹⁶¹ In particular, the role and status of women MDWs raises issues relating to the limitations of a rights-based approach. This is due to foundational assumptions within liberal human rights discourse concerning a public/private divide, which serves to “shore-up the invisibilization of social relations of reproduction within contemporary capitalist societies” and blocks the ability of women domestic workers to claim rights.¹⁶² In terms of economic rights, it has been argued that concepts such as labour and welfare rights rest upon deeply gendered ideals concerning both the ‘male breadwinner’ and an understanding of work as comprising of formal sector ‘productive’ employment outside of the home, rather than socially reproductive activity.¹⁶³

Therefore, the extent to which international human rights treaties afford protection for MDWs, whose association with the private sphere and work falls outside conventional definitions of ‘labour’, is questionable. This is particularly problematic in Sri Lanka, which has so far failed to ratify C189 pertaining to domestic workers, as well as adopt national legislation that recognises domestic work as ‘work’ entitled to rights guaranteed under the labour law of Sri Lanka. The non-recognition of domestic workers as ‘workers’ and right-holders within both state legislation and public discourse limits the potential of ‘rights talk’ as a tool for protecting some of the most vulnerable and disadvantaged groups.¹⁶⁴

Further, Linda Shaw and Angela Hale have claimed that the kind of rights enshrined in international law are often seen as too abstract and too far removed from the issues faced by women MDWs and their everyday struggles.¹⁶⁵ For example, one key issue

¹⁶⁰ Juanita Elias “Struggles over the Rights of Foreign Domestic Workers in Malaysia: the Possibilities and Limitations of ‘Rights Talk’” (2008) 37 *Economy and Society* 282 at 284; Hilary Charlesworth and Christine Chinkin *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000).

¹⁶¹ Margaret McLaren “Decolonizing Rights: Transnational Feminism and ‘Women’s Rights as Human Rights’” in Margaret McLaren (ed) *Decolonizing Feminism: Transnational Feminism and Globalization* (New York: Rowman & Littlefield, 2017).

¹⁶² Juanita Elias “Making Migrant Domestic Work Visible: The Rights Based Approach to Migration and the ‘Challenges of Social Reproduction’” (2010) 17 *Review of International Political Economy* 840 at 843.

¹⁶³ Elias, above n 162, at 843.

¹⁶⁴ Elias, above n 160, at 285.

¹⁶⁵ Linda Shaw and Angela Hale “The Emperor’s New Clothes: What Codes Mean for Workers in the

is *how* rights are to be claimed since many domestic workers lack access to a public sphere within which rights claims can be advocated, owing to employment practices that confine them to the household and state practices that prevent them from organising and forming associations and unions.¹⁶⁶

Concerns can also be raised regarding the inability of international human rights conventions to address and challenge entrenched structural socio-economic inequalities and discriminatory social norms within global labour markets, particularly intersecting hierarchies of class, gender, nationality and race that are integral to the functioning of the subordinate labour market status of domestic workers. Juanita Elias notes how a “dominant neoliberal development paradigm legitimates a view of human rights that presents them as complementing the operation of the market mechanism.”¹⁶⁷ Therefore, when states are responding to their international treaty obligations, they are arguably working within a paradigm that is compatible with the neoliberal economic order.

While I recognise these shortcomings, I argue that they do not undermine my reliance on a rights-based approach, which retains considerable rhetorical and mobilising power. In addressing these criticisms, I combine the three international conventions to create a set of ‘rights’ that are appropriate reference points for protecting women MDWs and attending to their specific needs and interests. Such international human rights treaties, and their monitoring procedures, provide a platform from which migrant workers and advocacy groups can pressure states into fulfilling their obligations, counter the devaluation of domestic work, and push for the recognition of ‘household helpers’ as employees with entitlements. Crucially, international norms can strengthen the leverage of non-governmental actors and legitimise their demands when advocating for legislative change.¹⁶⁸ An emphasis on rights has the “ability to

Garment Industry” in Rhys Jenkins, Ruth Pearson and Gill Seyfang (eds) *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (London: Earthscan Publications, 2002) at 106.

¹⁶⁶ Elias, above n 160, at 296.

¹⁶⁷ Juanita Elias “Gendered Political Economy and the Politics of Migrant Worker Rights: The View from South-East Asia” (2010) 64 *Australian Journal of International Affairs* 70 at 81.

¹⁶⁸ Jasper Krommendijk “The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies: The Case of the UN Human Rights Treaty Bodies” (2015) 10 *The Review of International Organizations* 489 at 495.

limit the freedom of markets to turn people into commodities, providing a basis for challenging the dominance of market-led development strategies.”¹⁶⁹

1.4 Gender

In combination with a rights-based lens, I propose a gender-informed approach centred on the standards established by the three international human rights conventions. The Domestic Workers Convention, the CEDAW and the ICMW serve as the reference point for assessing whether the domestic legal frameworks governing women MDWs in the Philippines and Sri Lanka are informed by gender, as well as the extent to which they address women migrant workers’ specific needs and vulnerabilities at each stage of the migration cycle.

1.4.1 Feminist Theories of Migration

Feminist debates on gender and migration are central to my approach. In feminist theory, gender is understood to be a matrix of identities, behaviours, and power relationships that are constructed by the culture of a society in accordance with sex.¹⁷⁰ Feminist theorists perceive gender as a core organising principle that underlies migration and related processes, such as the reasons for migrating, how the worker migrates, effective adaptation to the new country, successful reintegration back into the country of origin, and the vulnerabilities to exploitation the worker is exposed to throughout the entire process.¹⁷¹

The integration of gender analysis in migration studies has developed over three stages. The first emerged in the 1970s and early 1980s, with a conception of gender as an individual-level, static category which feminist scholars referred to as the ‘add

¹⁶⁹ Diane Elson and Jasmine Gideon “Organizing for Women’s Economic and Social Rights: How Useful is the Covenant on Economic, Social and Cultural Rights?” (2004) 8 *Journal of Interdisciplinary Gender Studies* 133 at 137.

¹⁷⁰ Elizabeth Grieco and Monica Boyd “Women and Migration: Incorporating Gender into International Migration Theory” (2003) *Online Journal of the Migration Policy Institute* <www.migrationpolicy.org>.

¹⁷¹ Grieco and Boyd, above n 170.

women and stir' approach.¹⁷² The second stage developed in the late 1980s and early 1990s, which involved feminist migration scholars focusing on gender as a system of relations influenced by migration processes, rather than simply contrasting women to men.¹⁷³ Pierrette Hondagneu-Sotelo posits that the most recent scholarship has advanced into a third stage, which examines how gender is a constitutive element of migration and how it “permeates a variety of practices, identities and institutions implicated in migration.”¹⁷⁴

Parreñas contends that gender is not merely the social and cultural differences between masculinity and femininity, but that gender is above all a relation of inequality between men and women in society.¹⁷⁵ She makes the case that feminist migration scholars should no longer focus only on the ways gender is constituted in the process of migration by comparing the experiences of men and women, but instead on the gender inequalities that control the experiences of women (and men) in the process of migration.¹⁷⁶ A gender-informed approach, therefore, helps to identify and address the ways that certain laws and policies perpetuate gender inequalities, and how this impacts on women domestic workers' access to rights.

Previously stereotyped as dependents of male migrants, with emphasis placed on their roles as passive wives and mothers, women are now migrating independently as the main economic providers and head of households.¹⁷⁷ However, many migration-related policies and regulations in countries of origin and destination are still not gender-sensitive, while governments tend to underestimate or neglect the gendered nature of migration.¹⁷⁸ Despite the ‘feminisation of migration’ and the new economic roles assumed by women in the migration process, state policies “frequently take men

¹⁷² Stephanie J. Nawyn “Gender and Migration: Integrating Feminist Theory into Migration Studies” (2010) 4 *Sociology Compass* 749 at 750.

¹⁷³ At 750.

¹⁷⁴ Pierrette Hondagneu-Sotelo “Gender and Immigration: A Retrospective and Introduction” in Pierrette Hondagneu-Sotelo (ed) *Gender and U.S. Immigration: Contemporary Trends* (University of California Press, 2003) at 9.

¹⁷⁵ Rhacel Salazar Parreñas “Inserting Feminism in Transnational Migration Studies” (2009) *Migration Online: Czech Republic* <www.lastradainternational.org>.

¹⁷⁶ Parreñas, above n 175.

¹⁷⁷ International Labour Organization *Making Migration Work for Women and Men in Rural Labour Markets* (2010) 6 Gender and Rural Employment Policy Brief. International Labour Office: Geneva at I.

¹⁷⁸ International Organization for Migration *Migration and Gender* (2008) *Essentials of Migration Management: Developing Migration Policy* Volume 2.10 at 6.

as the ‘norm’, ignoring women’s needs, aspirations, and capacity to act independently.”¹⁷⁹

A gender-informed approach is indispensable to a sound understanding of international migration and the legal protection of women MDWs for three reasons. First, feminised migratory movements, particularly in Asia, involve gender-specific vulnerabilities or experiences and therefore require gender-specific responses. For example, female migrants are often confronted with disadvantages in the migration process and in their employment due to different factors, including stereotyped labour roles for men and women and the lack of policies addressing women migrant workers’ specific needs, such as access to healthcare and maternity leave.¹⁸⁰

Second, adopting a gender lens helps to illuminate how migration policies are gender-blind or gender-biased and discriminate against women in practice.¹⁸¹ For instance, occupations dominated by women migrant workers, such as domestic work, are more frequently marked by restrictive regulations and limited employment law standards. Such gender-biased restrictions include a government enforced ban in Sri Lanka on the migration of domestic workers with children under the age of five years, as well as the requirement for their husband’s consent to confirm that he has “no objection” to the migration of his wife for employment.¹⁸² Consequently, since the majority of domestic workers are female, the policies disproportionately affect migrant women.

Third, the lack of scrutiny policymakers give to the private sphere of the home constitutes a gender-specific problem. This occupation renders women more susceptible to violence of various kinds as a result of the context of their work. Moreover, their status as women and as workers in gender-segregated labour markets makes women domestic workers particularly vulnerable to various forms of discrimination and exploitation. As a result, the migration experiences of these migrant women are qualitatively different from those of male migrant workers, and

¹⁷⁹ At 6.

¹⁸⁰ Organization for Security and Co-operation in Europe *Guide on Gender-Sensitive Labour Migration Policies* (2009) OSCE: Austria at I.

¹⁸¹ Oishi, above n 47, at 7.

¹⁸² Hiranthi Jayaweera “Gender, Class and Migration Governance: A Labour-Sending Country Perspective” (29 May 2015) COMPAS <www.compas.ox.ac.uk>.

they therefore require different protection.¹⁸³

Some leading scholars in the field contend that we must pursue gender comparative studies – in other words, compare women and men’s experiences – in order to adequately capture how gender is established in the process of migration and how gender distinguishes the experiences of men and women.¹⁸⁴ It may be argued that the tendency to focus on women rather than on two genders defined in relation to one another is a weakness of gender research. Nicola Piper notes that although the quest to make women visible is an important undertaking, this has resulted in the exclusion of male respondents in numerous empirical case studies.¹⁸⁵ Thus, gender has not sufficiently been approached as a relational concept and what presents itself as ‘gender and migration’ often turns out to be mainly ‘women in migration’.¹⁸⁶

However, I agree with Parreñas who maintains that gender can still be studied by solely focusing on women.¹⁸⁷ She posits that when incorporating a feminist perspective on migration, “one needs to move from a simple enumeration of the differences between men and women towards an examination of the structural inequalities that underlie experiences of migration.”¹⁸⁸ Such a feminist undertaking would not be dominated by the need to differentiate men’s and women’s experiences, but allows a sole focus on women. I adopt this approach to highlight how the economic and political context of both sending states impact on and discriminate against women MDWs. For instance, certain policies and practices in the country of origin can have a discriminatory impact on women, including limited access to resources and educational opportunities and their capacity to fully participate in society.

1.4.2 Gender and Intersectionality

¹⁸³ Cheng, above n 17, at 140.

¹⁸⁴ Pierrette Hondagneu-Sotelo “Gender and Contemporary U.S. Immigration” (1999) 42 *American Behavioral Scientist* 565 at 566.

¹⁸⁵ Nicola Piper “Bridging Gender, Migration and Governance: Theoretical Possibilities in the Asian Context” (2003) 12 *Asian and Pacific Migration Journal* 21 at 26.

¹⁸⁶ At 26.

¹⁸⁷ Parreñas, above n 175.

¹⁸⁸ Parreñas, above n 175.

A sole focus on gender has also received criticism for failing to acknowledge the experiences of women belonging to a racial minority or to ethnic communities.¹⁸⁹ For this reason, feminist scholars have warned that “a more complex understanding of oppression” is required to truly encompass the different realities of women, which “would not be compatible with a purely gender-centred analysis.”¹⁹⁰

Since the 1980s, theories have emerged in scholarly research that challenge and shift the focus from simplistic one-dimensional understandings of inequality, such as gender, to include the multiple and interrelated ways that women migrant workers experience discrimination and human rights violations. Among those, Kimberlé Crenshaw¹⁹¹ coined the term ‘intersectionality’, highlighting the intersection of race and gender and creating a qualitatively different form of discrimination.

Intersectionality constitutes an analytical framework derived from feminist theory. It encourages looking beyond the most clearly visible dimensions of inequality to recognise that oppression is situated at the intersection of various forms of subordination, including - but not limited to - gender, race, caste, socio-economic class, age, nationality, sexuality, religion and migrant status.¹⁹² Intersectional analysis aims to reveal multiple identities, exposing the specific forms of discrimination that occur as a consequence of the combination of identities. Thus, gender-based discrimination interconnects with discrimination based on other forms of ‘otherness’, which places women migrants in situations of double or triple discrimination, disadvantage or vulnerability to exploitation.¹⁹³

While gender acts as an organising principle of the labour market, reproducing and reinforcing traditional gender patterns, it is not only women who predominantly

¹⁸⁹ Lorena Sosa *Intersectionality in the Human Rights Legal Framework on Violence Against Women: At the Centre or the Margins?* (Cambridge University Press, 2017) at 7.

¹⁹⁰ At 7.

¹⁹¹ Kimberlé Crenshaw “Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics” (1989) 14 *University of Chicago Legal Forum* at 538.

¹⁹² Lee and Piper, above n 38, at 1.

¹⁹³ Malsiri Dias and Ramani Jayasundere “Sri Lanka: Good Practices to Prevent Women Migrant Workers from Going into Exploitative Forms of Labour” (1 December 2002) *Gender Promotion Programme Working Paper No 9: Series on Women and Migration*. International Labour Organization: Geneva at iii.

perform domestic work but also women of a certain race, class and ethnic origin.¹⁹⁴ Gender can intersect or interact with other forms of oppression to facilitate abuse, relegating women working as domestic workers to “servile status”.¹⁹⁵ The use of intersectionality can help clarify the ways in which race, class and gender operate to create an interlocking system of hierarchy and oppression in the case of women MDWs and their differential experiences in the Philippines and Sri Lanka.¹⁹⁶ These factors compound their vulnerability to human rights violations and deny their access to justice. For instance, labour laws in host states often exclude certain sectors in the economy where ‘low-skilled’ and low-wage women workers dominate, particularly domestic work.¹⁹⁷ This exclusion is exacerbated by government policies that limit a domestic worker’s freedom to choose employers and restrict them to one workplace, such as the *kafala* (sponsorship) system in Gulf States which links the legal status of domestic workers to that of their employer.¹⁹⁸

The complex experience of women MDWs cannot be fully captured by simply examining any single axis of their identity. By examining intersections of race, class and gender, an intersectional approach probes beneath a single identity to discover how different types of discrimination overlap to contribute to a situated disadvantage. In doing so, this analysis helps us to assess the impact of these converging identities on women MDW’s access to rights.¹⁹⁹ For example, it is the intersection of the domestic worker’s identity - female, ‘low-skilled’, Sinhalese/Tamil/Filipino, low socio-economic class and a foreign (sometimes undocumented) citizen – which puts her in a position of vulnerability, while the intersection of certain policies, programmes and laws uphold and perpetuate these inequalities.²⁰⁰ If policies fail to recognise and capture the specific identities of MDWs, such women will be further marginalised and “fall through the cracks” as they are prevented from exercising their

¹⁹⁴ Amaia Pérez Orozco, Denise Paiewonsky and Mar García Domínguez *Crossing Borders II: Migration and Development from a Gender Perspective* (2010) United Nations International Research and Training Institute for the Advancement of Women: Dominican Republic at 38.

¹⁹⁵ At 38.

¹⁹⁶ Ping-Chun Hsiung and Katherine Nichol “Policies on and Experiences of Foreign Domestic Workers in Canada” (2010) 4 *Sociology Compass* 766 at 773.

¹⁹⁷ Lee and Piper, above n 38, at 5.

¹⁹⁸ Dina Mansour-Ille and Maegan Hendow “From Exclusion-Ille to Resistance: Migrant Domestic Workers and the Evolution of Agency in Lebanon” (2018) 4 *Journal of Immigrant and Refugee Studies* 449 at 451.

¹⁹⁹ Alison Symington “Intersectionality: A Tool for Gender and Economic Justice” (2004) *Women’s Rights and Economic Change* No 9 at 2.

²⁰⁰ At 2-3.

human and labour rights.²⁰¹

The conditions and commonness of temporary domestic labour migration cuts asymmetrically across gender, ethnic and class divisions. The labour force participation rate of women is significantly lower than men in both the Philippines and Sri Lanka due to limited decent work opportunities and access to financial resources, restrictive workplace practices, and patriarchal gender norms resulting in women having greater responsibility for unpaid care work.²⁰² While these factors drive many women to pursue employment as domestic workers overseas, the intersection of ethnicity and class further determines the likelihood of migration. In Sri Lanka, for example, most women MDWs are typically of poor Sinhala-Buddhist or Muslim background. In contrast, the Tamil and particularly Indian Tamil population in Sri Lanka are under-represented in temporary labour migration, “reflecting an enduring confluence of socio-cultural discrimination and productive subordination that results in insufficient means to pursue foreign employment as an alternative” to indentured labour and local domestic work.²⁰³

I draw on the ‘systemic intersectionality’ proposed by Hae Choo and Myra Ferree²⁰⁴ as one style of intersectional practice. I focus on the role of the Philippine and Sri Lankan states in producing intersectional inequalities through their institutions, policies and practices, which intertwine to systematically disadvantage and discriminate against women MDWs. In particular, I argue that certain regulations enforced by the Philippine and Sri Lankan governments, as well as their failure to implement protective migration policies, creates conditions for the systematic exploitation of women MDWs by recruiters and employers. This systemic

²⁰¹ Dana Meads “Different but not Divided: Women’s Perspectives on Intersectionality. A Summary Report of the Asia Pacific Regional Consultation with the United Nations Special Rapporteur on Violence Against Women, its Causes and Consequences” (11-12 January 2011, Malaysia) Asia Pacific Forum on Women, Law and Development at 14.

²⁰² Matt Withers “Decent Care for Migrant Households: Policy Alternatives to Sri Lanka’s Family Background Report” (2019) 26 Social Politics 325; Asian Development Bank and the International Labour Organization “Gender Equality in the Labor Market in the Philippines” (December 2013).

²⁰³ Withers and Piper, above n 123, at 594.

²⁰⁴ Hae Yeon Choo and Myra Marx Ferree “Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions and Institutions in the Study of Inequalities” (2010) 28 Sociological Theory 129.

intersectionality corresponds with Acker's idea of 'inequality regimes',²⁰⁵ as an analytic approach to understanding how practices, processes and actions result in and maintain class, gender and racial inequalities. However, while Acker focuses on the mutual production of gender, race, and class inequalities in work organisations, this thesis centres on intersectional inequalities within the legal regime in the two labour-sending states.

1.4.3 Gender, Intersectionality and International Law

While I primarily rely on a gender-informed approach, an intersectional lens is used to assess whether the domestic legal frameworks in the Philippines and Sri Lanka adequately protect women MDWs against abuse on the grounds of their gender, race, ethnicity, socio-economic class, nationality and migrant status. These factors together contribute to the heightened vulnerability of MDWs in both sending and receiving countries. The domestic legal frameworks will be assessed by reference to standards established by the ILO's Domestic Workers Convention, the CEDAW and its General Recommendation No. 26 and the ICMW and its General Comment No. 1, all of which impose obligations on the state to provide gender-specific protections for women migrant workers at each stage of the migration cycle.

In particular, the protections outlined in the GR 26 and General Comment No. 1 are informed by gender, as well as intersectionality, and seek to safeguard women against discrimination and exploitation on the grounds of their multiple identities as women MDWs. For instance, both GR 26 and General Comment No. 1 recommend states to provide gender and rights-based pre-departure information and training programmes to raise women migrant workers' awareness of potential exploitation and to repeal sex-specific bans and discriminatory restrictions on women's migration on the basis of age, marital status or maternity status.

The CEDAW captures intersecting identities by requiring states to condemn and

²⁰⁵ Joan Acker "Inequality Regimes: Gender, Class and Race in Organizations" (2006) 20 *Gender & Society* 441.

eliminate discrimination against women in *all* its forms,²⁰⁶ with Article 9 prohibiting discrimination based on nationality and Article 14 protecting rural women. Similarly, Article 1 of the ICMW guarantees that the protections in the Convention apply without distinction of any kind as to sex, race, colour, language, religion, nationality, age, economic position, and marital status.

I draw on the protections provided by the three conventions and their accompanying recommendations to assess whether the laws and policies governing women MDWs in the Philippines and Sri Lanka are gender-sensitive and informed by intersectional identities. If not, I will examine whether they discriminate against women on multiple grounds and perpetuate their vulnerability to exploitation and rights violations in practice, resulting in situations of structural violence.

1.5 Proposed Framework: Bridging Gender and Rights

This thesis argues that a rights-based intersectional framework, sourced from the three international conventions, which focuses on domestic workers as right-holders is necessary if women MDWs are to receive adequate protection in law against exploitation. It is the language of ‘rights’ through which a political opening for discussions about the exploitative tendencies of employment contracts and migration policy is created. Ultimately, a rights-based approach to migration is more beneficial in practice when it is pursued in a way that has as its starting point the specific needs, interests and problems faced by marginalised *women* domestic workers.

In order to promote such a framework, it is necessary to challenge the ways in which states actively and passively participate in the transnational subordination of women MDWs. If sending states can influence and facilitate the volume and direction of labour migration flows, I argue that they also have the capacity to intervene to protect the rights of migrant workers. Analysing the legal frameworks governing MDWs in the Philippines and Sri Lanka through an intersectional and rights-based lens will allow me to expose the market-driven policymaking practices and commodification of migrant labour in both states that result in situations of structural violence.

²⁰⁶ Convention on the Elimination of all Forms of Discrimination Against Women 1249 UNTS 13 (opened for signature on 1 March 1980, entered into force 3 September 1981) [CEDAW], art 2.

Under mounting pressure from advocacy groups and civil society organisations, governments are more likely to translate their formal commitments under international law into domestic practice. A rights-based approach to migration has increasingly come to underpin the work of transnational activist groups, including the Migrant Forum in Asia network, which lobby governments through global and regional consultative processes such as the Global Forum on Migration and Development, Abu Dhabi Dialogue and Colombo Process.²⁰⁷ This approach has been particularly influential within the Asia-Pacific region, where migrant organisations have assumed a vital role in the advancement of a rights-based approach to migration. Acknowledging the limitations of state-initiated action and the increasing role of migrant worker organisations, Nicola Piper and Jean Grugel have reconceptualised rights-based governance as ‘governance from below’, referring to the increasing collective rights activism by social movements and transnational advocacy networks.²⁰⁸

Governance from below involves civil society organisations promoting a rights-based approach to migration to address the rights deficit in current policymaking practices, by lobbying for the adoption of human rights protection policies as well as decent work opportunities in both origin and destination countries.²⁰⁹ It is increasingly evident that the lobbying efforts by migrant worker advocacy groups and their participation in decision-making processes are having a sizeable impact in prompting governments to set a number of conditions and rights for MDWs *on paper*, in accordance with their international obligations.²¹⁰

However, this thesis highlights the disconnect between rights afforded to Filipina and Sri Lankan MDWs under domestic policy and international law and the actual

²⁰⁷ Nicola Piper and Stefan Rother “Political Remittances and the Diffusion of a Rights-Based Approach to Migration Governance: The Case of the Migrant Forum in Asia (MFA)” (2020) 46 *Journal of Ethnic and Migration Studies* 1057 at 1058.

²⁰⁸ Jean Grugel and Nicola Piper *Critical Perspectives on Global Governance: Rights and Regulation in Governing Regimes* (London: Routledge, 2007).

²⁰⁹ Nicola Piper “Democratising Migration from the Bottom Up: The Rise of the Global Migrant Rights Movement” (2015) 12 *Globalizations* 788 at 793.

²¹⁰ Nicola Piper, Stuart Rosewarne and Matt Withers “Redefining a Rights-Based Approach in the Context of Temporary Labour Migration in Asia” (September 2016) UNRISD Working Paper No 11 at 12.

implementation of such rights in practice. Piper and Grugel refer to this as an emphasis on legal rights or ‘rights in theory’ rather than ‘rights in practice’, which draws attention to the problematic assumption that comprehensive rights-based international legal frameworks will lead to a cascade of social, political and economic transformation.²¹¹ Both governments of the Philippines and Sri Lanka provide legal protections informed by rights and gender for women MDWs in theory, but this often fails to translate into practical reform. While I propose a rights-based approach to better protect women MDWs against exploitation, securing state compliance with existing international standards and the implementation of such instruments in practice poses a fundamental challenge: how to achieve that if the Philippine and Sri Lankan governments continue to prioritise a neoliberal market-driven approach to migration?

I argue that the principle of transformative equality has the potential to bridge the gap between policy and practice, by challenging some of the structural inequalities in the global labour market that sustain the vulnerability of women MDWs to exploitation. The success of a transformative approach will largely depend on the lobbying efforts and political pressure brought to bear by civil society organisations in challenging sending governments’ promotion of labour export policies. Two mechanisms through which migrant worker advocacy groups can increase their influence and pressure on sending governments is by utilising international law norms and their compliance mechanisms, and by participating in regional consultative processes.

1.5.1 Transformative Equality

The principle of transformative equality underpins several of the provisions in the CEDAW. Examples include Articles 2(f) and 5, which together require state parties to address prevailing gender relations and the persistence of gender-based stereotypes. The CEDAW Committee, as well as Simone Cusack and Lisa Pusey, argue for a two-pronged approach to transformative equality. First, the transformation of “institutions, systems and structures that cause or perpetuate discrimination and inequality”, and second, “the modification or transformation of harmful norms, prejudices and

²¹¹ Jean Grugel and Nicola Piper “Do Rights Promote Development?” (2009) 9 *Global Social Policy* 79 at 85.

stereotypes.”²¹² A transformative model of equality is not a panacea that will end all ills overnight. However, it does offer a lens through which laws, policies and practices of the state that may perpetuate gender inequality between men and women can be scrutinised and challenged in order to transform existing market-driven structures, commodification of labour and structural violence.

One prominent market-driven structure causing entrenched forms of discrimination and exploitation against women MDWs is the ‘race to the bottom’ between sending states in terms of labour standards and rights for migrant workers in receiving countries. Labour-sending countries have often engaged in ‘under-selling’ the rights of nationals to host states in order to ensure their share of an increasingly crowded labour market for migrants.²¹³ Lindio-McGovern contends that in “its desire to open markets for Filipino labour power, the Philippine government subordinates its will to the labour-receiving government in negotiating for protective measures for the rights of its migrant citizens.”²¹⁴

This is consistent with a ‘utilitarian consequentialist’ approach, which argues for an explicit trade-off of fewer rights and unequal treatment for migrant workers in exchange for increased labour market access and employment opportunities in host countries.²¹⁵ Patrick Taran claims that rights are therefore “commodified as negotiable bundles that may be traded, sold or renounced in exchange for economic benefits deriving from access to foreign labour markets.”²¹⁶ This trade-off illustrates the active and pivotal role played by sending countries in the global labour market, negating the hyper-globalist depiction of the diminishing role of the state in the globalisation process.

Based on my research, I propose that this ‘race to the bottom’ can be challenged by labour-sending states cooperating and adopting harmonised positions through regional

²¹² Cusack and Pusey, above n 39, at 10.

²¹³ Nicola Piper “Rights of Foreign Workers and the Politics of Migration in South-East and East Asia” (2004) 45 *International Migration* 71 at 74.

²¹⁴ Lindio-McGovern, above n 89, at 524.

²¹⁵ Patrick Taran “The Need for a Rights-Based Approach to Migration in the Age of Globalization” in Paul De Guchteneire, Antoine Pecoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers’ Rights* (Cambridge University Press, 2009) at 158.

²¹⁶ At 158.

consultative processes. This will help prevent destination countries expanding recruitment from sending states with inferior labour standards. Working collectively to ensure equal standards for migrant workers, for instance by implementing a reference wage and model employment contract, as opposed to competing for market share, would benefit both migrant workers and sending countries by enhancing their bargaining power with labour-receiving states. Ultimately, this is more beneficial for all sending countries in the long-term as it challenges the ever-shifting hierarchy of remuneration rates and conditions of employment across different states. Chapter three examines the transformative value of regional consultative processes in more detail, with particular emphasis on the Colombo Process.

The involvement of non-governmental organisations (NGOs) in such regional consultative processes points to the significant role of globally and regionally connected and locally active civil society organisations in exerting pressure on governments to comply with international norms, and prioritise the protection of the rights of women migrant workers. Civil society activism through transnational advocacy networks has been credited for “anchoring human rights as a common and powerful discourse” and bringing gender to the forefront of global migration debates.²¹⁷ Their actions are “political, dynamic and transformational” as local non-state actors connect with international society to demand accountability from national governments, while empowering migrant workers by providing various forms of assistance and services.²¹⁸

Civil society organisations effectively articulate the needs and aspirations of the poorest and most marginalised workers and push the agenda of women migrants.²¹⁹ In this way, they challenge the market-driven migration model that is sustainable only through the exploitation of women MDWs. However, the levels of labour activism in the Philippines and Sri Lanka reflect the length of time that workers from both states have been migrating. Michele Gamburd notes how “the longer the period of

²¹⁷ Jenna Hennebry, Hari KC and Nicola Piper “Not Without Them: Realising the Sustainable Development Goals for Women Migrant Workers” (2018) *Journal of Ethnic and Migration Studies* 1 at 4.

²¹⁸ At 5.

²¹⁹ At 12.

migration, the savvier and better organised the labourers.”²²⁰ The negative impact of neoliberal policies is actively contested by Filipina women migrants at home and overseas, led by vocal organisations such as GABRIELA, a nationwide network of grassroots organisations in the Philippines addressing women’s issues, and Migrante International. Both play a significant role in facilitating organised resistance to neoliberal globalisation and the commodification of labour among migrant workers, while also confronting the Philippine government and labour-receiving states in demanding alternatives to the neoliberal globalisation agenda.²²¹

In contrast, the small number of civil society organisations in Sri Lanka lack cooperation and coordination, particularly with regards to building networks overseas. Therefore, despite the dedicated efforts of NGO leaders, the civil society movement has not been able to influence the government on significant policy issues nor voice sophisticated critiques of globalisation to the same degree as organisations in the Philippines.²²²

Transformative equality is also based on the value of inclusive participation. Bob Hepple²²³ and Sandra Fredman²²⁴ consider inclusive participation as key to dismantling systemic inequalities and disadvantage. Hepple contends that the government’s response must be through dialogue with and incorporating the perspective of those individuals whose interests are directly affected in the process of change.²²⁵ Therefore, in order to translate both governments’ commitments under international human rights conventions into political, economic and social action, I argue that women migrants and civil society organisations need to be fully embraced as partners and afforded the opportunity to actively participate in policymaking processes. Broader participation of women MDWs facing intersectional

²²⁰ Michele R. Gamburd “Advocating for Sri Lankan Migrant Workers: Obstacles and Challenges” (2009) 41 *Critical Asian Studies* 61 at 83.

²²¹ Ligaya Lindio-McGovern “Neoliberal Globalization in the Philippines: Its Impact on Filipino Women and Their Forms of Resistance” (2007) 23 *Journal of Developing Studies* 15 at 27.

²²² Discussed further in chapter four.

²²³ Bob Hepple “Transformative Equality: The Role of Democratic Participation” (paper presented to the Facing Development: the North-South Challenge to Transnational Labour Law LLRN Conference, 2013).

²²⁴ Sandra Fredman *Discrimination Law* (2nd ed, Oxford University Press, 2011).

²²⁵ Hepple, above n 223, at 28.

discrimination, as well as civil society advocates, are critical to the achievement of policy that responds to women's needs and advances transformative equality.

The inclusive participation of advocacy groups and migrant workers in decision-making processes within policy arenas also ties in with the second element of transformative equality involving the “modification or transformation of harmful norms, prejudices and stereotypes” surrounding domestic work. Elias notes that the non-recognition of domestic work as ‘work’ and women domestic workers as right-holders within both state legislation and mainstream political discourse in many sending and receiving countries “underscores how domestic work remains an unconscious component of capitalist economic systems.”²²⁶ The involvement of civil society and migrant workers in policymaking is therefore crucial in countering the political and public discourse that stigmatises and devalues domestic work in both economic and social terms. This in turn will challenge protective employment laws and policies that exclude women domestic workers and sustain structurally entrenched gender inequality.

Ultimately, transformative equality for women MDWs is characterised by the implementation of policies and legal reforms that remove structural barriers, challenge discriminatory gender norms and facilitate the collective voice and representation of women in the policymaking decisions that impact on their ability to claim rights. Addressing the underlying structures and systems that lead to intersectional inequalities and rights violations against women MDWs is a formidable challenge. However, the suggestions outlined above have the potential to reshape norms and institutions and make such structural modifications possible over the long-term.

1.6 Conclusion

This chapter illustrated how a rights-based intersectional approach, in compliance with the three international conventions, is necessary in order to safeguard women domestic workers against rights violations and abuse throughout the entire migration

²²⁶ Elias, above n 162, at 841.

cycle. This approach helps to identify whether both sending states are prioritising labour export and the accumulation of remittances, premised on the commodification of migrant labour, by considering the extent to which their regulations are complying with international legal standards of protection sourced from the ILO's Domestic Workers Convention, the CEDAW and the ICMW. Such an approach can also be utilised by migrant workers and civil society to hold governments accountable to their international treaty obligations, whilst challenging some of the power imbalances in the global economy that marginalise MDWs and exacerbate their vulnerability to abuse.

I acknowledge that effecting structural change towards the migration of women domestic workers must also take into account the socio-economic inequalities in the global labour market that impede their ability to exercise their human and labour rights. However, I use Lee's tripartite typology to illustrate how both sending states possess the ability to push back against the direction that neoliberal globalisation is pulling them in terms of remittance migration. In fact, the Philippines and Sri Lanka play an instrumental role in promoting, facilitating and directing the movement of women domestic workers.

Chapter Two

Methodology

This chapter draws connections between the theoretical framework, the analytical distinction between the three phases of the migration cycle for domestic workers, and the collection of empirical data for the research.

The first section sets out the overarching research questions to be explored by the thesis. The second section explains the rationale for structuring the thesis in three distinct phases of migrant domestic work: pre-departure, employment overseas and reintegration.

The third section details the methodological approach adopted by the thesis and focuses on the empirical research, including data collection methods, site selection and participant sampling. It then outlines the question design used during interviews and focus group discussions, and how the questions were shaped according to the four elements of the theoretical framework and three phases of the migration cycle. Following this, I describe the preparatory work for data collection, including ethical considerations, and explain the approach adopted for data analysis.

2.1 Research Questions

The central research question for this thesis is: to what extent are the rights of women MDWs in the Philippines and Sri Lanka protected by the legal frameworks of their home states, consistent with the standards for protection under international law? In answering the main research question, I examine seven interrelated key sub-questions:

1. Which international legal instruments are relevant in setting the standards against which to judge the adequacy of protection for the rights of MDWs in the Philippines and Sri Lanka?

2. Which rights established under these instruments are most relevant, and most at risk of violation, in relation to domestic workers (i) before, (ii) during, and (iii) after migration?
3. To what extent do the legal frameworks governing MDWs in the Philippines and Sri Lanka comply with standards established under international law on paper and in practice?
4. To what extent do the two labour-sending states protect domestic workers from rights violations carried out by recruiters and employers throughout the migration cycle?
5. Are the regulatory approaches of the Philippine and Sri Lankan governments premised on the commodification and dehumanisation of women domestic workers, contrary to a rights-based approach?
6. Does the approach of the Philippine and Sri Lankan governments with regards to their regulation of the rights of women MDWs constitute structural violence?
7. Are both sending states prioritising neoliberal policies and the promotion of labour export above rights-based gender-informed protections for women MDWs?

2.2 Analysis of the Migration Cycle

A comprehensive rights-based approach to migration addresses migrant rights as embedded in the full circle of the migration process, which involves three main stages: pre-departure, employment overseas and return/reintegration. Women domestic workers are exposed to different human and labour rights violations, disadvantages and intersectional forms of discrimination at each stage of the migration cycle. Therefore, I consider each phase of the migration cycle

independently for the purposes of analysis and thesis structure. In doing so, this thesis provides a deeper examination of the challenges faced by women domestic workers at each stage of the migration cycle, and the extent to which both governments are responding effectively to protect women migrant workers against such vulnerabilities.

2.2.1 Pre-Departure

A multitude of political, social and economic ‘push’ factors are responsible for the decisions that lead to the migration of women domestic workers. These factors include poverty, lack of employment opportunities, demographic pressures, limited or no access to education, violence, and gender discrimination.²²⁷ However, this thesis focuses on the national policies of the labour-sending state. It emphasises how these national policies influence international migration through prohibitive, selective, permissive and promotional exit regulations that affect men and women migrants differently.²²⁸ Such policies are often conditioned by implicit or explicit assumptions about the status and roles of men and women within the family and in society.²²⁹

Where large numbers of women migrants have reported abuse and exploitation overseas as part of their migration as domestic workers, sending states have responded by adopting protective measures that actually disempower MDWs.²³⁰ The governments of the Philippines and Sri Lanka have enforced gender-based bans on the migration of women domestic workers below a certain age and to certain host countries, in an attempt to protect them against the risk of exploitation and abuse overseas. Such paternalistic bans have been said to “restrict the movement of women migrants, penalise their choice to migrate, or impose onerous prerequisites on their ability to leave.”²³¹ A joint study commissioned by the ILO and UN Women, which provides a policy mapping of restrictions on women’s migration in the Association of Southeast Asian Nations (ASEAN) region, found that while intending to protect

²²⁷ Misra, Woodring and Merz, above n 63, at 319.

²²⁸ Grieco and Boyd, above n 170.

²²⁹ Grieco and Boyd, above n 170.

²³⁰ United Nations *Towards Safe, Orderly and Regular Migration in the Asia-Pacific Region: Challenges and Opportunities* (2018) United Nations Economic and Social Commission for Asia and the Pacific: Bangkok. UN Doc ST/ESCAP/2801 at 42.

²³¹ Margaret L. Satterthwaite “Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers” (2005) 8 *Yale Human Rights and Development Journal* 1 at 60.

women workers from harm the bans often result in women migrating irregularly.²³² This renders women even more vulnerable to violence, as they have less access to assistance throughout the migration process.²³³

In addition, Anna Olsen, Technical Specialist for the ILO's 'TRIANGLE in ASEAN' programme,²³⁴ argues that "by limiting livelihood options instead of protecting their rights as migrant workers, gender-specific migration bans reinforce paternalistic gender norms."²³⁵ Since the migration bans do not apply to 'skilled' women nor 'low-skilled' men but specifically target 'low-skilled' domestic workers, the majority of whom are poor women, the regulations are gender-biased and discriminate against women MDWs on the grounds of their social class.²³⁶

Restrictions on the migration of women domestic workers can in turn heighten their vulnerability to rights violations by recruitment agencies during the pre-departure stage of the migration process. In order to bypass migration bans, recruiters and sub-agents are able to target and charge women illegal and excessive fees for the falsification of documents, particularly in relation to the age of the domestic worker.²³⁷

2.2.2 *Employment Overseas*

During their employment overseas, women migrant workers are at risk of various rights violations and abuse by recruitment agencies and employers. Domestic workers are especially vulnerable to violations in the workplace, such as heavy workloads with long working hours and restrictions on their freedom of movement. There are often reports of employers confiscating workers' travel documents, preventing them from

²³² Rebecca Napier-Moore *Protected or Put in Harm's Way? Bans and Restrictions on Women's Labour Migration in ASEAN Countries* (2017) International Labour Organization and United Nations Women: Bangkok at xiv.

²³³ Susie Jolly, Hazel Reeves and Nicola Piper "Gender and Migration: Overview Report" (October 2005) Institute of Development Studies at 39.

²³⁴ The TRIANGLE in ASEAN programme is part of the International Labour Organization's global effort to promote fair migration through delivery of technical assistance and support to governments, civil society and regional bodies.

²³⁵ Napier-Moore, above n 232, at 19.

²³⁶ The migration bans on women domestic workers are examined further in chapter five.

²³⁷ Migrant Forum in Asia "Labour Recruitment to the UAE: Gaps Between Policy and Practice in Sri Lanka, Nepal, Bangladesh and the Philippines" (January 2011) at 12.

leaving the country to return home and seek redress.²³⁸ These conditions are normalised due to a lack of legal protection for women MDWs in receiving states.

Since many domestic workers live within the same home as the employing family, they are frequently forbidden from leaving the premises either alone or at all. The resulting solitude exacerbates women's constructed vulnerability to violence whilst depriving them of possible support when rights violations occur.²³⁹ In particular, women MDWs can be subjected to gender-based violence, such as verbal or physical (including sexual) abuse, as a result of their living and working conditions.²⁴⁰ Employers are able to foster this dependence and isolation with many instances of exploitation going unreported, as women are often unable or unwilling to seek assistance.

Therefore, women MDWs are in particular need of protection by the sending state in the form of labour attachés and welfare officers in the relevant embassies overseas, who have the specific responsibility of safeguarding the rights and welfare of their nationals. Additionally, labour-sending states can take action in their own country to establish stronger legal protections for their nationals overseas. For instance, the government of the Philippines passed the Migrant Workers and Overseas Filipinos Act in 1995, calling for stricter monitoring of the policies of labour-receiving countries to ensure that they have adequate laws to protect migrant workers. The Act also tightens regulations on the recruitment of labour in the Philippines for work overseas and requires workers to register with Philippine embassies in host countries. However, the regulations need to be implemented to be effective.

2.2.3 *Return and Reintegration*

Governments in labour-sending countries, such as the Philippines and Sri Lanka, often focus on labour export, specifically the 'departure and deployment' process, as well as tackling the challenges of protecting MDWs overseas and facilitating their

²³⁸ D'Souza, above n 18, at 31.

²³⁹ Satterthwaite, above n 231, at 31.

²⁴⁰ Joanna Manganara "Women Domestic Workers: Undervalued, Unprotected, Invisible" (22 May 2017) International Alliance of Women <www.womenalliance.org>.

remittances back home.²⁴¹ Sending states appear to pay much less attention to migrant workers following their return home. Where that happens, domestic policies for successful reintegration will either not be available for ‘low-skilled’ migrant workers or will fail to address the necessary aspects required.

Returnee women MDWs are not always welcomed back home, despite their financial contributions to their family, community and national economy. In particular, women migrants may be suspected of misconduct while overseas by both their family members and society, with many domestic workers returning home to a disintegrated family having separated from their husbands.²⁴² Studies have shown that women returnees, especially those subjected to sexual abuse and/or exploitation overseas, are stigmatised and frequently face violence at the hands of their husbands and in-laws.²⁴³

Reintegration is especially important for women migrants, as they are more likely to experience forced or unplanned return after having suffered physical, psychological and sexual violence abroad, in comparison to male migrants. Some return with severe physical and psychological problems, disability and illness, making reintegration even more difficult.²⁴⁴ Thus, women returnees face serious challenges and destitution if they do not receive psychosocial and financial support from their home government and community on return.

Additionally, women MDWs have less access to the financial capital and skills required for successful reintegration having received a low-wage overseas, most of which they sent back home to their families as remittances. They are also lacking financial literacy skills.²⁴⁵ Therefore, the lack of viable employment opportunities on return often leads to circular migration, whereby migrants move overseas again after

²⁴¹ Bacalla, above n 57.

²⁴² Bandita Sijapati *Women’s Labour Migration from Asia and the Pacific: Opportunities and Challenges* (March 2015) International Organization for Migration Regional Office for Asia and the Pacific: Bangkok and Migration Policy Institute: Washington D.C. Issue No 12 at 9.

²⁴³ Hélène Harroff-Tavel and Alix Nasri *Tricked and Trapped: Human Trafficking in the Middle East* (2013) International Labour Organization Regional Office for the Arab States: Beirut at 95.

²⁴⁴ Turner, above n 45, at 54.

²⁴⁵ Nuntana Tangwinit “Helping Philippine Female Migrant Domestic Workers Face Difficulties of Going Home” (8 March 2017) *United Nations Women: Asia and the Pacific* <www.asiapacific.unwomen.org>.

returning to their communities.²⁴⁶ In order to overcome such problems, both governments of the Philippines and Sri Lanka have introduced economic capital opportunities and entrepreneurship assistance as key components of their reintegration programmes.

2.3 Methods of Data Collection

The data collection methods employed by this thesis were primarily informed and structured according to these three distinct stages of the labour migration process. I employed three different methods of data collection: semi-structured interviews, focus group discussion, and documentary analysis of primary and secondary sources. The application and combination of several research methods in the study of the same phenomenon is referred to as ‘triangulation’.²⁴⁷ Norman Denzin developed typologies of triangulation that qualitative researchers can use to enhance objectivity and validity of social research,²⁴⁸ three of which apply to this thesis. First, *data* triangulation for correlating people, time and space (discussed further below); second, *theory* triangulation for using and correlating multiple theoretical strategies, as illustrated in chapter one; and third, *methodological* triangulation for correlating data from multiple data collection methods so as to enhance confidence.²⁴⁹

Methodological triangulation can be further classified into two types – within-method or across-method triangulation. I use within-method triangulation by drawing on at least two data-collection procedures from the same design approach.²⁵⁰ This thesis combines qualitative research methods, including individual and joint interviews and focus group discussion, with primary and secondary sources, including government legislation and scholarly articles. Methodological triangulation has been found to be

²⁴⁶ Andrea Soco “Changing the Discourse on Return Migrants: Cosmopolitanism and the Reintegration of Return Filipino Migrant Domestic Workers” (2008) 56 *Philippine Sociological Review* 1 at 7.

²⁴⁷ Norman Denzin *The Research Act: A Theoretical Introduction to Sociological Methods* (Chicago: Aldine Transaction, 1978) at 291.

²⁴⁸ Norman Denzin *The Research Act: A Theoretical Introduction to Sociological Methods* (New York: Aldine Transaction, 2009).

²⁴⁹ Denzin, above n 248.

²⁵⁰ Judith Kimchi, Barbara Polivka and Joanne Sabol Stevenson “Triangulation: Operational Definitions” (1991) 40 *Nursing Research* at 364.

beneficial in providing confirmation of findings, more comprehensive data, increased credibility and an in-depth understanding of the phenomenon under study.²⁵¹

2.3.1 Interviews

A total of nineteen in-depth interviews and three focus group discussions were undertaken across Hong Kong, the Philippines and Sri Lanka with thirteen migrant worker advocacy groups, four international organisations and five government agencies.

The qualitative research method of individual and joint interviews was deemed the most appropriate means of gathering empirical data that addresses the four elements of the theoretical framework, as well as the research questions posed by the thesis from various perspectives at each stage of the migration cycle. Interviews are a “specialised form of communication between people for a specific purpose associated with some agreed subject matter.”²⁵²

In comparison to other techniques of data collection, such as questionnaires and participant observation, interviews are a highly desirable method for collecting in-depth information from participants to answer the research questions, without limiting the scope of the research and the nature of participant’s responses.²⁵³ Bruce Berg adds that interviewing is a valuable method because it builds a holistic snapshot, analyses words, and reports detailed views and experiences of informants.²⁵⁴

The interviews were semi-structured, which involves the researcher asking the participant a series of predetermined but open-ended interview questions.²⁵⁵ The questions can be departed from, when necessary and appropriate, to ask follow-up questions or to clarify certain answers. The researcher has more control over the

²⁵¹ Abir K. Bekhet and Jaclene A. Zauszniewski “Methodological Triangulation: An Approach to Understanding Data” (2012) 20 Nurse Researcher at 40.

²⁵² Garry Anderson *Fundamentals of Educational Research* (London: The Falmer Press, 1990) at 222.

²⁵³ Rana Muhammad Dilshad and Muhammad Ijaz Latif “Focus Group Interview as a Tool for Qualitative Research” (2013) 33 Pakistan Journal of Social Sciences at 191.

²⁵⁴ Bruce L. Berg *Qualitative Research Methods for the Social Sciences* (London: Pearson, 2007) at 96

²⁵⁵ Lioness Ayres “Semi-Structured Interview” in Lisa M Given (ed) *The Sage Encyclopedia of Qualitative Research Methods* (London: Sage Publications, 2008) at 811.

topics of the interview than in unstructured interviews, but in contrast to structured interviews there is no fixed range of responses to each question,²⁵⁶ allowing participants to discuss issues of importance to them.²⁵⁷

2.3.2 *Focus Group Discussion*

The additional qualitative research methodology of focus group discussion was employed when enough representatives from advocacy groups and government agencies were willing and available to participate. Focus groups are particularly beneficial as they provide the “opportunity to interview several respondents systematically and simultaneously.”²⁵⁸ They can be distinguished for their interactive nature by maximising participation and creating a richer, informal discussion between participants with the same interests and background. Jenny Kitzinger and Rosaline Barbour draw on the importance of this when they highlight how “instead of asking questions of each person in turn, focus group researchers encourage participants to talk to one another: asking questions, exchanging anecdotes, and commenting on each other’s experiences and points of view.”²⁵⁹

However, individual interviews have some clear advantages over focus groups. These advantages include the degree of control that the interviewer has and the greater amount of information that each informant has time to share.²⁶⁰ In contrast, focus groups are criticised for granting more attention to the role of the moderator, while providing less depth and detail about the opinions and experiences of a particular participant.²⁶¹ Despite this, I contend that focus groups create a more comfortable and familiar environment for participants to engage in a discussion with each other, while also providing a multiplicity of views and ideas than could be captured through individual methods.

²⁵⁶ At 812.

²⁵⁷ The interview and focus group questions are provided in Appendix III, IV and V.

²⁵⁸ William Boateng “Evaluating the Efficacy of Focus Group Discussion (FGD) in Qualitative Social Research” (2012) 3 *International Journal of Business and Social Science* at 54.

²⁵⁹ Jenny Kitzinger and Rosaline S. Barbour “Introduction: The Challenge and Promise of Focus Groups” in Rosaline S. Barbour and Jenny Kitzinger (eds) *Developing Focus Group Research. Politics, Theory and Practice* (London: Sage Publications, 2001) at 4.

²⁶⁰ David L. Morgan *Focus Groups as Qualitative Research* (2nd ed, California: Sage Publications, 1997) at 10.

²⁶¹ At 10.

Many of the advocacy groups selected to participate in the research were small in size and often had only one or two advocates available. This resulted in more individual and joint interviews being conducted but only a small number of focus group discussions, including two with advocacy groups in the Philippines and one with a Philippine government agency. Despite being less than anticipated, the three focus groups generated a larger quantity of high-quality data in the limited time available, which included a wide array of views and experiences.

2.3.3 *Primary and Secondary Sources*

Documentary analysis of primary and secondary sources was another method employed to collect data that addresses the four elements of the theoretical framework. I examined primary legal resources at the domestic level, including legislation, government regulations and official legal documents published by the governments of the Philippines and Sri Lanka. I also analysed primary legal resources at the international level to address the gender and rights-based elements of the theoretical framework, for example international human rights treaties and General Recommendations and Comments submitted by the UN Committees.

This analysis was supplemented with secondary sources, such as documents relating to the international legal instruments, as well as reports and studies published by the ILO, the UN, the IOM, and relevant government agencies. I also relied on submissions and reports by representatives of NGOs and advocacy groups such as the Asian Migrants Coordinating Body, Human Rights Watch, Migrante International, and the Migrant Forum in Asia. To address the political economy and structural violence elements of the theoretical framework, I used secondary sources including journal articles and books written by the leading academics and theorists in these particular disciplines.

2.4 Data Triangulation

In addition to methodological triangulation, this research also employed *data* triangulation. Data triangulation is the use of multiple data sources, including data in different places and from different participants. It enhances the credibility of research as it provides the opportunity to compare and cross-check findings.²⁶²

Manila in the Philippines and Colombo in Sri Lanka were chosen as fieldwork locations, because I am comparing the legal frameworks governing the protection of MDWs in these two states. I decided to include Hong Kong as an additional fieldwork site in order to provide a broader picture of the issues facing Filipina and Sri Lankan domestic workers on a regional level and in a receiving country context. In addition, there is a large network of migrant worker advocacy groups based in Hong Kong to support the growing number of foreign domestic workers from sending states across Asia. Therefore, interviewing advocacy groups and a government agency in Hong Kong allowed me to examine the extent to which the sending governments are involved in protecting the rights of domestic workers once they are onsite in the host country.

The in-depth interviews and focus group discussions, conducted with a diverse selection of participants, generated information-rich data to effectively answer the research questions posed by this thesis. While acknowledging that the small sample-size precludes statistical generalisation of the results, participant recruitment continued until data saturation occurred. Data saturation is defined as the point at which no new themes are emerging in the data to shed further light on the issues under investigation.²⁶³ No new topics and insights were identified following the analysis of approximately two thirds of the interview transcripts, thus it was determined that new information would not be elicited by sampling more participants. In addition, pragmatic considerations, including time and financial constraints of the overseas fieldwork, further determined the size of the sample.

²⁶² Sarah L. Hastings “Triangulation” in Neil J. Salkind (ed) *Encyclopedia of Research Design* (California: Sage Publications, 2010) at 1539.

²⁶³ Benjamin Saunders “Saturation in Qualitative Research: Exploring its Conceptualization and Operationalization” (2018) 52 *Quality & Quantity* at 1893.

Patricia Fusch and Lawrence Ness contend that there is a direct link between both *data* and *methodological* triangulation and the attainment of data saturation.²⁶⁴ The application of multiple data sources and methods maximises the depth of information and contributes to the reliability of results and the saturation of data.²⁶⁵ Therefore, I contend that the use of different types of triangulation by this thesis increases the transferability of the findings despite a relatively small sample size.

One of the most important research strategies was the ability to detect participant bias, generally representative of their affiliated stake in the migration of domestic workers. Participants may provide unreliable data because they are eager to please, have hidden motives or hold their own principles and viewpoints.²⁶⁶ Methodological and data triangulation helped to minimise the risk of participant bias by verifying the responses of the participants with different data sources, while also cross-comparing the differing and often contradictory responses of multiple participants.

2.4.1 Sampling

Participants were sampled purposively on the basis of their suitability in helping to answer the research questions. Purposeful sampling is widely used in qualitative research for the identification and selection of information-rich cases related to the phenomenon of interest.²⁶⁷ Michael Patton describes information-rich cases as “those from which one can learn a great deal about issues of central importance to the purpose of the inquiry, thus the term *purposeful* sampling.”²⁶⁸

I decided to conduct expert sampling, which is a particular type of purposeful sampling that involves the researcher assembling individuals with experience and

²⁶⁴ Patricia I. Fusch and Lawrence R. Ness “Are We There Yet? Data Saturation in Qualitative Research” (2015) 20 *The Qualitative Report* 1408 at 1411.

²⁶⁵ Patricia I. Fusch, Gene E. Fusch and Lawrence R. Ness “Denzin’s Paradigm Shift: Revisiting Triangulation in Qualitative Research” (2018) 10 *Journal of Social Change* 19 at 22.

²⁶⁶ Maria Dolores C. Tongco “Purposive Sampling as a Tool for Informant Selection” (2007) 5 *Ethnobotany Research and Applications* 147 at 154.

²⁶⁷ Lawrence A. Palinkas, Sarah M. Horwitz, Carla A. Green and Jennifer P. Wisdom “Purposeful Sampling for Qualitative Data Collection and Analysis in Mixed Method Implementation Research” (2015) 42 *Administration and Policy in Mental Health Research* at 533.

²⁶⁸ Michael Quinn Patton *Qualitative Research and Evaluation Methods* (3rd ed, California: Sage Publications, 2002) at 230.

expertise in a particular area in order to discover their views on an issue.²⁶⁹ I chose to interview the selected stakeholders because their core work and goals are in line with the focus of my thesis. The diverse range of participants provided multiple perspectives on the research questions, while offering deep explanatory insights into factors directly relating to the theoretical framework.

However, since purposive sampling involves the non-random selection of participants who have particular expertise and knowledge of the issues being addressed in the research, it introduces selectivity bias. Anthony Tuckett notes that one way of minimising the problem stemming from sample selection bias is to apply different techniques of data collection.²⁷⁰ Therefore, by combining interviews and focus group discussion with documentary analysis of primary and secondary sources, I was able to account for the similarities and differences of the information collected and reduce the bias inherent in this type of sampling.

2.4.2 *Research Participants*²⁷¹

First, I visited Hong Kong in March 2018 and interviewed one advocate at the Mission for Migrant Workers and one representative of the advocacy group United Filipinos in Hong Kong, as well as one labour attaché at the Philippine Overseas Labour Office.

Second, I visited the Philippines in March 2018 and interviewed two representatives of the Center for Migrant Advocacy and one advocate at the Development Action for Women Network (DAWN), as well as a focus group discussion with three advocates from Migrante International. In terms of government agencies, I interviewed one representative of the Philippine Overseas Employment Administration and conducted a focus group with five officials from the National Reintegration Center for Overseas Filipino Workers. In addition, I interviewed a representative of the International Organization for Migration (IOM) and a representative of the ILO in Manila.

²⁶⁹ Kristina Simion “Qualitative and Quantitative Approaches to Rule of Law Research” (July 2016) International Network to Promote the Rule of Law.

²⁷⁰ Anthony Tuckett “Qualitative Research Sampling: The Very Real Complexities” (2004) 12 *Nurse Researcher* 47 at 60.

²⁷¹ A description of the advocacy groups and international organisations selected for the research is provided in Appendix I.

Third, I visited Sri Lanka in June 2018 and conducted interviews with a representative from four advocacy groups: Women and Media Collective, Action Network for Migrant Workers (ACTFORM), Helvetas and Community Development Services, as well as a joint interview with Lawyers Beyond Borders. I also conducted a focus group discussion with three advocates from Caritas. In terms of government agencies, I interviewed a representative of the Sri Lanka Bureau of Foreign Employment and one official from the Ministry of Foreign Employment. In addition, I interviewed a representative from UN Women and an official from the ILO in Colombo. While in Sri Lanka, I conducted additional interviews with a member of the Centre for Women's Research (CENWOR) and a representative of the Asia Foundation in Colombo.

Recruitment of Participants

The majority of participants, including advocacy groups and international organisations, were initially contacted and recruited directly via phone or email. I then attempted to follow-up with participants who did not respond. On a couple of occasions, research participants suggested or introduced me to acquaintances suitable for the research who then became participants, otherwise known as referral sampling. This assistance was particularly useful for recruiting participants who were otherwise difficult to locate and directly contact, such as smaller-sized advocacy groups and representatives of international organisations.

From the larger sample of individuals whom I initially contacted, the final participants were recruited on account of their availability and willingness to be interviewed. Many potential research participants were often too busy with limited time or they were not situated in the country while I was conducting the research. The final sample size was also dependent on my own time constraints and tight schedule, as well as that of the participants.

It was more challenging to arrange interviews with government agencies. Therefore, I requested the assistance of the Philippine Embassy in New Zealand and the consulate representative of Sri Lanka in New Zealand, both of whom wrote endorsement letters

on my behalf to request an interview. This approach worked for two government agencies in the Philippines, but it did not elicit a response from the government ministries in Sri Lanka. I arranged meetings with two government agencies in Sri Lanka upon arrival in Colombo with the assistance of advocacy groups and an academic at the University of Colombo.

Each of the participants spoke English proficiently, thus interviews and focus groups were conducted directly without the assistance of an interpreter. This was a crucial factor in ensuring that sufficient depth was achieved and that I could directly shape the discussion to ensure both fluidity and relevance. The length of the interviews and focus group discussions ranged in time from half an hour to two hours.

Originally I intended to conduct interviews with women MDWs, but the information required to answer the research questions posed by my thesis led to a change of decision. Since many of the interview questions concerned the adequacy of the legal frameworks governing MDWs in the Philippines and Sri Lanka, and the compliance of domestic law with international standards of protection, I deemed advocacy groups, international organisations and government agencies to be more informed and experienced to answer such questions. There were also concerns regarding ethical approval and logistics, including problems negotiating access to returnee domestic workers for interviews, particularly in light of the time and financial constraints of the overseas fieldwork.

In addition, many of the advocates participating in the interviews and focus group discussions were former domestic workers, therefore they were able to share their experiences as past domestic workers as well as advocates representing current MDWs. Consequently, the research was still able to gather accurate data including a wide range of experiences to effectively answer the research questions, despite not interviewing domestic workers who had recently returned from employment overseas.

2.5 Question Design and Theory

The interview and focus group questions²⁷² were structured according to the three separate stages of the migration cycle: pre-departure, employment overseas and return. The questions were informed by the study's research questions and the four elements of the theoretical framework, in order to ensure that the information collected directly related and provided answers to the respective research questions posed by the thesis.

The specific questions asked varied depending on the fieldwork location and the type of participant being interviewed. In terms of the fieldwork location, the questions varied according to the different domestic legal frameworks, regulations and programmes in place in each country. For instance, the wording of questions regarding restrictions on the migration of women domestic workers in Sri Lanka through the Family Background Report differed slightly from questions regarding the country-specific migration bans on domestic workers from the Philippines.

The wording of the questions also changed according to the type of participant being interviewed and their role in the migration process. For example, representatives of government agencies were asked questions regarding how they assist and protect the rights of MDWs during pre-departure, employment overseas and on return, whereas advocacy groups were asked questions concerning their experience and view of government action and state regulations that seek to protect domestic workers at each stage of the migration cycle.

The questions differed to a greater extent for international organisations, as they were mostly tailored to the specific role and involvement of each organisation in the particular sending country. For instance, the ILO, UN Women and the IOM are involved in the migration of domestic workers in different capacities and provide the two governments with different types of assistance. Consequently, many of the interview questions were personalised, apart from some general questions concerning the government protection afforded to domestic workers against rights violations at each stage of the migration cycle.

²⁷² The interview and focus group questions are provided in Appendix III, IV and V.

Decisions around research method, sampling and other design issues can introduce researcher bias. Therefore, it is imperative for researchers to be self-aware of their values, subjectivity and predispositions and to acknowledge them as inseparable from the research process.²⁷³ To minimise bias from the research questions, the University of Auckland Human Participants Ethics Committee examined and approved the proposed questions before they were used in the interviews and focus group discussions. This helped to ensure that the wording of the interview questions were not preordained to elicit biased responses. However, since the interviews and focus group discussions were semi-structured, several new questions were added after the Committee's approval.

Rights

The rights element of the theoretical framework informed questions posed to the research participants during interviews and focus group discussions in each of the three fieldwork locations. All participants were asked questions regarding the relevant government's compliance with international human rights conventions on paper and in practice, specifically the ILO's Domestic Workers Convention, the CEDAW, and the ICMW, which set the basis for the rights framework.

In relation to each stage of the migration cycle, I asked questions concerning the degree of government protection afforded to domestic workers against rights violations by recruitment agencies and employers. In particular, I asked all participants questions surrounding the pre-departure orientation seminars for MDWs, in order to determine whether the training is rights-based in practice. In terms of employment overseas, I asked questions regarding the relevant government's degree of negotiation with host states to protect the rights of domestic workers abroad, for example through bilateral labour agreements. In relation to the return stage, I posed questions that sought to elicit information regarding the adequacy of redress mechanisms for returnee domestic workers who have suffered exploitation overseas.

²⁷³ Russel Ogden "Bias" in Lisa M. Given (ed) *The SAGE Encyclopedia of Qualitative Research Methods* (California: Sage Publications, 2008) at 61.

Gender

The gender-informed element of the theoretical framework also guided interview and focus group questions. All research participants were asked questions that sought to elicit information regarding the extent to which the legal frameworks in the Philippines and Sri Lanka are gender-informed and responsive to the needs of women MDWs. In particular, I asked questions to obtain information as to whether certain programmes and policies are gender-sensitive, including pre-departure orientation seminars, as well as the gender-responsiveness of labour attachés and welfare officers overseas.

Political Economy and Structural Violence

Advocacy groups and international organisations were asked questions that touched upon issues relating to political economy and structural violence theory. For example, I posed questions that sought to elicit information regarding the promotion of labour export and use of remittances in each sending state, as well as questions designed to obtain information about whether women MDWs have become a source of profit for the government and recruitment agencies. This information helped me to answer one of the key research questions posed by this thesis as to whether the approach of the Philippine and Sri Lankan governments with regards to their regulation of the rights of women MDWs constitutes structural violence.

2.6 Preparatory Work for Data Collection

The fieldwork was carried out between March and June 2018. Before starting the fieldwork, a further six months were spent on the preparation of the research. This included obtaining ethics approval, arranging interviews and focus groups with the relevant government agencies, international organisations and advocacy groups, and preparing the participant information sheet, consent forms, and interview/focus group questions.

Ethical Considerations

This research was conducted with the approval of the University of Auckland Human Participants Ethics Committee on 20th November 2017. The Participant Information Sheet distributed to the respective participants is provided in Appendix II. The consideration of ethics is a key component of research that involves human participants. A number of measures were adopted to protect research participants before, during and after the fieldwork.

Prior to the interview, the purpose of the research was explained to the participants and they were provided with a Participant Information Sheet in English. This provided enough detail about the research so that prospective participants could make an informed decision about taking part. The Participant Information Sheet highlighted that participation in the research was voluntary, in order to minimise the risk of coercion or feelings of obligation. Following this, the research participants provided their consent by signing an informed consent form. This required the participant to agree to take part in the research and to confirm that they understood the research procedure and their rights, including voluntary participation and their right to withdraw participation.

The key principles of ethical research are underpinned by the value of respect for persons. Inherent in this is the need to consider how the privacy of research participants is protected and the confidentiality of data maintained. After the fieldwork, I protected the confidentiality of the participants by ensuring that they cannot be identified as the source of the information provided in my research. However, for the joint interview and focus group participants in my research, I emphasised that I would do my best to ensure that the participants preserve each other's confidentiality, but I cannot guarantee that confidentiality will be maintained among the participants.

2.7 Data Analysis

The interviews and focus group discussions were audio-recorded with permission from the participants, and the recordings were transcribed verbatim for deeper

analysis. I transcribed the recordings independently without the assistance of a third-party transcriber. Although time-consuming, transcribing the recordings myself had significant analytical benefits, as I was able to gain greater familiarity with the data and develop deeper insight. In addition, the attention required to transcribe data facilitates careful reading and interpretative skills needed for later analysis.²⁷⁴

The interview and focus group transcriptions were analysed using thematic analysis. Thematic analysis is a method for identifying, analysing and reporting patterns or themes within qualitative data.²⁷⁵ It is a useful method for summarising key features of a large data set, as it enables the researcher to take a well-structured approach to handling data.²⁷⁶ Thematic analysis is also beneficial for examining the perspectives of different research participants, highlighting similarities and differences, and generating unanticipated insights.²⁷⁷

Virginia Braun and Victoria Clarke distinguish between a top-down or theoretical thematic analysis that is driven by the specific research questions, and a bottom-up or inductive analysis that is driven by the data itself.²⁷⁸ The data analysis for this research constitutes a top-down approach, as the transcripts were analysed in light of the research questions and four elements of the theoretical framework. I followed Braun and Clarke's six-step analytical framework, as this offered a clear and useable approach when carrying out thematic analysis.

The first step of the framework involved becoming familiar with all aspects of the data by transcribing, repeatedly reading the transcripts and noting down initial ideas, which informed the early stages of analysis.²⁷⁹ Step two required systematic organisation by coding the data into meaningful groups. This was carried out with the assistance of NVivo qualitative data analytic software. Within NVivo, the transcripts were organised according to the category of participant and tagged to the particular

²⁷⁴ Judith C. Lapadat and Anne C. Lindsay "Transcription in Research and Practice: From Standardization of Technique to Interpretive Positionings" (1999) 5 *Qualitative Inquiry* 64 at 80.

²⁷⁵ Virginia Braun and Victoria Clarke "Using Thematic Analysis in Psychology" (2006) 3 *Qualitative Research in Psychology* at 6.

²⁷⁶ Lorelli S. Nowell, Jim M. Norris and Deborah E. White "Thematic Analysis: Striving to Meet the Trustworthiness Criteria" (2017) 16 *International Journal of Qualitative Methods* 1 at 2.

²⁷⁷ At 2.

²⁷⁸ Braun and Clarke, above n 275, at 12.

²⁷⁹ At 17.

fieldwork location. The transcripts were then carefully coded to “nodes” representative of certain topics related to the research questions and the four elements of the theoretical framework. The nodes were organised according to the three different stages of the migration process.

The third step involved collating and examining the nodes to sort them into themes. The accumulation of multiple transcript excerpts within certain nodes demonstrated the emergence of dominant themes. A theme captures something important about the data in relation to the research questions and theoretical framework, and represents some level of patterned response or meaning within the data set.²⁸⁰ For instance, the analysis of transcripts for this research revealed a dominant theme of “problems experienced during recruitment”, which was made up of nodes such as agency fees, medical tests, contract violations and sub-agents.

Step four involved reviewing and refining the themes to assess whether they accurately reflect the meanings evident in the coded extracts and the entire data set. After confirming the validity of the themes, the fifth step required writing a detailed analysis of each individual theme to examine its connection with the research questions and theoretical framework. This was a significant step in order to draw empirical data from the interviews and focus group discussions that directly relates to the four theories. Finally, step six entailed the final analysis of the fully developed themes, selecting compelling extract examples and writing-up the data.²⁸¹

²⁸⁰ At 10.

²⁸¹ At 35.

Chapter Three

International Legal Framework for the Protection of the Rights of Migrant Domestic Workers

This chapter examines the three international human rights conventions which form the rights-based framework: the ILO's Domestic Workers Convention (C189), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). These three conventions set the standards against which this thesis will judge the adequacy of the legal frameworks governing the rights of domestic workers throughout the migration cycle in the Philippines and Sri Lanka.

I first outline the rights of women domestic workers that are most at risk of violation during pre-departure, employment overseas and on return. Such international standards form the basis of the rights-based gender-informed approach that underpins this thesis, in order to identify the extent to which they are being protected by the two states both in domestic law and practice. Following this, I evaluate the advantages and disadvantages of using the three conventions as the benchmark of protection through the lens of the theoretical framework. In particular, I analyse the extent to which the conventions incorporate a gender and intersectional perspective and whether this rights-based framework can protect domestic workers against exploitation given the structural inequalities in the global labour market and increasing competition between labour-sending states. I suggest that regional consultative processes, particularly the Colombo Process, have the transformative potential to facilitate collaboration rather than competition between sending states and thus represent a constructive supplement to current migration governance through formal international legal instruments.

3.1 The International Labour Organization (ILO)

The ILO's Domestic Workers Convention (C189) is the first international legal instrument used in setting the standards against which to judge the adequacy of rights protection for MDWs in the Philippines and Sri Lanka. The ILO is a UN specialised agency devoted to promoting social justice and internationally recognised human and labour rights. It has a unique tripartite structure and therefore distinguishes itself from other international organisations where membership is limited to states.²⁸² The tripartite structure comprises governments, workers' representatives (trade unions), and employer groups, all of whom are included and represented in discussions.

3.1.1 Domestic Workers Convention C189

The adoption of C189, and supplementing Recommendation No. 201, at the 100th Session of the International Labour Conference on 16th June 2011 marked an important moment in the struggle to draw paid domestic work out of the shadows and into the mainstream of the labour force.²⁸³

The Convention was largely instigated and inspired by a global movement of domestic worker organisations and trade unions that emerged during the lobbying and preparatory phase of C189. Domestic workers and advocacy groups used the ILO process as an organising tool, directly participating in all discussions and negotiations in the lead up to the adoption of C189.²⁸⁴ Following its adoption, this network of unions and domestic worker organisations evolved into the International Domestic Workers Federation (IDWF). The IDWF is a membership-based, democratic and global organisation of domestic workers, and the first global union federation led by women. As of September 2020, the IDWF has 77 affiliates from 60 countries, representing over 580,000 domestic worker members.

Convention 189 is the first international instrument devoted exclusively to regulating the employment conditions of domestic work. In its preamble, the Convention

²⁸² Stefanie Visel "Who Cares? – The ILO Convention 'Decent Work for Domestic Workers'" (2013) 3 *Transnational Social Review* 229 at 233.

²⁸³ Stuart Rosewarne "The ILO's Domestic Worker Convention (C189): Challenging the Gendered Disadvantage of Asia's Foreign Domestic Workers?" (2013) 4 *Global Labour Journal* at 2.

²⁸⁴ Karin Pape "ILO Convention C189 – A Good Start for the Protection of Domestic Workers: An Insider's View" (2016) 16 *Progress in Development Studies* 189 at 196.

recognises that domestic work continues to be undervalued, invisible, and primarily carried out by women and girls who are particularly vulnerable to discrimination in respect of conditions of employment and to other abuses of human rights. Therefore, the fundamental purpose of C189 is to formally recognise this occupation as work, while ensuring that it is regulated and treated on terms comparable to other forms of paid employment.

The Convention provides general and specific clauses designed to meet the particular circumstances and concerns of domestic workers. In doing so, it seeks to remedy their labour market disadvantage and challenge the vulnerability that flows from being employed in an occupation that is generally not regarded as work.²⁸⁵ In regulating domestic work, the Convention adopts a rights-based approach with Article 3(1) affirming that Member States “shall take measures to ensure the effective promotion and protection of the human rights of all domestic workers.”

Convention 189 assumes an integrated approach towards human rights law by including both civil rights, such as access to justice and privacy, and social and labour rights including working time and minimum wage. This holistic approach has reaped praise for its recognition that human rights often overlap, thus there should be no hierarchy between them.²⁸⁶

While the ILO establishes international labour standards, its conventions are not intended to replace existing national labour laws. Rather, the ILO encourages Member States to adopt its conventions and assists in their implementation. Therefore, the ILO’s role is “largely promotional and educational, as it does not hold the legal capacity to ensure that its standards are actually enforced.”²⁸⁷ Although the ILO may criticise Member States that have not respected its international labour standards, governments are not bound to conform. Consequently, the ILO is often criticised for its ineffective enforcement mechanisms and means of levying sanctions against non-compliant states.²⁸⁸ This is particularly problematic in light of the relatively low-

²⁸⁵ Rosewarne, above n 283, at 2.

²⁸⁶ Albin and Mantouvalou, above n 22, at 73.

²⁸⁷ Gary Teeple and Stephen McBride *Relations of Global Power: Neoliberal Order and Disorder* (University of Toronto Press, 2011) at 98.

²⁸⁸ Visel, above n 282, at 240.

ratification rate of C189, with only 30 Member States having ratified as of September 2020.

However, if a complaint is filed to the ILO against a Member State for violating a ratified convention, this can be a potent tool to pressure the government into compliance. Articles 26 to 34 of the ILO Constitution govern the complaint procedure, under which the Governing Body may form a Commission of Inquiry to carry out a full investigation of the complaint and make recommendations on measures to be taken by the state to address the problems raised. In terms of a Member State that has not ratified a particular convention, they are still obligated under the ILO Constitution to report on the position of its national law in relation to non-ratified conventions upon request by the ILO, as illustrated below in respect of Sri Lanka and C189.

3.1.2 C189 and the Migration Cycle

Pre-Departure

The Domestic Workers Convention comprises specific rights and protections relevant to the pre-departure stage of the migration process. Article 8 requires Members to establish that domestic workers receive a written contract enforceable in the country of employment, or a written job offer, prior to travelling to the country of employment. In addition, Article 15(a) states that to protect MDWs against abusive recruitment practices, each Member shall “determine the conditions governing the operation of private employment agencies recruiting or placing domestic workers in accordance with national laws, regulations and practice.” Article 15(e) adds that Members shall take measures to ensure that fees charged by agencies are not deducted from the remuneration of domestic workers.

Employment Overseas

Convention 189 comprises different protections for women domestic workers against violations commonly experienced while they are employed overseas. First, Articles

concerning financial matters include Article 11, which stipulates that domestic workers are to be covered by minimum wage laws and that remuneration is established “without discrimination based on sex.” Article 12 provides that domestic workers shall be paid directly, not through a third party, and at regular intervals at least once a month.

Second, there are a number of Articles that specifically address domestic workers’ sectoral disadvantage resulting from their work environment and living conditions. For example, Article 13 establishes the right to a safe and healthy working environment, combined with a general obligation for States to take measures to ensure domestic workers’ occupational safety and health; Article 6 requires States to take measures to ensure decent living conditions that respect the workers’ privacy; and Article 9 addresses the live-in requirement. It seeks to support domestic workers’ exercise of agency by ensuring that they are free to reach agreement with employers on whether to reside in the household, and are entitled to keep their identity and travel documents in their possession.

Third, the Convention includes provisions relating to the treatment of domestic workers, such as Article 5 requiring effective protection against all forms of abuse, harassment and violence; Article 10 stipulating 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, taking into account the special characteristics of domestic work; and Article 14 pertaining to the enjoyment of conditions that are not less favourable than those applicable to workers generally in respect of social security protection, including maternity benefits.

Return and Reintegration

Convention 189 accounts for the difficult circumstances that women MDWs may face on return, particularly if they have experienced rights violations pre-departure or overseas with no access to legal remedies. Article 8(4) requires Members to specify by means of laws, regulations and other measures, the conditions under which

domestic workers are entitled to repatriation on the expiry or termination of the employment contract. Article 16 of the Convention stipulates that each Member shall ensure “all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.” Article 17 adds that each Member shall “establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.”

3.1.3 C189: The Philippines and Sri Lanka

The Philippines was the second country to ratify C189 and it is currently the only country in Asia to have done so. It was signed by then-President Benigno S. Aquino III on 18th May 2012 and later ratified by the Philippine Senate on 6th August 2012. Philippine-based civil society played a large role in campaigning both regionally and internationally for the ratification of the Convention. To demonstrate compliance and commitment to the Convention, in January 2013 the government enacted a national law governing domestic workers in the Philippines titled Republic Act 10361, otherwise known as the Domestic Workers Act or *Batas Kasambahay*.

The Domestic Workers Act provides guidelines based on the provisions comprised in C189 on the rights and entitlements of domestic workers, such as minimum wage, working time regulations and the provision of compulsory social security benefits. The Social Security System enforces compulsory coverage by providing inspection services in order to ensure the domestic worker is registered. Under section 40, penalties for violating the provisions of the Act include an administrative fine ranging from PHP 10,000 to 40,000 (NZD 300 to 1,200) imposed by the Department of Labour and Employment regional offices.

Despite the Act only governing domestic workers employed in the Philippines, Rosalinda Dimapilis-Baldoz, former-Secretary of the Department of Labour and Employment, stated that with the ratification of C189 and a new national law, “the Philippines is in a better position to pursue terms and conditions of employment in

overseas domestic work.”²⁸⁹ According to Ronahlee Asuncion, setting standards on the terms of employment for domestic workers through national legislation is a major step towards recognising their value and status as workers and removing the stigma attached to such work.²⁹⁰

In contrast, the Sri Lankan government has been hesitant to adopt both domestic legislation and international law obligations pertaining to domestic workers, and has therefore not yet ratified C189. The government has committed on paper to ratifying C189 in the National Action Plan for the Protection and Promotion of Human Rights for 2017-2021, although state action to fulfil this commitment remains to be seen. During my fieldwork in Sri Lanka, I interviewed a representative of the ILO and questioned why the Sri Lankan government has not ratified C189. The representative responded:²⁹¹ *“Unfortunately our labour laws do not cover domestic workers let alone female domestic workers, this is the reason why in Sri Lanka we are having a bit of an issue with the ratification of C189.”*

Presently, domestic workers employed in Sri Lanka are excluded from the scope of employment protections under a range of legal instruments available to the rest of the workforce. These include, for example, the National Minimum Wage of Workers Act, which sets out a national minimum wage for all workers in any industry or service; the Shop and Office Act, which mandates when and how remuneration is paid to those employed; the Employees’ Trust Fund Act, which acts as a form of social security; and the Wages Board Ordinance, which mandates decent working conditions for those employed in trade.²⁹²

Under Sri Lankan law, a domestic worker is defined in the Domestic Servants Ordinance No. 28 of 1871 as a “servant, hired by the month or receiving monthly wages, and shall include female servants, cooks, coachman, horse-keepers, and house and garden servants.” This archaic legislative instrument fails to categorise the

²⁸⁹ Hon. Rosalinda Dimapilis-Baldoz *International Labour Organization Informal Ministerial Meeting* (18 June 2013) International Labour Organization: Geneva.

²⁹⁰ Ronahlee A. Asuncion “The Domestic Workers Act of the Philippines: Issues, Challenges and Concerns” (2014) 24 *Labour & Industry* 317 at 328.

²⁹¹ Interview with a representative of the International Labour Organization (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

²⁹² Esufally, above n 50, at 20.

domestic worker as entitled to rights guaranteed under the labour law of Sri Lanka and “serves to undermine both the dignity and professional credibility owed to her.”²⁹³

It is apparent that the Sri Lankan government is unlikely to ratify C189 until it includes domestic work either under its existing labour laws or by creating a separate law to cover domestic workers, similar to the approach taken in the Philippines. However, as Gamburd points out, patriarchal gender norms in Sri Lanka affect the structures and attitudes within which government initiatives on migrant women’s behalf take place, contributing to the lack of national support for migrant women and the legal recognition of domestic work under national law.²⁹⁴ Further, Sri Lanka’s inferior status and power in the international hierarchy of states, in contrast to the Philippines’ stronger labour market position for domestic workers, may also account for its reluctance to ratify C189 and enhance the protection of domestic workers for fear of losing valuable employment opportunities for its citizens in host states.

Sri Lanka is a Member State of the ILO, although it has not ratified C189, therefore the government has a legal obligation to report on non-ratified conventions if requested by the ILO. Article 19 paragraph 5(e) of the ILO Constitution requires the non-ratifying Member to “report on the position of its national law and practice in regard to the matters dealt with in the Convention”, and indicate any difficulties that are preventing or delaying its ratification. Consequently, the standard of protection afforded to MDWs under domestic law in Sri Lanka can still be measured against the international standard of protection comprised in C189. The ILO has not yet requested a report from Sri Lanka on C189 by virtue of Article 19.²⁹⁵ Sri Lanka submitted C189 to its Parliament in conformity with Article 19 paragraph 5 of the ILO Constitution on 8th January 2013, but subsequently indicated to the ILO that no proposal was made at the time in terms of possible ratification.²⁹⁶

²⁹³ At 7-8.

²⁹⁴ Gamburd, above n 220, at 76.

²⁹⁵ Correspondence INFONORM ILO to Sophie Henderson (4 August 2018) On file with writer.

²⁹⁶ Above n 295.

3.2 The Convention on the Elimination of All Forms of Discrimination Against Women

The UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on 18th December 1979, entering into force on 3rd September 1981. The CEDAW remains one of the most highly ratified UN Conventions with 189 State Parties. Both the Philippine and Sri Lankan governments promptly ratified the CEDAW in 1981. The Convention is the sole international legal instrument designed to promote and protect women's socio-economic, civil and political rights in both the public and private spheres.²⁹⁷

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) consists of 23 independent experts on women's rights elected by State Parties to the Convention, and performs a critical monitoring and oversight role to hold states to their obligations. The Committee measures compliance by reviewing state reports every four years that document compliance with the provisions of the treaty, as well as alternative shadow reports submitted by NGOs and civil society, which evaluate state reports and highlight issues that may have been misrepresented or neglected.

The Committee also assesses individual direct complaints of rights violations and formulates General Recommendations on specific provisions of the CEDAW to offer states clear guidance on the application of the Convention in particular situations.²⁹⁸ The CEDAW Committee's General Recommendations are not legally binding, as they are not part of the Convention itself, although the Committee expects State Parties to accept and implement them in good faith.²⁹⁹

Governments who commit to the Convention are legally bound to eliminate all forms of discrimination against women in all areas of life, and to ensure women's full

²⁹⁷ United Nations Women *CEDAW and Women's Migration in Asia: Factsheet* (2012).

²⁹⁸ United Nations Women, above n 297.

²⁹⁹ Hanna Beate Schöpp-Schilling "The Role of the Convention on the Elimination of All Forms of Discrimination Against Women and its Monitoring Procedures for Achieving Gender Equality in Political Representation" (paper presented to the International Institute for Democracy and Electoral Assistance, 2004).

development and advancement in order for them to exercise and enjoy their human rights. Accordingly, the CEDAW Committee imposes on State Parties a “formal legal obligation of equal treatment of women with men.”³⁰⁰ Formal (de jure) equality envisages identical treatment of women and men, and is concerned primarily with the content of laws and practices.³⁰¹

However, the Committee recognises that formal equality is not sufficient to fulfil a state’s obligations under the Convention, because of the pervasive tendency for societies to treat women as inferior to men.³⁰² Therefore, State Parties are also required to take all appropriate measures to ensure substantive (de facto) equality between women and men.³⁰³ Substantive equality has been defined as “eliminating individual, institutional and systemic discrimination against disadvantaged groups which effectively undermines their full and equal social, economic, political and cultural participation in society.”³⁰⁴ This approach highlights that equal treatment can often lead to outcomes that are unequal because of differences between women and men, thus states must also take biological and socially and culturally constructed distinctions between women and men into account.³⁰⁵ A substantive equality approach looks to a rule’s results and effects, and these rules must consider the differences between women and men to eliminate the disadvantages they bring to women.³⁰⁶

3.2.1 CEDAW and General Recommendation No. 26

The CEDAW Committee recognises that while migration presents new opportunities for women, it may also place their human rights and security at risk.³⁰⁷ The Committee issued General Recommendation 26 (GR 26) in 2008 to illustrate the

³⁰⁰ UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 25 Temporary Special Measures, on Article 4 [1] of the CEDAW, Annex I (4)*. UN Doc A/59/38 at 78 (2004).

³⁰¹ Cusack and Pusey, above n 39, at 10.

³⁰² UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 21 Equality in Marriage and Family Relations* UN Doc A/49/38 (2 April 1994) at 12.

³⁰³ At 11.

³⁰⁴ Ratna Kapur and Brenda Cossman *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996) at 176.

³⁰⁵ UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 25 Temporary Special Measures on Article 4 [1] of the CEDAW, Annex I (8)*.

³⁰⁶ Katharine Bartlett “Gender Law” (1994) *Duke Journal of Gender Law & Policy* 1 at 4.

³⁰⁷ Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008), [2].

“circumstances that contribute to the specific vulnerability of many women migrant workers, and their experiences of sex and gender-based discrimination as a cause and consequence of the violations of their human rights.”³⁰⁸ GR 26 contains robust rights protection for women migrant workers and was developed with the support of UN Women and substantial consultation with civil society, including women migrant workers and their organisations.³⁰⁹ Despite the non-binding nature of the Committee’s General Recommendations, they are the authoritative interpretation of the CEDAW and guide for State Parties to apply it consistently.³¹⁰

The Committee recommends that State Parties should use the CEDAW and GR 26 to formulate a gender-sensitive rights-based policy on the basis of equality and non-discrimination to ensure the protection of the rights of women migrant workers. The Committee further acknowledges that violations of the human rights of women migrant workers can occur in countries of origin, transit and destination.³¹¹ I use the gender-sensitive laws, policies and programmes outlined by the Committee in GR 26 that protect women migrant workers as key reference points at each phase of the migration cycle.

3.2.2 *CEDAW and the Migration Cycle*

Pre-Departure

General Recommendation 26 specifies that countries of origin should “repeal sex-specific bans and discriminatory restrictions on women’s migration on the basis of age, marital status, pregnancy or maternity status.”³¹² State Parties are advised to “lift restrictions that require women to get permission from their spouse or male guardian to obtain a passport or to migrate”,³¹³ such as the restrictions placed on women domestic workers by the Sri Lankan government through the Family Background

³⁰⁸ At [2].

³⁰⁹ United Nations Women, above n 297.

³¹⁰ Elisabeth Veronika Henn *International Human Rights Law and Structural Discrimination: The Example of Violence Against Women* (Berlin: Springer, 2019) at 43.

³¹¹ Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008), [9].

³¹² Article 2(f).

³¹³ Article 2(f).

Report.³¹⁴ GR 26 also requires sending states to “deliver or facilitate free or affordable gender and rights-based pre-departure information and training programmes that raise women migrant workers’ awareness of potential exploitation”,³¹⁵ including their legal rights in countries of employment and procedures for invoking redress mechanisms.

With regards to the recruitment of women migrant workers, GR 26 requires State Parties to provide a list of authentic and reliable recruitment agencies, and to implement accreditation programmes to ensure good practice among them.³¹⁶ States are also required to ensure that “recruitment agents participate in awareness-raising and training programmes to sensitise them on the rights of women migrant workers, the exploitation women could experience and the responsibilities of agencies towards the women.”³¹⁷

Employment Overseas

The CEDAW strengthens C189 by also referring to the legal protection for freedom of movement. GR 26 requires states to ensure that employers and recruiters do not confiscate or destroy travel or identity documents belonging to women migrants and to end the forced seclusion of women migrants, especially those working in domestic service.³¹⁸ GR 26 also raises the issue of diplomatic and consular protection and requires states to properly train and supervise their diplomatic staff to ensure that they fulfill their role in protecting the rights of women migrant workers overseas. Such protection should include quality support services for women migrants involving medical care, counseling, legal aid and shelter when required.³¹⁹

In addition, GR 26 refers specifically to the legal protection of the rights of women working in domestic work. It requires states to ensure that they are protected by labour laws, including wage and working time regulations, health and safety codes

³¹⁴ Discussed further in chapter five, section 5.2.2.

³¹⁵ Articles 3, 5, 10 and 14.

³¹⁶ Article 2(e).

³¹⁷ Article 2(e).

³¹⁸ Article 2(e).

³¹⁹ Article 3.

and holiday and leave regulations, and that laws include mechanisms for monitoring workplace conditions of migrant women.³²⁰

Return and Reintegration

The CEDAW GR 26 addresses a worker's right to return and recommends that states "should ensure that women who wish to return to their countries of origin are able to do so free of coercion and abuse."³²¹ It also focuses on services to women upon return and states that governments "should design or oversee comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned."³²² The GR 26 adds that governments "should monitor service providers to ensure that they do not take advantage of the vulnerable position of women returning from work abroad", and implement "complaint mechanisms to protect them against reprisals by recruiters, employers or former spouses."³²³

3.2.3 CEDAW: The Philippines and Sri Lanka

In compliance with the obligations of State Parties, the Philippines has submitted six state reports to the CEDAW Committee regarding its implementation of the Convention. In 2015, the Philippine government submitted its most recent combined seventh and eighth periodic reports. It received praise from the CEDAW Committee for its earlier adoption and implementation of the amended Migrant Workers and Overseas Filipinos Act in 2010 and the Domestic Workers Act in 2013, which safeguards the working conditions of domestic workers within the Philippines.³²⁴

However, the Committee expressed its concern regarding the continuing widespread exploitation of Filipina migrant workers overseas, particularly women domestic workers, and the insufficient support provided to reintegrate those who return. It recommended that the Philippine government ought to strengthen the regulation and

³²⁰ Articles 2(a), (f) and 11.

³²¹ Article 3.

³²² Articles 2(c) and 3.

³²³ Articles 2(c) and 3.

³²⁴ UN Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Combined Seventh and Eighth Periodic Reports of the Philippines* UN Doc CEDAW/C/PHL/CO/7-8 (25 July 2016).

inspection of recruitment agencies for migrant workers; continue its effort to raise awareness among women migrant workers about their rights, the risks that they may face and the channels that they can use to seek remedies in case of rights violations; and provide gender-responsive support to returnee women migrants for their reintegration.³²⁵

Sri Lanka submitted its first periodic report to the CEDAW Committee in 1986 and its most recent eighth periodic report in April 2015. In its concluding observations, the CEDAW Committee applauded Sri Lanka's efforts to improve its institutional and policy framework aimed at accelerating the elimination of discrimination against women and promoting gender equality, such as the National Plan of Action to address Sexual and Gender-based Violence in 2016.³²⁶ However, the Committee expressed concern regarding the existence of discriminatory regulations that impose restrictions on migrant women and recommended that the Sri Lankan government abolish the Family Background Report, with a view to lifting the sex-specific restrictions on migration.³²⁷

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

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) is the third international legal instrument I use, which sets the standards against which to judge the adequacy of rights protection for MDWs in the Philippines and Sri Lanka. The ICMW specifies the basic minimum standards of human rights protection to which a particularly vulnerable group of people - migrant workers and members of their families - are entitled irrespective of their gender, employment and residency status. The underlying purpose of the ICMW is the recognition that migrant workers, both in a regular and irregular situation, are first and foremost human beings entitled to the enjoyment of fundamental rights

³²⁵ At [38(b), (c) and (e)].

³²⁶ UN Committee on the Elimination of Discrimination Against Women *Concluding Observations on the Eighth Periodic Report of Sri Lanka* UN Doc CEDAW/C/LKA/CO/8 (3 March 2017) at [5(c)].

³²⁷ At [39].

without discrimination.³²⁸ It is a comprehensive document, covering the entire migration process from pre-departure in the country of origin, through travel in countries of transit, to entry and residence in the destination state, and return to the country of origin.

The ICMW has a complex and difficult history. The treaty was formally proposed by a General Assembly resolution of 1979 but due to differences of opinion between labour-sending and receiving states, the final text was not endorsed until 18th December 1990. There was a further lengthy period of 13 years until the requisite 20 ratifications had been obtained to allow the Convention to enter into force on 1st July 2003. Since then, ratification has proceeded slowly with a total of 55 states having ratified as of September 2020.

The ICMW has still not been ratified by the primary labour-receiving states for domestic workers, including Singapore, Kuwait, Jordan and Saudi Arabia. This stands in stark contrast to the 189 State Parties that have ratified the CEDAW. One perceived obstacle to the ratification of the ICMW by host countries is that it does not distinguish sufficiently between the rights of regular and irregular migrants.³²⁹ There is collective fear that ratification would “obligate receiving states to grant too many rights to migrants who do not hold legal status in the country”, which would “counter their struggle against the irregular movement of individuals.”³³⁰ Despite the broad protections offered by the ICMW, the low level of ratification has contributed to doubts as to its value for claiming rights in practice.³³¹

However, Lesley Wexler argues that despite the relatively low number of ratifications of the ICMW, it still serves non-legal functions by influencing non-binding regional processes, contributing to the development and dissemination of best practices and helping produce and codify a human rights discourse.³³² The International Steering

³²⁸ Directorate-General for External Policies of the Union *Current Challenges in the Implementation of the UN International Convention on the Rights of All Migrant Workers and Members of Their Families* (July 2013) European Parliament Policy Department. EXPO/B/DROI/2013/05.

³²⁹ At 24.

³³⁰ At 24.

³³¹ Jennifer S. Hainfurther “A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers” (2009) 24 *American University International Law Review* 843 at 855.

³³² Lesley Wexler “The Non-Legal Role of International Human Rights Law in Addressing Immigration” (2007) 439 *University of Chicago Legal Forum* 359 at 403.

Committee for the Campaign for Ratification of the Migrant Rights Convention contends that the ICMW has become “an instrument of reference for State Parties and non-ratifying countries, including those that have stated explicitly that they do not wish to ratify it.”³³³

3.3.1 ICMW and General Comment No. 1 on MDWs

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, composed of 14 independent experts, is the body responsible for overseeing State Parties’ compliance with the ICMW through reviewing and commenting on periodic reports from states. The Committee also issues General Comments that serve as authoritative guides for States on how to interpret and implement particular provisions contained in the ICMW. Much like the CEDAW Committee’s General Recommendations, the Committee’s General Comments do not carry any formal authority to bind State Parties.³³⁴ However, since General Comments “reflect established treaty obligations”, states are often required to give effect to the substance of a General Comment issued by a UN treaty body in order to ensure full compliance with their obligations under the ratified convention.³³⁵

Noting the omission of express references to domestic workers in a range of national and international frameworks of law, the Committee issued General Comment No. 1 on MDWs in October 2009. As a formal interpretation of the ICMW, the General Comment provides State Parties with guidance on how to implement their obligations under the ICMW with respect to MDWs.³³⁶ Leading up to the adoption of General Comment No. 1, the Committee organised a Day of General Discussion on the situation of MDWs, which generated wide participation by representatives of states, international organisations, civil society groups and domestic workers.

³³³ International Steering Committee for the Campaign for Ratification of the Migrant Rights Convention “Guide on Ratification: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families” (June 2012) at 7.

³³⁴ Helen Keller and Leena Grover “General Comments of the Human Rights Committee and Their Legitimacy” in Helen Keller and Geir Ulfstein (eds) *United Nations Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) at 129.

³³⁵ Machiko Kanetake “United Nations Human Rights Treaty Monitoring Bodies before Domestic Courts” (2018) 67 *International and Comparative Law Quarterly* 201 at 218.

³³⁶ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers* UN Doc CMW/C/GC/1 (23 February 2011), [28].

The Day of General Discussion enabled the Committee to promote greater awareness of the particular situation and rights of MDWs by dividing participants into two working groups.³³⁷ The first group discussed recruitment and employment of domestic workers, including the exploitative practices of recruitment agencies, while the second working group focused on the effective protection of domestic workers and the importance of a gender perspective to aid in understanding how women migrant workers experience different types of abuse.³³⁸ These group discussions led to good practice recommendations. These recommendations included the need for countries of origin to raise awareness through public education campaigns on the broad rights of MDWs, to provide mandatory training for recruiters and employers engaged in the process of deploying and hiring MDWs, and to implement protection-sensitive and transparent frameworks and agreements with destination countries.

It is recognised by the Committee that domestic workers are vulnerable to abuse throughout the migration cycle, with a number of factors exposing them to violations of their human rights. I rely on the recommendations to State Parties through General Comment No. 1, which address the three stages of the migration cycle.

3.3.2 ICMW and the Migration Cycle

Pre-Departure

The Committee on the Protection of Migrant Workers recommends that for nationals considering whether to migrate for domestic work, sending countries “should take appropriate measures to disseminate information on their rights under the Convention as well as the conditions for their admission, employment and their rights under the law and practice of other States.”³³⁹ For workers who have made the decision to migrate for domestic work, State Parties are encouraged by the Committee “to

³³⁷ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *Report of the Day of General Discussion on Migrant Domestic Workers 11th Session* UN Doc CMW/C/11/CRP.3 (12-16 October 2009).

³³⁸ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, above n 305.

³³⁹ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers* (23 February 2011), [28].

develop more specific pre-departure training in consultation with relevant NGOs, domestic workers and reliable recruitment agencies.”³⁴⁰ Such training could cover a “know your rights” curriculum covering both international and national frameworks; a “know your obligations” orientation to essential aspects of the law and culture of the host country; “awareness-raising” training including working conditions, social security, debt, finance and work-related fees; and basic language preparation.³⁴¹

The Committee also provides that in accordance with Article 66 of the ICMW, states have an “obligation to effectively regulate and monitor labour brokers, recruitment agencies and other intermediaries to ensure that they respect the rights of domestic workers”³⁴² in countries of origin, transit and employment. This may take the form of licensing; monitoring and inspection; sanctions and penalties; and systems of recording and reporting, including web-based formats that are accessible to the public.

Employment Overseas

In accordance with Article 39 of the ICMW, the Committee recommends that states should “protect the right of MDWs to freedom of movement and residence, including by ensuring that domestic workers are not required to live with their employers or stay in the house during their time off,”³⁴³ while also ensuring that they retain possession of their travel and identity documents.³⁴⁴ State Parties are also encouraged to ensure that domestic workers have “explicit written terms of employment, in a language they can understand, outlining their specific duties, hours, remuneration, days of rest and other conditions of work, in contracts that are free, fair and fully consented to.”³⁴⁵

The Committee suggests that embassies and consulates of labour-sending states should play an active role in protecting the rights of their nationals employed as domestic workers abroad by ensuring adequately trained staff and mechanisms to

³⁴⁰ At [29].

³⁴¹ At [29].

³⁴² At [33].

³⁴³ At [39].

³⁴⁴ At [39].

³⁴⁵ At [40].

receive and address complaints. They are also advised to provide counselling and facilitate appropriate shelter for workers fleeing abusive employment circumstances, and to cooperate with embassies and consulates of other countries of origin to identify abusive recruitment agencies and promote protection policies for MDWs.³⁴⁶

Return and Reintegration

The Committee for the ICMW recognises that many domestic workers may return to their country of origin with less pay than they are due and with no possibility of seeking compensation. It also draws attention to those who return in order to escape an abusive work relationship, often with no access to support mechanisms and no possibility of seeking legal remedies.³⁴⁷ Therefore, the Committee includes an obligation in General Comment No. 1 for receiving states to ensure that all MDWs have access to mechanisms for bringing complaints about violations of their rights.³⁴⁸ In particular, the Committee considers that workers should be able to access courts and other justice mechanisms, as well as “access to temporary shelter when needed due to the abusive circumstances of their employment.”³⁴⁹

3.3.3 ICMW: The Philippines and Sri Lanka

The Philippines participated in the deliberations of the draft version of the ICMW in the early 1980s, and the Philippine delegation contributed ideas and avidly supported its approval by the UN General Assembly.³⁵⁰ The Philippines was the first country in Asia to ratify the ICMW on 5th July 1995, which occurred simultaneously with the bringing into force of new legislation pertaining to the protection of the rights of migrant workers: the Migrant Workers Act or Republic Act 8042. Civil society organisations in the Philippines played an active role in ensuring the implementation of the Migrant Workers Act and ratification of the ICMW through their participation

³⁴⁶ At [62].

³⁴⁷ At [17].

³⁴⁸ At [49].

³⁴⁹ At [50].

³⁵⁰ Robyn Iredale and Nicola Piper “Impact of Ratifying the 1990 UN Convention on the Rights of All Migrant Workers and Members of Their Family: Case Studies of the Philippines and Sri Lanka” (August 2005) Working Paper 15: Asia Pacific Migration Research Network at 6.

in policymaking, attendance at hearings in the formulation of regulations affecting their rights, and by expressing their views in position papers.³⁵¹

Sri Lanka promptly ratified the ICMW on 16th March 1996 following a one-step accession. In contrast to the Philippines, the decision to ratify the ICMW was not driven by a high publicity episode involving migrant worker exploitation and “vibrant civil society movement”, but instigated by the “pro-labour” government at the time.³⁵² Research conducted by Piyasiri Wickramasekara revealed that by ratifying the ICMW “Sri Lanka was seeking multilateral means to address protection of migrant workers, in view of reluctance of major destination countries in West Asia to entertain bilateral agreements at the time.”³⁵³ Wickramasekara adds that the Sri Lankan government “thereby hoped that the moral/legal force and institutional capability of the ICMW would help to get international attention focused on the exploitation of Sri Lankan migrant workers.”

However, Robyn Iredale and Nicola Piper report that some NGOs suspect it was “more of a routine ratification on the part of the Sri Lankan government rather than a political commitment to protect migrant workers.”³⁵⁴ This latter argument is supported by the fact that there has been no substantial revision of national migration legislation to ensure conformity with the principles of the ICMW by the Sri Lankan government. This stands in stark contrast to the new legislation implemented at the time of ratification in the Philippines.³⁵⁵

3.4 Evaluating International Law Instruments for MDWs

In this section I evaluate the strengths and weaknesses of each of the three conventions, which represent the rights-based approach, through the lens of the other

³⁵¹ At 32.

³⁵² At 32.

³⁵³ Piyasiri Wickramasekara *The ICRMW and Sri Lanka* in Alan Desmond (ed) *Shining New Light on the UN Migrant Workers Convention* (South Africa: Pretoria University Law Press, 2017) at 254; Piyasiri Wickramasekara “Accession with Low Compliance: Sri Lanka’s Experience with the 1990 International Convention on Migrant Workers” (2019) *Migration and Development* at 4.

³⁵⁴ Iredale and Piper, above n 350, at 34.

³⁵⁵ Piyasiri Wickramasekara “Accession with Low Compliance: Sri Lanka’s Experience with the 1990 International Convention on Migrant Workers” (2019) *Migration and Development* at 5.

elements of the theoretical framework. I first analyse the extent to which each convention incorporates a gender-informed and intersectional perspective as part of its provisions governing women MDWs. Following this, I assess the extent to which the rights-based framework can protect women domestic workers against exploitation in the global labour market in light of the neoliberal globalisation thesis and structural violence theory.

3.4.1 *Gender and Intersectionality*

The ILO's Domestic Workers Convention (C189)

Convention 189 applies a gender-sensitive lens to migrant worker issues by focusing solely on domestic workers. In this way, C189 provides the foundation for female-specific migrant rights. For example, Article 11 states that “each member shall take measures to ensure that domestic workers enjoy minimum wage coverage ... and that remuneration is established without discrimination based on sex.” The inclusion of minimum wage coverage without sex-based discrimination has important implications for gender equality and for women’s participation in the labour market, whilst also preventing gender from becoming an element that devalues labour standards.

In addition, C189 is a positive step from a feminist perspective since its provisions establish a principle of equality between domestic workers and any other worker protected by labour laws. By advocating that host country governments afford domestic workers conditions no less favourable than those applying to workers generally, the Convention seeks to remedy the disadvantage that flows from being employed in a women-dominated occupation that is generally not regarded as work.³⁵⁶

From an intersectional perspective, however, C189 fails to directly include provisions protecting MDWs from discrimination on the grounds of race, socio-economic class and nationality. For instance, although Article 11 ensures remuneration is established without discrimination based on sex, the Convention does not mention other forms of

³⁵⁶ Rosewarne, above n 283, at 2.

identity such as race and nationality. This is particularly problematic considering the extent to which there is often a hierarchy with remuneration rates and conditions of employment that varies according to race and national origin, irrespective of the level of the domestic worker's skills and experience.³⁵⁷ Article 3 of the Convention includes a general clause prohibiting discrimination in respect of employment and occupation, yet a more precise reference to other categories of discrimination is necessary.

When I questioned a representative of the ILO in the Philippines as to why the ILO did not incorporate provisions in C189 that protect domestic workers against other forms of discrimination, they responded:³⁵⁸

Convention 189 might not have a specific provision on race or socioeconomic class because there are existing ILO Conventions that already address these things, such as Convention No. 111 concerning Discrimination in Respect of Employment and Occupation.³⁵⁹ If you bring in these factors again then it might just complicate the issue, which is really about domestic workers.

However, Rosewarne contends that a domestic worker's race, ethnicity, nationality, socio-economic class and religion are critical in shaping their vulnerability to exploitation, and it is a "combination of these attributes that positions such workers in the lower rungs of a highly segmented global labour market."³⁶⁰ Therefore, rather than "complicating the issue", including these attributes in C189 would help to clarify the different types of discrimination faced by domestic workers and protect them against it. In addition, while protection against discrimination in employment on the basis of race, sex, nationality or socio-economic class is provided for in Convention No. 111, the Member State needs to include domestic work as a form of employment under its national law in order for it to protect MDWs, which has not yet happened in Sri Lanka.

³⁵⁷ At 12.

³⁵⁸ Interview with a representative of the International Labour Organization (The author, Manila the Philippines, 16 March 2018) Transcript on file.

³⁵⁹ The Discrimination (Employment and Occupation) Convention No 111 is ratified by 175 states, including the Philippines and Sri Lanka.

³⁶⁰ Rosewarne, above n 283, at 11.

CEDAW

The CEDAW Committee sees the integration of a gender perspective as essential to the analysis of the position of women migrants and the development of policies to counter discrimination and abuse. GR 26 comprises gender-specific protections for women migrant workers including the following state obligations: to provide comprehensive gender and rights-based pre-departure information and training programmes that raise prospective women migrant workers' awareness of potential exploitation;³⁶¹ to adopt regulations and design monitoring systems to ensure that recruitment agents respect the rights of all women migrant workers;³⁶² to ensure women have equal and independent access to travel documents;³⁶³ and to ensure that women who wish to return to their countries of origin are able to do so free of coercion and abuse.³⁶⁴

However, there are no specific provisions in the CEDAW itself that directly recognise women's intersectional identities. Consequently, the Convention has been accused of failing to protect against different forms of discrimination. Johanna Bond argues that the CEDAW "provides protection to a monolithic category of women, a category characterised by women who experience only gender discrimination, rather than mutually reinforcing forms of discrimination such as racism, classism and ethnocentrism."³⁶⁵

Despite no explicit reference to intersectional discrimination, I agree with Meghan Campbell's assessment that the CEDAW still captures intersecting identities and the diversity of women by protecting several other identity grounds. For instance, Article 9 prohibits discrimination based on nationality, Article 14 protects rural women, and Article 2 commits State Parties to condemn discrimination in *all* its forms. Therefore,

³⁶¹ Article 3.

³⁶² Article 2(e).

³⁶³ Article 2(d).

³⁶⁴ Article 3.

³⁶⁵ Johanna E. Bond "International Intersectionality: A Theoretical and Pragmatic Exploration of Women's International Human Rights Violations" (2003) 53 Emory Law Journal 71 at 95.

there is a “firm textual basis requiring the state to account for all identities, experiences and factors that contribute to discrimination and inequality.”³⁶⁶

Moreover, General Recommendation No. 25 on Temporary Special Measures in Article 4 paragraph 1 of the CEDAW mentions that women may suffer from multiple forms of discrimination based on race, ethnic or religious identity, disability, age, class or other factors. The CEDAW Committee requires State Parties to take special temporary measures to eliminate multiple forms of discrimination against women and its compounded negative impact on them.

ICMW

The Committee for the ICMW recommends that states should incorporate a gender perspective in an effort to develop remedies to the gender-based discrimination that women domestic workers face throughout the migration process.³⁶⁷ In doing so, states are advised to repeal sex-specific bans and discriminatory restrictions on women’s migration on the basis of age, marital status, pregnancy or maternity status,³⁶⁸ including restrictions that require women to get permission from their male spouse to obtain a passport or to travel³⁶⁹ or bans on women MDWs marrying nationals or permanent residents.³⁷⁰ The Committee also recommends states to ensure that medical testing of domestic workers, including tests for pregnancy or HIV, is only done voluntarily and subject to informed consent.³⁷¹

Compared to C189 and the CEDAW, the ICMW adopts the strongest intersectional approach. For example, Article 1 guarantees that the protections in the Convention are applicable without distinction of any kind as to sex, race, colour, language, religion, nationality, age, economic position, marital status, birth or other status. The

³⁶⁶ Meghan Campbell “CEDAW and Women’s Intersecting Identities: A Pioneering New Approach to Intersectional Discrimination” (2015) 22 *Revista Direitovg* 479 at 487.

³⁶⁷ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers* (23 February 2011), [60].

³⁶⁸ At [61]; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature on 18 December 1990, entered into force 1 July 2003) [ICMW], arts 1 and 7.

³⁶⁹ ICMW, art 8.

³⁷⁰ ICMW, art 14.

³⁷¹ ICMW, art 14.

Convention also sets out a broad set of substantive rights, such as the right to life and freedom from torture, that must be extended to all migrant workers, regardless of their employment or residency status.

3.4.2 *Neoliberal Globalisation and Structural Violence*

Research surrounding the difficulties of implementing a rights-based approach, as sourced from the three international conventions, revealed structural inequalities in the global labour market and competition between labour-sending states as the two most significant factors impeding the successful ratification and implementation of international human rights treaties.

Structural Inequalities in the Global Labour Market

Chapter one detailed how neoliberal policies and structural adjustment reforms disproportionately harm women, with increases in poverty and unemployment in developing countries placing additional burdens on women within both the household and public sphere.³⁷² Consequently, women have often turned to labour migration as a survival strategy. Poorer women migrate in hope of finding greater economic opportunities to provide support for their families, while wealthier families commodify their care responsibilities through hiring domestic workers.³⁷³ Thus, neoliberal policies perpetuate intersecting hierarchies of gender, race, ethnicity, socio-economic class and nationality that sustain the domestic worker's disadvantaged position in a sex-segmented labour market.³⁷⁴

Accordingly, Fiona Robinson contends that a narrow focus on labour standards and workers' rights, through international conventions that promote formal equality between women and men, cannot adequately address the entrenched structural pressures and inequalities that place women domestic workers in a vulnerable position

³⁷² Parekh and Wilcox, above n 27.

³⁷³ Parreñas, above n 29, at 560.

³⁷⁴ Leah Briones *Empowering Migrant Women: Why Agency and Rights are Not Enough* (New York: Routledge, 2016) at 33.

in the global labour market.³⁷⁵ The principle of formal equality is essential to many international labour and human rights conventions, including C189, the CEDAW and the ICMW. Formal equality involves the identical treatment of women and men and removes discriminatory laws and policies that hamper women in exercising their human rights.

The formal equality approach is particularly evident in C189, requiring states to take measures towards ensuring equal treatment between domestic workers and workers generally. Although the formal equality model advances the equal rights of women through laws and policies that remove formal barriers, I argue that it falls short by failing to address the systemic roots of intersectional discrimination that disadvantage women in the first place. Frances Raday notes how “neoliberal philosophy undermines the CEDAW by creating market conditions which make women’s equal opportunity in economic and labour markets in theory axiomatic, but unattainable in practice.”³⁷⁶

The CEDAW Committee attempts to address this deficiency by embracing Cusack’s and Pusey’s two-pronged principle of transformative equality,³⁷⁷ which requires states to address the underlying causes and structures of gender inequality.³⁷⁸ The CEDAW Committee’s adoption of transformative equality³⁷⁹ demonstrates how international conventions may advance the rights of women migrant workers, as it considers the complex structural inequalities of globalisation that render such workers more susceptible to rights violations.

The Committee’s approach to transformative equality is outlined in its General Recommendation 25 on Temporary Special Measures and centres on two distinct categories of state obligations. The first category requires states to adopt measures

³⁷⁵ Fiona Robinson “Beyond Labour Rights” (2006) 8 *International Feminist Journal of Politics* 321 at 325.

³⁷⁶ Frances Raday “Gender and Democratic Citizenship: The Impact of CEDAW” (2012) 10 *International Journal of Constitutional Law* 512 at 516.

³⁷⁷ According to Andrew Byrnes, transformative equality might also be seen as a form of substantive equality with systemic and structural dimensions. “Article 1” in Marsha A. Freeman, Christine Chinkin and Beate Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination Against Women* (Oxford University Press, 2012) at 56.

³⁷⁸ Cusack and Pusey, above n 39, at 10.

³⁷⁹ Article 5(a) of the CEDAW is the international norm that expresses the concept of transformative equality.

“towards a real transformation of opportunities, institutions, systems and structures so that they are no longer grounded in historically determined male paradigms of power” that cause or perpetuate discrimination and inequality.³⁸⁰ Article 3 of the CEDAW is at the core of this obligation and clarifies that positive actions are required across all fields – political, social and economic – to ensure progress in all aspects of women’s lives. It requires a reassessment of legislation, policies and programmes, including those for economic development and poverty reduction, to evaluate their impact upon women’s equality and advancement.

Intersectionality theory, which aims to “transcend intersectional discrimination and bring about social transformation”,³⁸¹ coincides with this vision of transformative equality. Shreya Atrey observes how such a transformation “involves an overhaul of the structures and relationships of power, in terms of unsettling institutional norms of hierarchical organisation which disadvantage certain people, especially those who belong to multiple disadvantaged groups.”³⁸²

The second category of a transformative equality approach concerns the modification or transformation of harmful norms, prejudices and stereotypes that violate women’s rights.³⁸³ The Committee has explained that State Parties “should create the conditions necessary for women to exercise their autonomy and agency” and to “make choices without the limitations set by stereotypes and rigid gender roles.”³⁸⁴ The provisions of GR 26 and General Comment No. 1 illustrate these two categories of state obligations. For instance, neither the GR 26 nor General Comment No. 1 view migration as a gender-neutral phenomenon. Rather, they suggest practical measures to protect women migrants that states can implement to address gender-inequality, a gendered labour market and the worldwide feminisation of poverty and labour migration.

This second category of obligations is particularly relevant to women’s stereotyped role of being primarily responsible for care and domestic work. Since domestic work

³⁸⁰ [10].

³⁸¹ Shreya Atrey “Women’s Human Rights: From Progress to Transformation, An Intersectional Response to Martha Nussbaum” (2018) 40 Human Rights Quarterly 859 at 870.

³⁸² At 870.

³⁸³ CEDAW Preamble, [14], arts 2(f), 5 and 10(c).

³⁸⁴ Cusack and Pusey, above n 39, at 11.

remains largely unacknowledged and unpaid in the private realm, it fails to be valued and recognised in the labour market as “work”. The ILO’s Domestic Workers Convention is an example of the way in which a reorientation and characterisation of domestic work can change the value attached to such work.³⁸⁵ Instead of being regarded as ‘part of the family’ or the undignified and unprofessional term ‘servant’, as seen in Sri Lankan law, the Convention requires domestic workers to be recognised as workers and given regulated terms and conditions and employment protections.³⁸⁶

The principle of transformative equality underpins several of the provisions in the CEDAW. Examples include Articles 2 and 5, which read together require State Parties to address prevailing gender relations and the persistence of gender-based stereotypes. “Equality as transformation” aims at “changing society in such a way that those features of existing cultures, religions or traditions and of legal, social and economic structures that obstruct the equality and human dignity of women are subjected to fundamental change.”³⁸⁷ Cusack and Cook add that this means “State Parties are required to undertake a social re-ordering of their political economy, and the cultural valuations ascribed to men and women.”³⁸⁸

This thesis argues that the principle of transformative equality provides a pathway to address the intersectional discrimination of women domestic workers, while simultaneously challenging the underlying causes of inequality. Recent developments in international institutions reinforce CEDAW’s transformative potential, including the appointment by the Human Rights Council of a Working Group on Discrimination Against Women in Law and Practice in 2011. The mandate of the Working Group includes preparation of a compendium of best practices for elimination of laws that discriminate against women, to develop ways to eliminate discrimination against women in law and practice, and to make recommendations on reform and

³⁸⁵ Sandra Fredman “Working Together: Human Rights, the Sustainable Development Goals and Gender Equality” (November 2018) The British Academy at 13.

³⁸⁶ At 13.

³⁸⁷ Rikki Holtmatt “The CEDAW: A Holistic Approach to Women’s Equality and Freedom” in Anne Hellum and Henriette Sinding Aasen (eds) *Women’s Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) at 111.

³⁸⁸ Simone A. Cusack and Rebecca J. Cook “Combating Discrimination on Sex and Gender” in Catarina Krause and Martin Scheinin (eds) *International Protection of Human Rights: A Textbook* (Turku: Åbo Akademi University Institute for Human Rights, 2009) at 207.

implementation of policies to promote the empowerment of women.³⁸⁹ This agenda clearly allows for *transformative* and not merely *formal* equality.³⁹⁰

Ultimately, although the transformative provisions of the CEDAW provide normative tools to contend with the neoliberal exploitation of women migrant workers, a large gap remains between normative policy and political, economic and social practice. I contend that the activism and advocacy efforts of civil society organisations and migrant workers, and their participative inclusion in policymaking through regional processes, are indispensable to hold governments accountable to their commitments under international law and reframe neoliberal development policies.

Competition Between Labour-Sending States

The second significant factor impeding the ratification and implementation of international conventions is increasing competition between labour-sending states. Sending states are largely driven to promote labour migration in order to generate foreign exchange earnings by way of increased remittances. These remittances in turn address national debt and provide relief to local labour market pressures.³⁹¹ Thus, as supported by the neoliberal globalisation thesis, labour-sending governments are often deterred from enforcing greater rights protection and labour standards for their workers through international conventions. This is because they fear that such enforcement would impair trade relations with host states and constrain the potential for economic growth.

A report on the obstacles to the ratification of the ICMW, for example, revealed that labour-sending states of Bangladesh and Indonesia were both reluctant to ratify the ICMW for fear of being undercut by non-ratifying neighbours and losing markets in the host country.³⁹² Such a concern is exacerbated in a globalised labour market

³⁸⁹ United Nations Human Rights Council *Resolution Adopted by the Human Rights Council 15/23* Elimination of Discrimination Against Women UN Doc A/HRC/RES/15/23 (8 October 2010).

³⁹⁰ Raday, n 376, at 515.

³⁹¹ Piyasiri Wickramasekara “South Asian Migration to the Gulf: A Safety Valve or a Development Strategy?” (2016) 5 *Migration and Development* at 99.

³⁹² Robyn Iredale and Nicola Piper “Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective” (2003) UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants.

where sending states are competing for greater market share, resulting in a ‘race to the bottom’ in terms of labour standards and rights. When host states are able to choose between a range of countries to satisfy their labour needs, this diminishes the bargaining power of sending states and international organisations to establish minimum terms and conditions of employment to protect migrant workers abroad.³⁹³ Collaboration between sending countries, rather than competition, is imperative in order to transform existing market-driven systems and structures that cause or perpetuate discrimination and inequality.

Such collaboration can be seen between participating states of regional consultative processes in the Asia-Pacific region. A regional consultative process is an informal, member-driven and non-binding forum that brings together representatives of states, civil society and international organisations to discuss migration-related issues in a regional context.³⁹⁴ Since such processes are based upon voluntary membership, states that participate demonstrate a willingness to act cooperatively in the realm of migration and exchange information in order to establish a common plan of action.

The Colombo Process, established in 2003, is a regional consultative process on the management of overseas employment and contractual labour for countries of origin in Asia. It espouses a rights-based approach to the governance of labour migration, recognising the importance of ensuring that the human rights of all migrant workers are promoted and protected, irrespective of their legal status.³⁹⁵ Twelve states are currently members of the Colombo Process: the Philippines, Sri Lanka, Afghanistan, Bangladesh, Cambodia, China, India, Indonesia, Nepal, Pakistan, Thailand and Vietnam. The process is supported and facilitated by the IOM. Since the inaugural meeting in Sri Lanka in 2003, the states have come together for Senior Officials Meetings in the Philippines in 2004 and Indonesia in 2005. This meeting in Indonesia was the first where countries of destination took part as ‘observer states’, including Bahrain, Kuwait, Qatar, Saudi Arabia, the United Arab Emirates, Italy and the Republic of Korea. After meeting in 2005, it took six years for the next high-level

³⁹³ Rosewarne, above n 283, at 12.

³⁹⁴ Amanda Klekowski von Koppenfels *The Role of Regional Consultative Processes in Managing International Migration* (May 2001) International Organization for Migration: Geneva, at 5.

³⁹⁵ Colombo Process Summary Report of the 4th Senior Officials’ Meeting and 5th Ministerial Consultation (24-25 August 2016) Colombo: Sri Lanka.

political meeting in Bangladesh in 2011. Since then, states have met again in Sri Lanka in 2016 and their latest meeting took place in Nepal in 2018.

The loss of momentum and gaps in leadership between 2005 and 2011 were attributed to the Process being solely dependent on IOM raised funds to organise regular Senior Officials Meetings, as well as the absence of an “overarching institutional architecture to integrate the many positive elements and other vital components in a manner that generated sufficient momentum within the Colombo Process.”³⁹⁶ Despite the lack of activity at the state level, the Colombo Process remained relatively active in other areas. For instance, a training curriculum for labour attachés and overseas employment administrators was developed and regional workshops for employment agencies were held with a focus on ethical recruitment. During this period, the Colombo Process also sought to diversify its partnerships and increase engagement with destination countries, resulting in the establishment of the Abu Dhabi Dialogue in 2008. The Abu Dhabi Dialogue engages the twelve member states of the Colombo Process and seven countries of destination, being Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, the United Arab Emirates and Malaysia. Regular observers include the IOM, the ILO, and representatives from the private sector and civil society.

To address the obstacles that led to the six-year gap in Senior Officials Meetings, the 2011 Ministerial Consultation in Bangladesh adopted the first ‘Operating Modalities’. These provide overarching guidelines for member states in which to structure dialogue and related activities, in order to bring about regularity, predictability and sustainability to the process.³⁹⁷ In particular, the modalities established the procedures for the appointment and role of the chairmanship; the format and hosting of the meetings; dialogue with destination countries; and ways to engage with civil society and other stakeholders. Crucially, the funding structure was revised and now consists of a self-funding mechanism based on equal annual contributions of US\$4545 from each member state, as opposed to relying solely on the IOM to financially support regular Senior Officials Meetings.

³⁹⁶ Address by the Ambassador Ravinatha Aryasinha, Permanent Representative of Sri Lanka to the United Nations, on the occasion of the handing over of the Chairmanship of the Colombo Process (29 March 2017) <www.ft.lk.com>.

³⁹⁷ Regional Consultative Process on Overseas Employment and Contractual Labour for Countries of Origin in Asia “Proposed Operating Modalities” (21 April 2011).

Since 2005, the Colombo Process member countries have taken proactive steps to better manage labour migration and protect the rights of migrant workers. They have amended existing regulations or adopted new legislation concerning labour migration and signed bilateral labour agreements and memoranda of understanding with key destination countries. Colombo Process countries have also launched specific programmes and activities to regulate the recruitment process, ensure the incorporation of minimum standards into employment contracts and provide welfare support at origin and destination.³⁹⁸

However, there remains a gap between the aims of policy measures as laid out on paper and their implementation on the ground. In preparation for the Ministerial Consultation in Bangladesh and at the request of several Colombo Process countries, the IOM carried out a study in 2011 to identify good practices as well as remaining challenges. It proposed a three-pronged strategy to be adopted by Colombo Process countries to develop their capacity for effective implementation.³⁹⁹ The first focused on knowledge generation and exchange, and recommended that countries identify and develop strategies to address data gaps and produce the evidence required to inform policy. The IOM's second recommendation focused on meaningful collective partnerships among Colombo Process members and the importance of negotiating as a group with destination countries, in order to increase their bargaining power.⁴⁰⁰ The third strategy involved practical dialogue at various state levels and with non-governmental actors, particularly civil society, through multi-stakeholder groups that could provide independent advice on matters concerning labour migration policy.

While there has been no further in-depth report to evaluate the extent to which the Colombo Process member states have implemented these strategies since 2011, the achievements of the thematic area working groups⁴⁰¹ established in 2016 under the

³⁹⁸ Dovelyn Agunias, Christine Aghazam and Graziano Battistella "Labour Migration from the Colombo Process Countries: Good Practices, Challenges, and Ways Forward" (2012) International Organization for Migration: Bangkok and Migration Policy Institute: Washington D.C. at 14.

³⁹⁹ At 77.

⁴⁰⁰ At 80.

⁴⁰¹ The five thematic area working groups are skills and qualification recognition, chaired by Sri Lanka; fostering ethical recruitment, chaired by Bangladesh; pre-departure orientation and empowerment, chaired by the Philippines; remittances, chaired by Pakistan; and labour market analysis, chaired by Thailand.

chairmanships of Sri Lanka and Nepal, as well as the increasing space for civil society in Ministerial meetings, illustrate the progress made. In particular, the working group on ‘pre-departure orientation and empowerment’, which included civil society groups, aims to ensure effective dissemination of information about safe and decent labour migration and access to social protection mechanisms and has resulted in national level reforms across several Colombo Process states. Engagement with other migration related forums has been strengthened, including regular meetings with destination countries through the Abu Dhabi Dialogue and the incorporation of Colombo Process recommendations into the final text of the Global Compact for Safe, Orderly and Regular Migration to reflect the perspective of Asian labour-sending states.⁴⁰²

Notably, the Colombo Process Declaration of 2016 adopted the ‘promotion of equality for women migrant workers’ as an additional crosscutting theme, in order to incorporate a gender lens into the five main working group discussions. The objective of this thematic area is to strengthen the efforts of the Colombo Process member states in addressing the specific needs and vulnerabilities of women migrant workers, particularly those in the domestic work sector.⁴⁰³ Activities and initiatives in this field are overseen by UN Women, which drafted a standardised gender-responsive employment contract for women MDWs in 2016.

During the third Senior Officials Meeting of the 2015 Colombo Process, Mr G.S. Withanage, Secretary to the Ministry of Foreign Employment in Sri Lanka, commented that “Colombo Process countries had shown that being competitors for the same markets with competing national interests had not stood in the way of collective action.”⁴⁰⁴ Cooperation between sending and receiving states through regional consultative processes will perhaps help to offset fears associated with the consequences of ratifying the ICMW and C189. State-led regional dialogues represent a constructive supplement to the current management of international migration through formal international legal instruments, in order to advance policy coherence

⁴⁰² Sixth Ministerial Consultation on Overseas Employment and Contractual Labour for Countries of Origin in Asia (16 November 2018) Kathmandu, Nepal.

⁴⁰³ Above n 402.

⁴⁰⁴ Colombo Process “Colombo Process Meeting Concludes with Far Reaching Decisions Aimed at Ensuring Skilled and Safe Labour Migration from Asia” (6 November 2015) <www.colomboprocess.org>.

and concrete action on upholding migrant rights. The Colombo Process has regained its momentum as a transformative approach to confronting structural inequalities, assuming a specific role for Asian countries of origin in migration governance.

3.5 Conclusion

Ultimately, although processes of neoliberal globalisation and low-ratification rates threaten to undermine the rights of domestic workers comprised in international law, C189, the CEDAW and the ICMW remain crucial instruments that comprise human and labour rights deemed to be universally acceptable. They provide an umbrella under which advocacy groups and migrant workers in both countries can pressure their governments to deliver on their international obligations, and in the case of Sri Lanka, lobby for ratification. If ratified by the government, such instruments allow workers and advocacy groups to participate politically by monitoring and reporting on state compliance, which legitimises their demands for better working conditions and rights of women domestic workers at home and overseas.

Despite the fact that the Sri Lankan government has failed to ratify C189 and harmonise national legislation with the provisions of international conventions requiring formal compliance, it has nevertheless demonstrated an active role in regional consultative processes as a leader of the Colombo Process and Chair-in-Office of the Abu Dhabi Dialogue. This suggests a preference for voluntary non-binding forums that focus specifically on regional migration, as opposed to binding international conventions.

However, while the Philippine government is also actively participating in regional forums, it is equally effective at ratifying formal international treaties and negotiating bilateral labour agreements. This is likely a reflection of its more powerful position in the global labour market and greater demand for its educated domestic workers with superior market value. The more active and independent civil society in the Philippines has also heavily influenced the government's inclination to adopt national legislation to protect domestic workers, ratify international conventions, and intervene with receiving country officials to secure better working conditions for women

migrant workers.⁴⁰⁵ In contrast, the Sri Lankan government has failed to effectively engage with and involve civil society organisations in the design and implementation of migration policies,⁴⁰⁶ discussed further in the next chapter.

⁴⁰⁵ Ireland, above n 7, at 334.

⁴⁰⁶ Wickramasekara, above n 353, at 260.

Chapter Four

Domestic Legal Frameworks Governing Migrant Domestic Workers in the Philippines and Sri Lanka

This chapter moves from the international conventions to the domestic legal regimes of the Philippines and Sri Lanka, using a comparative approach to assess their performance of those obligations. The first section analyses the evolution of international labour migration in each state and how this developed into a permanent dependence on foreign employment.

The chapter then examines the events that steered both countries to adopt comprehensive legal frameworks to govern women migrant domestic workers. This analysis of the legal frameworks reveals contradictory policy priorities. Notably, both states claim that they do not promote overseas employment as a means to sustain economic growth and achieve national development. However, their actions suggest that they continue to prioritise the export of women domestic workers to overseas labour markets in order to accumulate remittances. This in practice undermines their obligations under international law to protect the rights of women MDWs.

The third section of the chapter analyses the institutional frameworks in both labour-sending states and how the regulations are implemented and monitored by government agencies in practice at each stage of the migration cycle (see Table 1). This analysis focuses on the three most relevant government agencies in the Philippines: the Philippine Overseas Employment Administration, the Overseas Workers Welfare Administration and the National Reintegration Center for Overseas Filipino Workers. I also examine the two key institutions in Sri Lanka: the Sri Lanka Bureau of Foreign Employment and the Ministry of Foreign Employment. The conclusion analyses similarities and differences between the two countries' approaches.

Table 1: The Philippines and Sri Lanka: Legal and Institutional Frameworks

Migration Process	The Philippines	Sri Lanka
Legislative and Policy Frameworks	Migrant Workers and Overseas Filipinos Act	Sri Lanka Bureau of Foreign Employment Act and The National Policy on Labour Migration
Pre-Departure: Institutions	The Philippine Overseas Employment Administration	Sri Lanka Bureau of Foreign Employment and the Sri Lanka Foreign Employment Agency
Employment Overseas: Institutions	The Overseas Workers Welfare Administration and the Philippine Overseas Labour Office	Sri Lanka Bureau of Foreign Employment and the Ministry of Foreign Employment
Reintegration: Institutions	The Overseas Workers Welfare Administration and the National Reintegration Center for Overseas Filipino Workers	Sri Lanka Bureau of Foreign Employment (Special unit on return and reintegration set up within the Bureau)

4.1 Case Study One: The Philippines

Labour emigration from the Philippines is a century-old phenomenon that can be traced back to the 1920s and the Spanish colonisation of the Philippines. Since then, there have been three notable waves of Filipino migration.

The first wave in the 1930s involved the flow of Filipino labour migrants, mostly male, to the US. As a colony of the US, the Philippines became a convenient source of labour since Filipinos were exempt from immigration restrictions. Rodriguez notes how institutional arrangements under the colonial labour system established by the Americans would ultimately serve as precursors to the Philippine governments’

reliance on labour export today.⁴⁰⁷ Filipino anti-colonialists' decade long-fight against the US during the Philippine-American war, the restructuring of Philippine society under US colonialism, along with labour demand in the US, produced the structural conditions for the large-scale emigration of 'low-skilled' agricultural and service workers from the Philippines to the US.⁴⁰⁸ To escape poverty, around 50,000 Filipino farmers left the Philippines to work on crop farms in Hawaii and on the West Coast of the US. By the end of the 1930s, there were 108,424 Filipinos in all fifty states working in jobs ranging from fruit packing to kitchen and hotel service.⁴⁰⁹ The role of labour recruiters in securing short-term contractual employment for Filipino workers under the American colonial administration is "likely to have normalised that form of employment which would be among the defining features of the institutionalised labour brokerage programme post-'independence'."⁴¹⁰

The second wave of Filipino migration occurred in the aftermath of World War II, which marked the end of US colonial rule in the Philippines, and therefore independence, in 1946.⁴¹¹ Aside from the traditional male agricultural workers, Filipino migrants were largely composed of professional workers including an increasing number of Filipina nurses influenced by training programmes first established under US colonial domination, as well as doctors and engineers who filled skill gaps in the US, Canada and Western European countries.⁴¹² In the 1950s and 1960s, the demand for Filipino non-professional contract workers also grew in some of the neighbouring Asian countries with barbers and musicians migrating to East Asian cities.

The most recent wave of Filipino migration emerged in the 1970s. On 21st September 1972, President Ferdinand Marcos signed Proclamation No. 1081 placing the Philippines under martial law and with it came political uncertainty, economic instability and human rights abuses contributing to a sudden exodus of Filipino workers.

⁴⁰⁷ Rodriguez, above n 87, at 1.

⁴⁰⁸ At 17.

⁴⁰⁹ Joaquin L. Gonzalez *Philippine Labour Migration: Critical Dimensions of Public Policy* (Singapore: Institute of Southeast Asia Studies, 1998) at 26-31.

⁴¹⁰ Rodriguez, above n 87, at 17.

⁴¹¹ Rodriguez, above n 87, at 10.

⁴¹² Gonzalez, above n 409, at 30.

A combination of ‘pull’ factors also stimulated migration, including the 1973 oil crisis resulting in a quadrupling of oil prices and in turn increased revenues and large infrastructure projects for many Gulf States.⁴¹³ West Asian countries, including Saudi Arabia, Bahrain, Kuwait and the United Arab Emirates, turned to the import of labour to address their labour shortages by employing mainly male Filipinos to work on oil platforms and construction sites.⁴¹⁴ Government officials in the Philippines were eager to take advantage of these demands. Marcos emphasised the goals of temporary labour migration by affirming that “overseas employment addresses two major factors: unemployment and balance of payments position. If these problems are met or at least partially solved by contract migration, we also expect an increase in national savings and investment levels.”⁴¹⁵

Shortly after in 1974, Marcos institutionalised the official policy of the Philippine government to engage in contractual or temporary overseas labour migration through the Philippine Labour Code, otherwise known as Presidential Decree 442. The programme began mainly as a temporary measure to boost foreign currency reserves and alleviate the country’s deficits by way of remittance generation, as well as to address the high unemployment problem by encouraging thousands of Filipinos to seek employment overseas.⁴¹⁶ The Labour Code mandated the establishment of three state agencies: the Overseas Employment Development Board, the National Seaman’s Board, and the Bureau of Employment Services, responsible for the development, promotion, regulation and implementation of the labour export programme.⁴¹⁷

However, the returns on overseas workers’ remittances could not fully alleviate the balance of payments crisis and the Marcos administration was forced to seek relief from the IMF and World Bank in the late 1970s. These institutions imposed strict structural adjustment reforms that favoured an economic liberalisation programme of export-led development detrimental to the Philippines’ local industries, as they primarily supported the economic interests of foreign investors and wealthy Filipino

⁴¹³ At 71.

⁴¹⁴ At 71.

⁴¹⁵ Presidential Speech (20 July 1982) as cited in Oishi, above n 47, at 63.

⁴¹⁶ Jorge V. Tigno “Emigration as a Silver Bullet and Public Policy in the Philippines” University of the Philippines.

⁴¹⁷ Oishi, above n 47, at 64.

elites.⁴¹⁸ As the institutionalisation of migrant labour became more ingrained, the dominant profile of overseas Filipino workers changed from males in both sea and land-based employment in the 1980s to women in service work. Traditionally depicted as docile and cheap, migrant women were relegated to menial, low-paying and gender-specific jobs, including precarious work in factories, entertainment and domestic work.⁴¹⁹

Marcos formally ended marital law on 17th January 1981, but it was not until 1986 when democracy was restored after Marcos was overthrown and forced into exile. James Tyner details how the martial law period was characterised by a significant economic transformation of the Philippines, as the country during this decade was more fully incorporated into the global economy.⁴²⁰ Economic policies were designed primarily to attract new private investment, as Philippine development policy became increasingly oriented towards export production and liberalisation of imports.⁴²¹

Despite the government's export-oriented programmes providing a form of employment for some people, the structural adjustment reforms ultimately resulted in increasing unemployment and decreasing wages for most, as well as the depletion of state care resources.⁴²² Coupled with unstable labour markets, the inadequacies of public assistance pushed families to send an able bodied member outside the country to meet labour demands in the global North, where low-wage foreign employment would offer greater stability than many jobs in the Philippines.⁴²³ Parreñas contends that more than providing welfare for their nationals, obtaining the IMF's good housekeeping seal of approval, which is a prerequisite for obtaining more loans from foreign lending agencies, has been the Philippine government's highest priority.⁴²⁴

By 1983, foreign debt reached \$42.8 billion. Marcos mandated that overseas workers must remit 50% or more of their wages to their families in the Philippines through the

⁴¹⁸ Rodriguez, above n 87, at 12.

⁴¹⁹ Cheryll Alipio "Lives Lived in 'Someone Else's Hands': Precarity and Profit-making of Migrants and Left-behind Children in the Philippines" (2019) 7 *Trans-Regional and National Studies of Southeast Asia* 135 at 142.

⁴²⁰ Tyner, above n 133, at 29.

⁴²¹ At 29.

⁴²² Rodriguez, above n 87, at 13.

⁴²³ Parreñas, above n 69, at 50.

⁴²⁴ Rodriguez, above n 87, at 50.

official Philippine banking system with Executive Order 857, in order to increase the foreign exchange earnings required for debt servicing.⁴²⁵ Workers were subjected to punitive measures if they failed to remit their earnings, such as non-renewal of passports and denial of eligibility for overseas work. Such coercive measures to control migrant workers' earnings embody the Philippine government's commodification of migrant labour as a way of addressing its foreign debt.

In that same year, the Philippine government consolidated its three migration agencies to form the Philippine Overseas Employment Administration. This reorganisation, according to Maruja Asis, "signified an intensified effort on behalf of the Philippine government to capitalise on the global economy and to use overseas employment as a permanent national development strategy."⁴²⁶ Ultimately, the Philippine state opportunistically took advantage of the historical legacies of international migration under US colonial rule on the one hand, and new forms of labour demand globally on the other, in order to profit from the export of its citizens.⁴²⁷ Thus, neoliberalism intensified and expanded the state's prior reliance on overseas employment, resulting in a remittance economy.

Although Filipino men and women shared and continue to share the displacements of structural adjustment policies, gender aggravates the impacts on women. The labour force participation rate of women in the Philippines reached a new low in 2018, dropping to 46% compared to 75% for men.⁴²⁸ Their participation is much lower than men's due to gendered social norms that result in greater unpaid care burdens, as well as women's limited access to resources including education, training, credit and financial services.⁴²⁹ The ILO reports that women as "providers of their families" are responsible for 84% of the total household time allocated to childcare, which

⁴²⁵ Rodriguez, above n 87, at 50.

⁴²⁶ Maruja M.B Asis "The Overseas Employment Program Policy" in Graziano Battistella and Anthony Paganoni (eds) *Philippine Labour Migration: Impact and Policy* (Scalabrini Migration Center, Quezon City, Philippines, 1992) cited in James A. Tyner *Made in the Philippines: Gendered Discourses and the Making of Migrants* (London: Routledge Curzon, 2004) at 36.

⁴²⁷ Rodriguez, above n 87, at xxvi.

⁴²⁸ Government of the Philippines National Economic and Development Authority *Determinants of Female Labor Force Participation in the Philippines* (2019) at 2.

⁴²⁹ International Labour Organization and Asian Development Bank "Gender Equality in the Labor Market in the Philippines" (2013) Asian Development Bank: The Philippines, at 2.

constrains their participation in paid work.⁴³⁰ The poor state of women's labour market opportunities in the Philippines suggests that the depletion of state care resources by austerity measures hurts women much more so than men, raising the likelihood of women's migration as a 'survival strategy' pursued largely out of desperation.⁴³¹

Where women's employment does occur in the Philippines it is mainly concentrated in the agricultural sector. However, while their economic opportunities as farmers/forestry workers are constrained by their inability to purchase land, the work is also seasonal and characterised by low wages and poor working conditions.⁴³² The wholesale and retail trade and services sector also accounts for a large share of women's employment, typically comprising of self-employed workers selling food and household goods, as well as the growing domestic work sector offering particularly low pay and a lack of legal protection.⁴³³

Filipino workers are now migrating in different gendered flows. Men are predominantly employed as production plant workers, equipment operators and 'related labourers' in West Asia.⁴³⁴ Since 1995, Filipina migrants have primarily performed service work, such as domestic work, cleaning and manufacturing labour, largely in West and East Asian countries. Women have long dominated temporary labour migration from the Philippines. Data from the Philippine Overseas Employment Administration reveals that there have always been more female new-hires than males since 1993, with the concentration of females reaching a high of 74% in 2004.⁴³⁵

While it is women of a relatively low socio-economic class who migrate for domestic work from the Philippines, Parreñas employs the 'international division of reproductive labour' to illustrate how women who perform reproductive labour for

⁴³⁰ At 11

⁴³¹ Parreñas, above n 69, at 51.

⁴³² At 18

⁴³³ At 22

⁴³⁴ Alipio, above n 419, at 142.

⁴³⁵ Aniceto Orbeta Jr and Michael Abrigo "Philippine International Labor Migration in the Past 30 years: Trends and Prospects" (November 2009) Philippine Institute for Development Studies, Discussion Paper Series No 2009-33.

class-privileged women in richer countries are often themselves employers of domestic workers from an even lower social class back in the Philippines who are unable to afford the high costs of foreign employment.⁴³⁶ Filipina MDWs tend to be older with more resources, better educated and belong to a low but more comfortable class strata than local domestic workers, most of whom come from poor families in the provinces. Their higher class enables them to work outside the country to earn a better wage and depend on the unpaid, or low paid, domestic labour of female relatives or less privileged women who replace them.⁴³⁷ Parreñas notes how this hierarchical relationship “forms from the unequal development of industrialised and developing countries in transnational capitalism, class differences in the Philippines, and the relegation of reproductive labour to women.”⁴³⁸

4.1.1 Legal Framework

The year 1995 marked a significant turning point in the development of the Philippine migratory framework with the enactment of Republic Act 8042 (RA 8042), otherwise known as the Migrant Workers and Overseas Filipinos Act and often hailed by the Philippine state as the ‘Magna Carta of Overseas Employment’. The Republic Act 8042 is the most comprehensive law concerning the protection of Filipino migrant workers against rights violations throughout the migration cycle. While the Philippine Congress later passed the Domestic Workers Act or Batas Kasambahay in 2013, this law only applies to domestic workers employed in the Philippines. Because there is no law currently enforced in the Philippines that exclusively governs domestic workers migrating overseas, this thesis assesses RA 8042, as amended by the Republic Act 10022, against the standard of rights protection for women MDWs established under international law.

A Knee-Jerk Policy Response to Increasing Exploitation

Republic Act 8042 was enacted as a swift legislative response to the highly-publicised trials of two Filipina domestic workers. Their plight exposed the inadequacy of the

⁴³⁶ Parreñas, above n 29, at 561.

⁴³⁷ Sayres, above n 55, at 10.

⁴³⁸ Parreñas, above n 29, at 571.

Philippine government in protecting the rights of women domestic workers abroad and threatened the very existence of the country's overseas employment policy.⁴³⁹

The first case centred on 42-year-old Flor Contemplacion employed in Singapore. In 1991, Contemplacion was charged with the double murder of another Filipina domestic worker, Delia Maga, and the four-year-old Singaporean son of Maga's employer. After pleading guilty, Contemplacion was executed in 1995, although rumours surfaced that she had been framed and tortured into accepting blame for both crimes.⁴⁴⁰ The Filipino public depicted Contemplacion as a martyr and a national symbol of their economic struggle and participation in overseas employment as a pathway out of poverty for the sake of their children.⁴⁴¹ Contemplacion's martyrdom inspired mass demonstrations along with widespread criticism of Philippine officials, particularly the Philippine ambassador to Singapore.⁴⁴² Various human rights, feminist and migrant worker groups "condemned the Philippine state's failure to safeguard the rights of workers deemed crucial to the nation's economic development and questioned the humanity of its state-sponsored policy of exporting labour."⁴⁴³

Upon the arrival of Contemplacion's body in the Philippines in 1995, then-President Fidel Ramos described her as a "heroine of the Philippine economy" and "a vital export commodity (for) the Philippines' own economic strategy."⁴⁴⁴ This follows a state practice first heralded by President Cory Aquino in 1988 of labelling overseas Filipino workers as '*mga bagong bayani*' (modern-day heroes), for sustaining the national economy with their remittances.⁴⁴⁵ Such a statement conflicts with the enactment of RA 8042 in the same year, which seeks to protect the rights and welfare of women MDWs while claiming that "the State does not promote overseas

⁴³⁹ Tyner, above n 133, at 95.

⁴⁴⁰ James A. Tyner "Migrant Labour and the Politics of Scale: Gendering the Philippine State" (2000) 41 *Asia Pacific Viewpoint* 131 at 142.

⁴⁴¹ Anna Romina Guevarra "Managing 'Vulnerabilities' and 'Empowering' Migrant Filipina Workers: The Philippines' Overseas Employment Program" (2006) 12 *Social Identities* 523 at 524.

⁴⁴² James A. Tyner *The Philippines: Mobilities, Identities and Globalization* (New York: Routledge, 2009) 68.

⁴⁴³ Alipio, above n 419, at 140.

⁴⁴⁴ Ninotchka Rosca "The Philippines Shameful Export" *The Nation* (online ed, New York, 17 April 1995) <www.questia.com>.

⁴⁴⁵ Guevarra, above n 441, at 524.

employment as a means to sustain economic growth and achieve national development.”⁴⁴⁶

The second case involving Sarah Balabagan occurred just months after the execution of Contemplacion. Balabagan was a 16-year-old Filipina domestic worker who entered the United Arab Emirates with the assistance of illegal recruiters. The recruiters falsified her passport and employment documents to bypass regulations, representing her as a 28-year-old woman. In July 1994, Balabagan killed her employer in self-defence after he allegedly attacked and raped her.⁴⁴⁷ She was found guilty of manslaughter and sentenced to 7 years imprisonment. However, in September 1995 the sentence was overturned and Balabagan was resentenced to death by firing squad. The potential execution of another Filipina domestic worker initiated further public protests throughout the Philippines, causing the President of the United Arab Emirates to personally intervene.⁴⁴⁸ As a result of his negotiations, Balabagan was resentenced again to 100 cane lashes and a 12-month imprisonment term (of which she served approximately 8 months).

The protests provided an important mobilisation tool for advocacy groups to attract media attention and pressure the Philippine government into better protecting overseas Filipino workers against abusive employers and unscrupulous recruiters.⁴⁴⁹ In addition, opposition parties, church associations, women’s groups, labour unions and NGOs capitalised on the Ramos administration’s political vulnerability during an election campaign period.⁴⁵⁰ Migrant worker organisations, such as the Philippine Migrant Rights Watch and Migrante International, championed protective legislation and demanded the state to assume more responsibility for women MDWs.⁴⁵¹

RA 8042: An Act of Contradictions

Subsequently, Ramos signed RA 8042 on 7th June 1995, which put forth a rigorous programme of welfare protection for overseas Filipino workers throughout the

⁴⁴⁶ Republic Act 8042, s 2(c).

⁴⁴⁷ Oishi, n 47, at 67.

⁴⁴⁸ Tyner, above n 442, at 68.

⁴⁴⁹ Guevarra, above n 135, at 32.

⁴⁵⁰ Gonzalez, above n 409, at 6.

⁴⁵¹ Ireland, above n 7, at 328.

migration cycle. Underlining the government's conflicting priorities, the title states that it is "an Act to institute policies of overseas employment and establish a higher standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress."

On its face, RA 8042 is informed by gender and often focuses on the protection of women migrant workers. The Act refers to women migrant workers and their "particular vulnerabilities", declaring that "the State shall apply gender-sensitive criteria in the formulation and implementation of policies and programs affecting migrant workers and the composition of bodies tasked for the welfare of migrant workers."⁴⁵² As Anna Guevarra notes, the Philippine government was now in a position to appease its public and at the same time continue to profit from the deployment of women into 'vulnerable' work occupations.⁴⁵³

Another key feature of the Act is that it is highly rights-based in principle. The Republic Act 8042 provides that the Philippines can only deploy its workers to "countries where the rights of Filipino migrant workers are protected." The government recognises any of the following as a guarantee on the part of the labour-receiving country for the protection of the rights of overseas Filipino workers: the receiving state has existing labour and social laws protecting the rights of migrant workers; it is a signatory to multilateral conventions, declarations or resolutions relating to the protection of migrant workers; and it has concluded a bilateral agreement or arrangement with the government protecting the rights of overseas Filipino workers.⁴⁵⁴

Republic Act 8042 states three main policy ideas. First, "that the State does not promote overseas employment as a means to sustain economic growth and achieve national development."⁴⁵⁵ Second, the possession of skills is the best protection for migrant workers and therefore the government will only deploy '*skilled*' workers.⁴⁵⁶ Third, working overseas is a matter to be left to the negotiation between the worker

⁴⁵² Republic Act 8042, s 2(d).

⁴⁵³ Guevarra, above n 441, at 530.

⁴⁵⁴ Republic Act 8042, ss 4(a), (b) and (c).

⁴⁵⁵ At s 2(c).

⁴⁵⁶ At s 2(g).

and the employer.⁴⁵⁷ However, inconsistent implementation of such policies highlights the Philippine government's prioritisation of labour export and a market-driven migration system.

First, the provision in section 2(c) of the Act that “the State does not promote overseas employment to sustain economic growth and achieve national development”, was undermined in 2009 when President Gloria Macapagal-Arroyo set a target for annual deployment. Alongside this target, the President issued Administrative Order 247, which instructed the Philippine Overseas Employment Administration (POEA) to “execute a paradigm shift by refocusing its functions from regulation to full-blast market-development efforts”⁴⁵⁸ and “to increase the countries currently hosting Filipino workers by breaking through the 200-country barrier.”⁴⁵⁹ Tyner notes the irony that the death of a female domestic worker and the quest for worker welfare “provided the impetus, and justification, for the Philippine state to foster an environment that would lead to a greater globalised presence of its labour force.”⁴⁶⁰

The second policy of only deploying ‘skilled’ Filipino workers was also disregarded, as occupations considered ‘low-skilled’ – such as those in the domestic work sector – continue to be among the top occupations for overseas Filipino workers.⁴⁶¹ It is likely that one of the reasons for the high proportion of ‘low-skilled’ workers overseas is that there is a shortage of ‘skilled’ jobs and decent employment opportunities in the Philippines, therefore educated workers are often obliged to pursue ‘low-skilled’ work abroad.⁴⁶² Many women working as domestic workers overseas have college degrees and professional work experience as teachers and nurses. This results in the ‘brain drain’ from the Philippines as their educational training is wasted or underutilised in labour-receiving countries.⁴⁶³

⁴⁵⁷ At s 29.

⁴⁵⁸ Administrative Order No 247, s 1 (4 December 2008).

⁴⁵⁹ At s 5.

⁴⁶⁰ Tyner, above n 442, at 72.

⁴⁶¹ Scalabrini Migration Center and the International Organization for Migration *Country Migration Report: The Philippines* (2013) at 203.

⁴⁶² Mi Zhou “Fair Share? International Recruitment in the Philippines” (2017) International Labour Organization: Geneva, Working Paper No 4.

⁴⁶³ Lindio-McGovern, above n 221, at 24.

The third policy concerning the phase-out of the regulatory functions of the POEA was subsequently repealed by the Republic Act 9422 in 2007. The Republic Act 9422 amended RA 8042 by strengthening the regulatory functions of the POEA and repealing the provision on the deregulation of recruitment activities. Section 1 of the Republic Act 9422 states that the POEA shall “formulate and implement a system for promoting and monitoring the overseas employment of Filipino workers”, highlighting the vested interest of the government in advancing its labour export programme.

Such policy ideas in RA 8042 highlight the contradictory priorities evident in the Philippine overseas employment programme: the need to promote labour export and compete in the international labour market, while also protecting the rights of women MDWs in compliance with their international obligations. The Philippine government’s failure to implement legislative provisions in practice, particularly regarding their assurance to not promote overseas employment to sustain economic growth, indicates that the state is in fact prioritising the export of women domestic workers to overseas markets above the protection of their rights.

This prioritisation of an export-oriented economy is also evident in the way that the government continues to market domestic workers as part of the national development policy. Domestic labour provides, through remittances, the largest source of foreign currency in the Philippines.⁴⁶⁴ The remittances generated from overseas employment have become the hallmark of Philippine economic development.⁴⁶⁵ The Philippine government’s enthusiasm for a gender-focused legislative framework and labour export programme is influenced by the conviction that women “can be depended on to remit a larger proportion of their income than men.”⁴⁶⁶ Rosewarne claims that “this behaviour is attributed to gender-ascribed norms regarding women’s relatively greater commitment to meeting familial responsibilities.”⁴⁶⁷

⁴⁶⁴ Diane Sabenacio Nititham “Migration as Cultural Capital: The On going Dependence on Overseas Filipino Workers” (2011) 48 Malaysian Journal of Economic Studies 185 at 189.

⁴⁶⁵ Zhou, above n 462, at 23.

⁴⁶⁶ Rosewarne, above n 118, at 85.

⁴⁶⁷ At 86.

The Philippine government's extraordinary reliance upon remittances has increased since the 1990s. Remittances from overseas Filipino workers reached a new record high of \$3.2 billion in December 2018. This is higher by 3.6% compared to the level recorded in the same month of the previous year, accounting for 9.7% of gross domestic product in 2018.⁴⁶⁸

A recent example of remittance dependence in the Philippines is the government's creation of an 'Overseas Filipino Bank'.⁴⁶⁹ On 26th September 2017 President Duterte signed Executive Order No. 44, which states that "there is a need to establish a policy bank dedicated to provide financial products and services tailored to the requirements of overseas Filipinos, and focused on delivering efficient foreign remittance services." Migrante International assert that the Bank enables a more "fast-tracked concentrated system of profiting from migrant workers' incomes earned abroad."⁴⁷⁰ Although it is not compulsory for workers to remit through the Overseas Filipino Bank, the government-owned bank further institutionalises the Philippine labour export programme and reliance on migrant worker remittances.

I share the view of Audrey Wozniak that the dependence placed on remittances by the Philippine government eliminates any motivation to industrialise and modernise domestic infrastructure, such as updating agricultural technologies, creating domestic jobs, and addressing government corruption.⁴⁷¹ Therefore, remittances fail to provide the foundations for productive long-term development and economic growth in the Philippines. In turn, a conflicting cycle results whereby uneven development forces domestic workers into seeking employment overseas, only for their remittances to maintain the model of development that they themselves are excluded from.⁴⁷² In similar vein, Tyner accuses the Philippine government of sacrificing the well being of women migrant workers abroad, in order to maximise remittances and advance capital

⁴⁶⁸ Daxim L. Lucas "2018 Remittances Hit All-Time-High" *Business Inquirer* (online ed, The Philippines, 16 February 2019) <www.business.inquirer.net>.

⁴⁶⁹ Through Executive Order No 44, President Duterte authorised the transfer of shares of the Philippine Postal Savings Bank to the Lank Bank of the Philippines for its subsequent conversion into the Overseas Filipino Bank.

⁴⁷⁰ Migrante International "OFW Bank Further Institutionalizes Bankrupt Labour Export Program" (10 October 2017) <www.migranteinternational.org>.

⁴⁷¹ Audrey Wozniak "Mutual Empowerment? Examining the Power Relationship Between Overseas Filipino Workers and the Motherland" (2015) *Georgetown Journal of Asian Affairs* 98 at 113.

⁴⁷² Matt Withers "Remittance Economy: Migration Under-Development in Sri Lanka" (PhD Thesis, University of Sydney, 2017) at 6.

accumulation, while upholding a strong trade relationship with receiving states.⁴⁷³ The provisions enforced by the government in RA 8042 thus correspond with realist political economy theory and Weiner's assertion that global migration is largely influenced by the actions and policies of states, as sending countries have strong economic incentives, in the form of remittances, to promote migration.⁴⁷⁴

4.1.2 Institutional Framework

The rise of the Philippine government's market-driven approach to migration is also reflected in the creation and strengthening of institutions to allow for the systematic movement of workers, which deepens the government's engrained reliance upon an exported labour force.⁴⁷⁵ It has been argued that the Philippine government "actively structures, facilitates, and sustains a globalised service economy" by regulating and transporting migrant workers overseas.⁴⁷⁶ It does this primarily through three state agencies organised under the Department of Labour and Employment: the Philippine Overseas Employment Administration, the Overseas Workers Welfare Administration and the National Reintegration Center for Overseas Filipinos.

The Philippine Overseas Employment Administration (POEA)

The main government agency for migration, the POEA, is an industry regulator for overseas employment and chiefly responsible under RA 8042 for supervising all aspects of recruitment activity by private recruitment agencies.⁴⁷⁷ It does so by implementing minimum labour standards, accreditation, registration and approval of manpower requests, and the processing of employment contracts.⁴⁷⁸

In coordination with other government agencies, the POEA explicitly seeks to globalise its labour force by conducting various marketing strategies. These include

⁴⁷³ Tyner, above n 442, at 60.

⁴⁷⁴ Talani, above n 102, at 239.

⁴⁷⁵ Wozniak, above n 471, at 99.

⁴⁷⁶ Kimberly A. Chang and Lily H.M Ling "Globalization and its Intimate Other: Filipina Domestic Workers in Hong Kong" in Marianne H. Marchand and Anne Sisson Runyan (eds) *Gender and Global Restructuring: Sightings, Sites and Resistances* (New York: Routledge, 2000) at 35.

⁴⁷⁷ Republic Act 8042, s 23, as amended by Republic Act 10022, s 14.

⁴⁷⁸ POEA Revised Rules and Regulations: Governing the Recruitment and Employment of Land based Overseas Filipino Workers (2016).

global marketing missions, promotional materials, focused training programmes and participation in the drafting of bilateral agreements to promote the overseas employment of Filipino workers and, according to one commentator, “tap into the shifting sites of capital accumulation.”⁴⁷⁹ The POEA’s mandate centres on the now-familiar competing two functions: promotion of the overseas employment of Filipino migrant workers and the protection of migrant workers’ rights for overseas employment to fair and equitable recruitment practices.

In February 2016, the POEA revised its Rules and Regulations governing the recruitment and employment of overseas Filipino workers.⁴⁸⁰ With regard to women MDWs, three particular regulations were implemented. First, section 51(a) states that although recruitment agencies may still charge placement fees equivalent to one-month basic salary to all other Filipino migrant workers, domestic workers can no longer be charged placement fees.

Second, section 118 outlines the documentary requirements to be followed by recruitment agencies when processing domestic workers. These requirements include an individual verified employment contract, certificates of participation in the Pre-Employment Orientation Seminar and the Comprehensive Pre-Departure Education Programme for MDWs. Most workers must also be awarded a skill certification by the Technical Education and Skill Development Authority, which in the case of domestic workers is a National Certificate for Household Service Workers.

Third, section 119 provides that the minimum deployment age of a female domestic worker is 23 years of age (compared to 18 years of age for all other types of workers), and the minimum salary for MDWs shall be US\$400 per month. In chapters five and six of this thesis I show that the Rules governing MDWs are not being implemented in practice by the POEA, with recruitment agencies often bypassing regulations and charging domestic workers excessive placement fees.

The Overseas Workers Welfare Administration (OWWA)

⁴⁷⁹ Tyner, above n 442, at 60.

⁴⁸⁰ POEA Revised Rules and Regulations (2016), above n 478.

The second state agency under the Department of Labour and Employment is the OWWA established in 1977. The OWWA is the main agency tasked with the promotion of the welfare and interests of migrant workers and their families. It offers services including insurance and health care, education and training, family welfare and social services, legal assistance, remittance services and on-site services for workers overseas.⁴⁸¹ Membership of the OWWA is mandatory for all migrant workers upon signing an employment contract with the POEA. Membership continues for a maximum of two years until the termination of their contract, after which the membership has to be renewed. The US\$25 membership fee is chargeable to the hiring employer for each departing documented contract worker. This in turn funds the OWWA's services and programmes.⁴⁸²

In terms of education and training, members of the OWWA planning to work as domestic workers overseas are required to attend the Comprehensive Pre-Departure Education Programme, examined further in chapter five. The OWWA seeks to benefit and promote the welfare of migrant workers' families left behind in the Philippines. Therefore, it offers educational assistance to family members/dependents of active members including the Education for Development Scholarship Programme. The OWWA's Reintegration Programme also includes social and family counselling, although as discussed in chapter seven, the majority of the initiatives for reintegration focus on economic and business services to the detriment of psychosocial support.

The OWWA also offers a Workers Welfare Assistance Programme consisting of on-site services in host countries by the Philippine Overseas Labour Officials. Services include psychosocial counselling, mediation/conciliation with the employer, airport assistance, outreach missions and legal assistance to migrant workers who wish to pursue a labour or welfare case against their employer in the host country.⁴⁸³ The in-country assistance includes the Repatriation Assistance Programme, which provides temporary shelter at the Administration's Halfway House in the Philippines, transportation allowance back to their province and stress debriefing. All Filipino

⁴⁸¹ Aniceto Orbeta, Michael Abrigo and Michael Cabalfin "Institutions Serving Philippine International Labor Migrants" (November 2009) Philippine Institute for Development Studies at 11.

⁴⁸² POEA Revised Rules and Regulations (2016), above n 478, s 129.

⁴⁸³ Overseas Workers Welfare Administration (OWWA) "Programs and Services" <www.owwa.gov.ph>.

migrant workers, regardless of their membership with the Administration, can avail of this programme.

The National Reintegration Center for Overseas Filipino Workers

The National Reintegration Center, established in 2007 through the issuance of the Department Order 79-07 and further institutionalised through RA 10022, is the most recent addition to the institutions serving migrant workers under the Department of Labour and Employment. The Reintegration Center coordinates with the OWWA and various non-governmental agencies to provide mechanisms to returning Filipino migrant workers for their productive reintegration into the mainstream of Philippine society.⁴⁸⁴

The mission of the Center is to “enable overseas Filipino workers and their families to work and live with an entrepreneurial mind-set”, primarily by “empowering them to plan for investment, business or local employment upon their return, while responding to the reintegration needs of displaced and distressed migrant workers.”⁴⁸⁵ However, the majority of the programmes and services provided by the Center are business focused. For instance, both the Small Business Management Training and Financial Awareness Seminar and the Balik Pinay! Balik Hanapbuhay! (Special Programme for Returning Women Migrant Workers) intend to bring about improved socio-economic wellbeing of women returnees, discussed further in chapter seven.

According to Lee’s tripartite typology for theorising sending state interventions, the actions of the Philippine state are distinctive because it uses all three types of competition-supporting interventions in concert. The Philippine government employs directing regimes to establish migration channels into new markets and promote Filipino workers within those markets. The POEA conducts yearly marketing missions and quickly responds to changes in the economics and politics of receiving regions that might affect labour demand.⁴⁸⁶ Lee posits that the Philippine government not only engages in negotiations with receiving country governments, but it is

⁴⁸⁴ National Reintegration Center for Overseas Filipino Workers “Mission and Vision” <www.nrcodole.gov.ph>.

⁴⁸⁵ Above n 484.

⁴⁸⁶ Lee, above n 32, at 1465.

“proactive and focuses on initiating new and potential migration relationships as much as on reinforcing existing relationships.”⁴⁸⁷ In addition, the POEA’s regulation and coordination of recruitment agencies, imposition of minimum requirements for employment contracts, and provision of documentation for potential migrants corresponds with Lee’s facilitating regimes. Through the “promotion of continued national identification and return migration and investment”⁴⁸⁸, the OWWA and National Reintegration Center offer programmes that can be categorised as accommodating regimes.

4.2 Case Study Two: Sri Lanka

International labour migration from Sri Lanka began much later than that from the Philippines, as did state attempts to regulate it. The Sri Lanka Freedom Party, in power from 1956 to 1977, advocated a closed-door economic policy post-independence committed to improving socio-economic equality through nationalism, protectionism and import-substitution within industry and, later, agriculture. While other Asian nations were starting to send ‘cheap’ migrant labour overseas in the early 1970s, the Sri Lankan government was more concerned with addressing its economic woes without recourse to external solutions, placing heavy restrictions on temporary labour migration. The frailties of the closed economy model were thrown into stark relief when in 1973 the global oil crisis provoked a sharp increase in the price of Sri Lanka’s main imports – petroleum and related products – relative to its small stream of predominantly agricultural exports.⁴⁸⁹

The year 1977 was a pivotal turning point in Sri Lanka’s social and economic history. The government of Sirimavo Bandaranaike was ousted in a landslide victory to the United National Party headed by J.R Jayawardene, promising neoliberal reforms and an economic liberalisation programme as a panacea for the economic crises of the closed economy period.⁴⁹⁰ Jayawardene oversaw the implementation of free-market policies that rapidly deregulated and privatised the Sri Lankan economy, including

⁴⁸⁷ At 1465.

⁴⁸⁸ At 1459.

⁴⁸⁹ Withers, above n 96, at 35.

⁴⁹⁰ At 41.

public healthcare and education. The relaxation of migration policies and exchange rate restrictions and the establishment of free trade zones revamped the country's economy and its integration within the global capitalist system.⁴⁹¹

These reforms and the switch from import substitution to export production led to drastic socio-economic changes that set the groundwork for rapid mobility of labour migration, which has continued unabated ever since.⁴⁹² Consistent with the movement of overseas Filipino workers, increasingly large numbers of 'low-skilled' Sri Lankan migrant workers were pulled in by West Asia's 'oil boom' in the late 1970s and early 1980s to meet burgeoning demand for cheap labour.⁴⁹³ Even after employment opportunities in Singapore, Malaysia, Italy and Hong Kong arose in the late 1980s, the Gulf States continued to employ roughly three-quarters of migrants from Sri Lanka.

Though the liberalisation programme was successful in stimulating short-term growth, government expenditures were largely financed by international loans, developmental aid and foreign exchange receipts earned from remittances.⁴⁹⁴ By 1982, government debt had tripled and debt servicing took up a growing portion of government revenue, precipitating heavy cutbacks to developmental and welfare projects.⁴⁹⁵ The new macroeconomic tensions of Sri Lankan neoliberalism produced and sustained a countrywide recourse to international migration as a permanent livelihood strategy for poorer households with 'low-skilled' workers. Temporary migration could bring in earnings much greater than could be expected at home, particularly in light of the significant risk of unemployment and limited access to local decent work in Sri Lanka.⁴⁹⁶

From the early 1980s the government of Sri Lanka followed the Philippines' development model to promote women working overseas, with a labour export programme concentrated principally on the recruitment of women for employment as

⁴⁹¹ Ireland, above n 7, at 330.

⁴⁹² At 330.

⁴⁹³ Ireland, above n 7, at 330.

⁴⁹⁴ Withers, above n 96, at 36.

⁴⁹⁵ At 37.

⁴⁹⁶ Dhananjayan Sriskandarajah *The Migration-Development Nexus: Sri Lanka Case Study* (2003) International Organization for Migration: Geneva at 266.

domestic workers.⁴⁹⁷ Gamburd provides that in 1981, 52% of Sri Lankans working abroad were women and by 1994, women made up 79% of overseas migrants.⁴⁹⁸ There was growing demand for domestic workers in West Asia, particularly in light of the bans on female migration imposed by India, Pakistan and Bangladesh in the 1980s and 90s. Thus, Sri Lankan women, frustrated by the lack of local employment opportunities and decline of rural livelihoods under neoliberal patterns of accumulation, were predisposed to take up these positions.⁴⁹⁹

Male labour migrants from the same period were principally low-waged workers temporarily employed as construction labourers on projects in the Gulf. Despite women migrants remaining dominant until 2007, the total number of women in *regular* migrant labour flows has gradually decreased since the mid-1990s. This is likely a result of sustained demand for male construction workers in West Asia, as well as various regulatory measures implemented by the government to reduce and restrict ‘low-skilled’ female migration through the Family Background Report.⁵⁰⁰ The Report raised the minimum age requirement for women domestic workers according to the destination country, and imposed a ban on the migration of women with children under the age of five years where foreign employment would impair the performance of care activities.⁵⁰¹ However, I examine in chapter five how the restrictions have caused many women from households that depend on foreign employment as a ‘survival strategy’ to migrate through *irregular* channels.

The sense of female domesticity cemented in colonial times is largely responsible for women having a significantly higher unemployment rate than men within Sri Lanka. The labour force participation rate of women sat at 36.6% as of 2016, less than half the rate of men.⁵⁰² Though women tend to be as well educated as men, owing to free education policies, and acquire skills applicable to paid work, they are encumbered by stereotyped gender roles that prevent these skills from translating into extensive or

⁴⁹⁷ Stuart Rosewarne “Temporary International Labour Migration and Development in South and Southeast Asia” (2012) 18 *Feminist Economics* 63 at 68.

⁴⁹⁸ Michele Ruth Gamburd *The Kitchen Spoon’s Handle: Transnationalism and Sri Lanka’s Migrant Housemaids* (Cornell University Press, 2000) at 35.

⁴⁹⁹ Withers, above n 96, at 42.

⁵⁰⁰ Sri Lanka Ministry of Foreign Employment *Annual Performance Report* (2015) xi.

⁵⁰¹ Discussed further in chapter five, section 5.2.2.

⁵⁰² Department of Census and Statistics “Sri Lanka Labour Force Survey: Annual Report (2017) Colombo: Department of Census and Statistics

diverse labour force participation in high-growth and professional industries.⁵⁰³ Patriarchal gender norms are reinforced by inflexible working arrangements and workplace hiring practices. For instance, Sri Lankan law governing maternity benefits makes employers bear its entire cost, encouraging them to discriminate against hiring women.⁵⁰⁴

Despite women's labour force participation in Sri Lanka remaining low, they constitute the majority of the workforce in Sri Lanka's key export-earning sectors: indentured to plantations, exploited in factories as garment workers, or without rights as domestic workers in private homes.⁵⁰⁵ Comparable to women in the Philippines, their participation in paid work has become a source of social tension, testing the rigidity of traditional gender norms as "women are caught between material pressures to enter paid employment at the lowest tiers of the economy and social pressures to fulfil care work."⁵⁰⁶

The conditions and commonality of women's temporary labour migration also cuts asymmetrically across Sri Lanka's ethnic and class divisions. Throughout the first three decades of migration to West Asia, the majority of women domestic workers were typically of poor Sinhala-Buddhist or Muslim background. More recently, Sri Lankan Tamils have also begun migrating for foreign employment in growing numbers having previously been excluded from labour migration due to the effects of the civil war, as formal recruitment channels did not extend into contested territories in the north.⁵⁰⁷

In contrast, Sri Lanka's Indian Tamil population is under-represented in temporary labour migration, reflecting an enduring convergence of socio-cultural discrimination, productive subordination and an insufficient means to pursue foreign employment as an alternative to indentured plantation labour or internal domestic work."⁵⁰⁸ The disparity between their opportunities for internal and international domestic work is a

⁵⁰³ Withers, above n 202, at 329.

⁵⁰⁴ International Labour Organization *Factors Affecting Women's Labour Force Participation in Sri Lanka* (2016) ILO Country Office for Sri Lanka and the Maldives at 16.

⁵⁰⁵ Withers and Piper, above n 123, at 593.

⁵⁰⁶ At 593

⁵⁰⁷ Withers, above n 96, at 42.

⁵⁰⁸ Withers and Piper, above n 123, at 594.

product of the stigma attached to local domestic work, which is seen to infer subordinate social standing, unlike the sense of heightened social status attributed with foreign domestic work.⁵⁰⁹

The situation is similar in the Philippines, with overseas domestic work granting an enhanced social status to women who tend to be better educated and originate from more urban backgrounds. In contrast, stigmatised local domestic workers tend to be less-educated women from the poorest southern regions of the Visayas and Mindanao working in Luzon or Manila, and thus have different ethnic backgrounds, skin tones, local languages, and in some cases, religious beliefs than their employers.⁵¹⁰

4.2.1 Legal Framework

The Sri Lanka Bureau of Foreign Employment Act No. 21 of 1985 was the first major legislative recognition of labour migration.⁵¹¹ The Act was passed in response to escalating abuse and rights violations against women migrant workers, following increasing levels of migration as domestic workers to countries in West Asia. The Act is the primary piece of legislation that applies to Sri Lankan workers migrating for foreign employment, with the key purpose of establishing the principal regulatory body for overseas employment: the Sri Lanka Bureau of Foreign Employment (SLBFE). Comparable with the POEA, the conflicting objectives for the Bureau are to “promote and develop employment opportunities outside Sri Lanka”, as well as “to undertake the welfare and protection of Sri Lankans employed overseas.”⁵¹²

National Policy on Labour Migration

A new national labour migration policy was deemed to be a timely requirement in light of the “important economic, social and political developments since the mid-1980s when the basic institutional, legal and regulatory framework was

⁵⁰⁹ At 594.

⁵¹⁰ Sayres, above n 55, at 10.

⁵¹¹ Amended by Act No 4 of 1994.

⁵¹² Sri Lanka Bureau of Foreign Employment Act (No 21 of 1985), s 15.

developed.”⁵¹³ Consequently, in 2009 the Sri Lankan government approved the National Policy on Labour Migration to govern Sri Lankan citizens engaged in employment overseas. According to the Ministry of Foreign Employment, such developments include “the impact of globalisation trends on the economy, rapid growth of migrant numbers with associated vulnerability, protection and welfare issues, increasing feminisation of migration, and social implications of migration.”⁵¹⁴

Implementation of the Policy is overseen by the National Labour Migration Advisory Committee and chaired by the Minister of Foreign Employment with support from the SLBFE. The preface to the Policy states that “in view of the continuing importance of overseas employment for the economy and society, the newly created Ministry of Foreign Employment has given priority attention to articulating its long term vision, aims and commitment to labour migration.” The National Policy was developed with technical assistance from the ILO and through consultation among government institutions, civil society organisations, recruitment agencies and other social partners.⁵¹⁵

There are two notable contradictory features of the National Labour Migration Policy. First, comparable to the conflicting government policies in RA 8042 in the Philippines, the National Policy in Sri Lanka claims that “overseas employment cannot be considered a major strategy to sustain economic growth and achieve national development in the long run.” Therefore, the state “shall continuously strive to create decent work opportunities at home.”⁵¹⁶ In contradiction, the Policy adds that the state shall “develop a comprehensive market promotion plan for overseas employment opportunities in foreign countries”, and that a “mechanism will be implemented to carry out labour market analysis in foreign countries, on a continuing basis, to identify new areas and ascertain demand for workers.”⁵¹⁷

⁵¹³ Ministry for Foreign Employment Promotion and Welfare *National Labour Migration Policy for Sri Lanka* (October 2008) Preface.

⁵¹⁴ At Preface.

⁵¹⁵ Swairee Rupasinghe *Promoting Decent Work for Women and Men Migrant Workers from Sri Lanka: Profile of Labour Migration in Sri Lanka* (January 2017) International Labour Organization Country Office for Sri Lanka and the Maldives.

⁵¹⁶ Ministry for Foreign Employment Promotion and Welfare, above n 513, at 32.

⁵¹⁷ At 34.

Second, again comparable to RA 8042 in the Philippines, the National Policy in Sri Lanka recognises that a key element in protecting all migrant workers against exploitation is the possession of skills. Therefore, it places emphasis on the need to promote and support the migration of ‘skilled’ men and women for employment overseas and “reduce the outflow of ‘low-skilled’ workers including women workers who are employed as housemaids.”⁵¹⁸ The Policy attributes ‘low-skilled’ as the root cause of vulnerability and disadvantage faced by migrant workers. It also claims that ‘low-skilled’ workers “face violations of human rights more than ‘skilled’ workers and professionals, due to diverse vulnerabilities resulting from a lack of adequate education and training, language skills and capacity to conform to work demands.”⁵¹⁹ However, Withers contends that the ‘development of skills’ as an effective means of protection “represents a weakening policy resolve towards defending the rights and working conditions of the vast majority of migrants who remain firmly within the ‘low-skilled’ category.”⁵²⁰

Despite articulating its long-term commitment to preventing women migrating as ‘low-skilled’ workers, there is clear tension between the aims of the National Labour Migration Policy on paper and the government’s actions in practice. For instance, the government simultaneously facilitates and supports the outflow of women domestic workers through state agencies and mechanisms primarily tailored to ‘low-skilled’ vocations such as insurance and loan schemes, a range of welfare services, pre-departure training and compulsory registration with the SLBFE. Recent statistics confirm the continuing prevalence of low-wage and ‘low-skilled’ workers, including domestic workers, which still account for 89% of all labour migrants.⁵²¹

This continuous promotion and facilitation of the migration of women domestic workers reflects the great financial stake Sri Lanka has in the remittances sent home by its workers. In 2019, the combined earnings of its two largest export industries – garment manufacturing and tea – were eclipsed by remittance inflows totalling US\$6.7 billion, equivalent to 56% of total earnings from goods exports and 7.8% of

⁵¹⁸ Ministry for Foreign Employment Promotion and Welfare, above n 513, at 1.

⁵¹⁹ At 10.

⁵²⁰ Withers, above n 96, at 44.

⁵²¹ Central Bank of Sri Lanka *Economic and Social Statistics of Sri Lanka 2018* (2018) Colombo: Central Bank of Sri Lanka.

GDP for the same year.⁵²²

The Secretary of the Ministry of Foreign Employment further emphasised Sri Lanka's continuing dependency on remittance earnings during a migration policy symposium held in 2014. Here she spelt out the government's explicit intention of increasing annual remittances from the US\$6.4 billion received in 2014 to US\$10 billion by 2016.⁵²³ In order to achieve this target, several policy tools were highlighted, including the recent mandate by the SLBFE that all domestic workers must attain a National Vocational Qualification Level 3 certificate prior to migration.⁵²⁴ The course was deemed a necessary step in 're-branding' Sri Lankan domestic workers as 'domestic housekeeping assistance', a move in-turn designed to attract higher wages and thus increased remittances.⁵²⁵

Sri Lanka Employment Migration Authority Act

Cases of extreme abuse against Sri Lankan MDWs became particularly high profile in early 2010. One case concerned Lahadapurage Ariyawathie, a 49-year-old domestic worker who had nails and metal particles hammered into her arms, legs and forehead by her Saudi employer after complaining about being overworked.⁵²⁶ In light of such abuse, the Ministry of Foreign Employment proposed a new piece of legislation in 2011 entitled the 'Sri Lanka Employment Migration Authority Act'. This legislation was expected to establish an Employment Migration Authority to replace the SLBFE and create new guidelines for sub-agents to prosecute misconduct.⁵²⁷ It was supposed to come into force by the end of 2014, but has not yet been enacted by Parliament.

⁵²² Central Bank of Sri Lanka "External Sector Performance – December 2019" (February 2020) <cbsl.gov.lk>

⁵²³ Institute of Policy Studies "Summary Report: International Conference on Policies for Mainstreaming Migration into Development in Sri Lanka" (14 August 2014) Colombo: Institute of Policy Studies at 5.

⁵²⁴ Sri Lanka Bureau of Foreign Employment "Domestic House Keeping Assistant National Vocational Qualification-03 (Middle East)" <www.slbfe.lk>.

⁵²⁵ Withers, above n 96, at 92.

⁵²⁶ The Guardian "Saudi Couple Hammered 24 Nails into Sri Lankan Maid, Say Officials" (online ed, London, 26 August 2010) <www.theguardian.com>.

⁵²⁷ United Nation Human Rights Council *Report of the Special Rapporteur on the Human Rights of Migrants: Mission to Sri Lanka* UN Doc A/HRC/29/36/Add.1 (2 April 2015).

Interviews carried out with advocacy groups and international organisations in Sri Lanka revealed that a new Act to replace existing legislation is no longer on the agenda. Instead, a representative of the ILO in Colombo informed me:⁵²⁸

The government of Sri Lanka are looking at revising the existing Sri Lanka Bureau of Foreign Employment Act for now, but the issue with the existing Act is that it is an Act to establish the Bureau – an institutional Act – it is not really an Act that regulates the industry and stakeholders.

The government's next steps in terms of legislative reform remain unclear. The Employment Migration Authority Act has been delayed indefinitely five years after it was anticipated to be passed into law. This stands in contrast to the Sri Lankan government's active involvement and leadership of the Colombo Process and Abu Dhabi Dialogue, both of which seem to be its current focus.

4.2.2 Institutional Framework

The Ministry of Foreign Employment is the lead Ministry responsible for labour migration. The SLBFE is tasked with regulating the foreign employment industry and enforcing the provisions of the Sri Lanka Bureau of Foreign Employment Act. Other government institutions and agencies involved in the labour migration process in Sri Lanka are the Ministries of Labour Relations and Manpower, Foreign Affairs, Justice and Law Reform, and Child Development and Women Empowerment. I focus primarily on the role of the SLBFE and the Ministry of Foreign Employment as the two key institutions.

The Ministry of Foreign Employment

Over the past decade, the prevailing philosophy of actively promoting labour migration has intensified, culminating in the creation of the Ministry of Foreign

⁵²⁸ Interview with a representative of the International Labour Organization (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

Employment Promotion and Welfare in February 2007.⁵²⁹ It was renamed the Ministry of Foreign Employment by the newly elected government under President Maithripala Sirisena in 2015. The omission of ‘welfare’ from its name is perhaps indicative of the Ministry’s priorities going forward. The mission of the Ministry is to “convert the entire labour market migration sector into a demand driven process, and make it highly competitive by introducing new mechanisms to meet the international market challenges, realising the important contribution to the national economy.”⁵³⁰

The key functions of the Ministry include the development of the National Labour Migration Policy; formulation of policies and programmes; regulation and supervision of the Bureau and employment agencies, specifically the Sri Lanka Foreign Employment Agency; enhance the welfare of migrant workers; and introduce new laws to ensure the protection of migrant workers.⁵³¹ Institutionally, the creation of a specific government ministry focusing solely on foreign employment is significant. It demonstrates the Sri Lankan state’s reliance on, and permanent commitment to, the export of migrant workers.

In 2010, the Ministry convened a National Advisory Committee on Labour Migration. The Committee provides a national-level forum for trade unions, NGOs and other key stakeholders, such as employers, to influence policymaking and exchange information on migrant worker issues.⁵³² The role of the Committee is to review the labour migration process, explore challenges and follow developments in the labour market to advise on all aspects of the process. Since the Committee comprises stakeholders including NGOs, the Sri Lankan government claims that the “voice of migrant workers is adequately represented at decision and policymaking level.”⁵³³

However, interviews with advocacy groups in Sri Lanka revealed that the Advisory Committee is often ineffective in practice and the government is failing to fully

⁵²⁹ Withers, above n 96, at 43.

⁵³⁰ Ministry for Foreign Employment Promotion and Welfare, above n 513, at 3.

⁵³¹ Sri Lanka Ministry of Foreign Employment *Annual Performance Report* (2015).

⁵³² Samanthi J. Gunawardana “Labor Movement Responses to International Labor Migration in Sri Lanka” (January 2014) Solidarity Center and Rutgers University at 17.

⁵³³ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families *Consideration of Reports Submitted by State Parties under Article 73 of the Convention: Sri Lanka* (3 May 2016) at 4.

embrace them as partners in the protection of migrant workers. An advocate from Caritas in Sri Lanka highlighted this problem during our focus group discussion.⁵³⁴

Recently we had an experience where the Ministry called us and other civil society organisations to come up with our suggestions for the new (Employment Migration Authority) Act. We went to the sessions and presented our comments to which they were not interested to accommodate the things said by civil society. They called us just two days ahead of the meeting, and did not give us time to prepare or for everyone to be a part of it. The government is not really consulting the civil society organisations, but what I can see is that all these organisations are desperately trying to give them our comments.

Sri Lanka Bureau of Foreign Employment

The second key institution is the Bureau of Foreign Employment established under the SLBFE Act No. 21 in 1985, as amended by Act No. 4 of 1994 and Act No. 56 of 2009. It aims to ensure that workers migrate through legal channels and to minimise corruption and exploitation by recruitment agencies. The Bureau is mandated by law to “create efficient and equitable pathways for people to benefit from their skills in overseas employment markets, securing interests of all stakeholders, while contributing to economic growth.”⁵³⁵ Notably, the SLBFE’s vision is for “Sri Lanka to be the best choice for competent human resources for the overseas market.”⁵³⁶

The Bureau was originally the sole institutional structure overseeing foreign employment. However, it became increasingly apparent that it could not adequately oversee all aspects of migration without assistance from other government agencies and institutions. Since 2007, the SLBFE has come under the purview of the Ministry of Foreign Employment. Sri Lankans leaving for employment overseas are required by law to pay a registration fee with the Bureau of LKR 15,200 (NZD 133.00) prior to

⁵³⁴ Focus group discussion with an advocate from Caritas (The author, Colombo Sri Lanka, 14 June 2018) Transcript on file.

⁵³⁵ Sri Lanka Bureau of Foreign Employment “Overview of Bureau of Foreign Employment” <www.slbfe.lk>.

⁵³⁶ Sri Lanka Bureau of Foreign Employment, above n 536.

their departure.⁵³⁷ The fee is used to fund welfare programmes both locally and overseas for the benefit of Sri Lankans employed abroad and their family members at home.

The Sri Lankan Bureau of Foreign Employment Act empowers the Bureau to manage the emigration of workers through specific organisational functions. First, private recruitment agencies must apply to the Bureau's licensing division in order to obtain a license for foreign employment. Applicants are required to provide a number of documents, face an interview and must prove that the office of the agency meets certain requirements.⁵³⁸ Following this, a team from the SLBFE will visit and inspect the premises and check the authenticity of the documents before granting approval for the license.⁵³⁹

Second, the Act has enabled the SLBFE to provide a number of welfare measures to prepare migrants for overseas employment and to protect them while abroad. These measures include pre-departure training, skills improvement, setting up of the Workers Welfare Fund, insurance and loan schemes for migrant workers and scholarship schemes for the children of migrant workers.⁵⁴⁰ The Bureau also uses its power under the Act to set minimum terms and conditions of employment. Following the example set by the Philippines, Sri Lanka adopted a model employment contract to set benchmarks for minimum labour standards in pay, hours of work and holiday leave.⁵⁴¹

Third, the SLBFE offers a complaint management system to receive grievances and complaints from migrant workers in respect of foreign employment. The Bureau takes the necessary steps to settle the complaint with the assistance of the local recruitment agent, while also maintaining a close relationship with the Sri Lanka embassies

⁵³⁷ Sri Lanka Bureau of Foreign Employment Act (No 21 of 1985), s 51, as amended by Act No 4 of 1994 and Act No 56 of 2009.

⁵³⁸ Sri Lanka Bureau of Foreign Employment "Functions Related to Licensing Division" <www.slbfe.lk>.

⁵³⁹ Sri Lanka Bureau of Foreign Employment, above n 490.

⁵⁴⁰ Sri Lanka Bureau of Foreign Employment Act (No 21 of 1985), s 15.

⁵⁴¹ At s 15(i).

abroad through the computer network and direct communication with embassy staff,⁵⁴² examined further in chapter six.

Sri Lanka's policy responses also correspond with Lee's directing and facilitating interventions in labour migration. Similar to the POEA, the SLBFE targets and facilitates the size of the migrant flow through coordination and regulation of the recruitment process, as well as through the provision of documentation for prospective migrants including both identity and labour market qualifications. Directing regimes work to redirect or reshape migration flows towards new or growing markets, and in doing so, attempt to exercise control over the kinds of migration that occur and protect the rate of remittances against shifts in labour market conditions.⁵⁴³ Such sending state regimes actively seek out opportunities for migrant workers and research developments in labour market demand in the world economy. To ensure migrant workers are able to effectively compete in these new markets, Sri Lanka has developed training and education programmes to promote the added value and comparative advantage of its nationals over those of other countries. The use of such diversifying and competition-supporting interventions to secure global contracts characterises the Sri Lankan state regime as directing.

4.3 Conclusion: Country Comparison

Despite international migration from Sri Lanka beginning approximately half a century later than that from the Philippines, both governments' approaches to labour export have followed similar trajectories since the 1970s with the promotion of women domestic workers to overseas labour markets dominating much of the 1980s and 1990s. The main provisions and features of Sri Lanka's National Policy on Labour Migration are almost identical to RA 8042 in the Philippines. For instance, both claim that the state does not promote overseas employment as a means to sustain economic growth and achieve national development, and that they will only support the migration of '*skilled*' men and women for employment overseas. However, this chapter revealed the contradictory tension between their rights-based policies in theory

⁵⁴² Sri Lanka Bureau of Foreign Employment "Complaint Management System" <www.slbfe.lk>.

⁵⁴³ Lee, above n 32, at 1463.

and their persistent promotion of ‘low-skilled’ workers for overseas employment in practice, which undermines their commitments under domestic and international law.

The Philippines was the first to respond to increasing levels of exploitation against domestic workers and enforce a comprehensive legislative and institutional framework to protect their rights throughout the migration cycle. In contrast, Sri Lanka’s lacklustre defence of domestic workers has been much slower with the implementation of its National Policy in 2009, and its failure to enforce much needed legislative amendments in the form of the Employment Migration Authority Act. I argue that there are three interconnected reasons for the Philippine governments’ seemingly tougher and more effective legislative defence of women MDWs, in contrast to the Sri Lankan government’s more passive stance: the influential role of civil society, ingrained gender norms, and the position of each state in the international division of labour.

Firstly, the Philippines is home to extremely independent and active civil society organisations, which are able to push the state for better working conditions for women migrants. Section 1(h) of RA 10022 in the Philippines provides that “the State recognises NGOs, trade unions and workers associations as partners of the State in the protection of Filipino migrant workers and in the promotion of their welfare.” Consultation with NGOs is an integral part of POEA decision-making processes, and hundreds of NGOs are accredited to provide pre-departure training.⁵⁴⁴ An advocate from United Filipinos in Hong Kong confirmed the active and often successful role of Filipino civil society organisations during our interview:⁵⁴⁵

There are more than 300 Filipino organisations here (Hong Kong). They are not only giving education and training but also doing lobbying and rallies. It is not enough that we raise our concern to the government and ask for a meeting and dialogue, it is also good that they see our force and how many people are complaining about the policies. Because of the strong

⁵⁴⁴ Ireland, above n 7, at 328.

⁵⁴⁵ Interview with an advocate from United Filipinos (The author, Hong Kong, 14 March 2018) Transcript on file.

Filipino movement in Hong Kong, we are able to challenge the Philippine government and the consulate here to take action in favour of us.

In the absence of adequate government protection and regulation, Filipino civil society both at home and abroad have attempted to address the gaps by protesting, organising migrant workers, and offering services to assist with rights violations onsite and with their reintegration.⁵⁴⁶ In contrast, civil society organisations in Sri Lanka appear to lack cooperation and coordination and are not able to influence the Sri Lankan government on significant policy issues despite their dedication and struggle to participate in policymaking.⁵⁴⁷ An advocate from Action Network for Migrant Workers (ACTFORM) in Sri Lanka stressed this problem during our interview: *“Philippine NGOs and the Philippine government work closely together and are very collective. Sri Lankan NGOs and the government are not collective. Maybe we can link with the government more closely and highlight the gaps.”*⁵⁴⁸

Alternatively, migrant rights groups and NGOs in Sri Lanka can strengthen their influence by forming alliances with Philippine NGOs, as well as organisations in other countries, on a regional and global level. This has already taken place through the Migrant Forum in Asia network of grassroots organisations and trade unions of migrant workers, members of which include Women and Media Collective and ACTFORM in Sri Lanka and the Center for Migrant Advocacy in the Philippines. Members of the network are able to work together to participate more effectively in global forums and coordinate campaigns to lobby governments on the ratification of international conventions.

In addition to a lack of support and inclusion by the Sri Lankan government, Gamburd contends that civil society organisations in Sri Lanka are also disempowered by the restrictive political and personal freedoms experienced by workers in key labour-receiving countries.⁵⁴⁹ The majority of Sri Lankan domestic workers are employed in Gulf States, including Saudi Arabia, Lebanon and Kuwait,

⁵⁴⁶ Robyn Iredale and Kalika N. Doloswala “International Labour Migration from India, the Philippines and Sri Lanka: Trends and Policies” (2004) 27 Sri Lanka Journal of Social Science 107 at 125.

⁵⁴⁷ Gamburd, above n 220, at 75.

⁵⁴⁸ Interview with an advocate from ACTFORM (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

⁵⁴⁹ Gamburd, above n 220, at 84.

which have strict policies that limit organisational activity. When host governments repress such initiatives and constrain attempts to improve labour conditions, this in turn demotivates and hampers the advocacy efforts of NGOs within the sending country.

While a large number of Filipina domestic workers are employed in Gulf States, many work in East and Southeast Asian countries such as Hong Kong, Singapore and Taiwan, as well as European countries including Italy and the United Kingdom. Therefore, Filipina domestic workers have worked longer in destination countries, many of which provide more opportunities for autonomous activities and are more conducive to labour organising than the strict political climate of West Asia.⁵⁵⁰ In addition, gender roles in these countries are less restrictive for women. Hong Kong, in particular, has a favourable organising environment with a “vibrant civil society populated by vocal labour unions and NGOs,” which enables the empowerment of Filipinas who for many years have dominated the domestic service market in Hong Kong.⁵⁵¹

Secondly, gender norms and household relations in Sri Lanka differ from the Philippines. This affects the structures and attitudes within which labour organising and government initiatives on migrant women’s behalf take place,⁵⁵² further contributing to the lack of state protection for domestic workers. Despite the long history of colonialism in the Philippines, which embedded a patriarchal culture among Filipinos and gendered social norms that contribute to women’s greater responsibility for care work, the country is home to a very active and dynamic feminist movement. Numerous women-focused NGOs and advocacy groups have helped to ensure that gender equality remains at the forefront of national discourse and played a key role in mobilising the campaign for the passage of the Domestic Workers Act in the Philippines, in compliance with the ratification of the ILO’s Domestic Workers Convention.⁵⁵³

⁵⁵⁰ At 79.

⁵⁵¹ At 80.

⁵⁵² At 65

⁵⁵³ Philippine Migrant Rights Watch and International Labour Organization “The Right of Domestic Workers: A Primer on ILO Convention No. 189 and RA 10361 Domestic Workers Act” (2014) ILO Country Office for the Philippines.

Adding to the force of NGO pressure, the participation of Filipinas in wage employment and inclusion in national politics, while lower than men, is higher than that of Sri Lankan women.⁵⁵⁴ Despite an increasing number of women domestic workers in Sri Lanka becoming the ‘breadwinners’ of their households, the government has failed to recognise domestic work as ‘work’ under national law, a reality that hinders government and NGO efforts on behalf of women domestic workers abroad.⁵⁵⁵ Prevailing gender norms in Sri Lanka see the provision of care as a natural facet of South Asian womanhood, thus skills are not recognised and domestic work is devalued.⁵⁵⁶ Sri Lanka’s Family Background Report, discussed in the next chapter, is one leading example of the way the state reinforces the traditional gender roles and responsibilities of women as primary caregivers and their secondary position in society.

Thirdly, Sri Lanka’s inferior status in the international hierarchy of labour-sending states further hampers its intervention in support of domestic workers abroad. Ireland points to the global labour market’s modest valuation of Sri Lankan domestic workers due to their lower educational qualifications, limited proficiency in foreign languages like English, skin colour and religious makeup, rendering them less desirable to foreign employers.⁵⁵⁷ This, along with Sri Lanka’s comparatively smaller scale and shorter history of labour migration, contributes to its fragile market position and lack of bargaining power with host countries, dissuading government officials from intervening vigorously in favour of domestic workers. Instead, Sri Lanka often accommodates to the wishes of the more powerful Gulf countries for fear of the political/economic/social consequences in receiving states and losing valuable employment opportunities for its citizens.⁵⁵⁸ Sri Lanka’s reluctance to ratify the ILO’s Domestic Workers Convention and effectively implement its domestic legal framework governing MDWs abroad further reflects its fear of losing out in the international labour market and being undercut by non-ratifying neighbours with less demanding migrant workers.

⁵⁵⁴ Ireland, above n 7, at 328.

⁵⁵⁵ Gamburd, above n 220, at 65.

⁵⁵⁶ Withers and Piper, above n 123, at 591.

⁵⁵⁷ Ireland, above n 7, at 331.

⁵⁵⁸ Gamburd, above n 220, at 79.

In contrast, powerful demand for educated Filipina domestic workers with preferred attributes makes for more sensitivity on the part of receiving country governments to the Philippine's defence of its domestic workers and civil society lobbying for improvements in the treatment that they receive.⁵⁵⁹ However, despite being in a stronger market position and pushed by a forceful civil society, the Philippines still frequently fails to negotiate agreements with host states to safeguard the rights of domestic workers. The weakness of labour-sending countries to protect their migrants highlights the contradictions in both countries and the need for multilateral agreements between sending states through regional consultative processes, in order to enhance their individual bargaining power.

⁵⁵⁹ Ireland, above n 7, at 334.

Chapter Five

The Pre-Departure Stage

This chapter focuses on the pre-departure stage of the migration process. It analyses the data collected during the fieldwork, as well as primary and secondary sources, to examine the legal frameworks governing MDWs in the Philippines and Sri Lanka. It first examines the formal legal and regulatory frameworks in the two sending states that are specific to the pre-departure stage of the migration cycle, in order to assess the extent to which the two governments are complying with international standards of protection.

Second, the chapter analyses how the legal frameworks are failing to protect the rights of women MDWs in practice by drawing on the data collected from the interviews and focus groups with the research participants in the Philippines, Sri Lanka and Hong Kong. The thematic data analysis reveals three dominant issues impacting on the rights of women MDWs during the pre-departure stage in the Philippines and Sri Lanka: the inadequacy of training and education for domestic workers through pre-departure and post-arrival information seminars; restrictions on the migration of domestic workers, including the country-specific migration bans in the Philippines and the Family Background Report in Sri Lanka; and the failure to effectively regulate recruitment agencies, including recruiters charging illegal placement fees in the Philippines, and the practice of unlicensed sub-agents in Sri Lanka.

These issues are viewed through the theoretical lens set out in chapter one. The analysis illustrates, in particular, the two forms of structural violence. Structural violence by *commission* is evident through actions of the state, such as enforcing discriminatory migration bans that restrict the rights of domestic workers and exacerbate their vulnerability to abuse. Structural violence also involves inaction or *omission* by the government to ensure the protection of women MDWs against exploitation.

5.1 Pre-Departure Training and Education

Information dissemination in the form of pre-departure orientation programmes is recognised by the three international conventions as an important tool in labour-sending states for protecting migrant workers against rights violations and abuse throughout the migration cycle. These educational programmes are expected to provide departing migrant workers with rights-based information to ease their transition into the country of destination. Pre-departure orientation programmes are premised on two ideas: that the protection of migrants begins at home, and that information builds a foundation for migrant worker empowerment and rights protection.⁵⁶⁰

5.1.1 *International Law*

The right to pre-departure information is specified in the CEDAW GR 26. GR 26 says that states should “deliver or facilitate free or affordable gender and rights-based pre-departure information and training programmes that raise prospective women migrant workers’ awareness of potential exploitation”, including their legal rights and entitlements in countries of employment, procedures for invoking formal and informal redress mechanisms, cultural conditions in countries of destination, emergency telephone numbers of their home embassy and services, and information on general and reproductive health.⁵⁶¹ It adds that such training programmes should be held in decentralised training venues so that they are accessible to women.⁵⁶²

In addition, the ICMW General Comment No. 1 on MDWs urges states to provide specific pre-departure training and awareness-raising programmes, developed in consultation with relevant NGOs, migrant workers and recognised recruitment agencies.⁵⁶³ It reiterates the recommendations in the CEDAW Committee’s GR 26,

⁵⁶⁰ Maruja M.B Asis and Dovelyn Rannveig Agunias *Strengthening Pre-Departure Orientation Programmes in Indonesia, Nepal and the Philippines* (September 2012) Issue No 5. International Organization for Migration: Bangkok and Migration Policy Institute: Washington D.C. at 1.

⁵⁶¹ Committee on the Elimination of Discrimination Against Women *General Recommendation No.26 on Women Migrant Workers* (5 December 2008), [24(b)(i)].

⁵⁶² At [24(b)(i)].

⁵⁶³ ICMW, [29].

adding that the pre-departure training could cover a ‘know your rights’ curriculum including both international and national frameworks, as well as a ‘know your obligations’ orientation covering essential aspects of the law and culture of the destination country.⁵⁶⁴

5.1.2 Domestic Law in The Philippines and Sri Lanka

The Philippines has a comprehensive legal framework governing migrant worker training and education with three information seminars at different stages of the migration process: the Pre-Employment Orientation Seminar, the Pre-Departure Orientation Seminar and the Post-Arrival Orientation Seminar. In contrast, the Sri Lankan government offers only a Pre-Departure Orientation Seminar.

5.1.2.1 Pre-Employment Orientation Seminar

The Philippines

The Pre-Employment Orientation Seminar in the Philippines is a mandatory computer-based education programme provided by the POEA, as required by section 14 of RA 10022. The objective of the Seminar is to “guide overseas jobseekers in understanding the realities of working overseas and to help them in making a decision on whether or not to pursue overseas employment.”⁵⁶⁵ The free online Seminar offers a special platform for domestic worker applicants separate from the Seminar provided for ‘skilled’ workers. The prospective domestic worker has to complete all eight self-learning modules and an examination before being awarded the Pre-Employment Orientation Seminar certificate and submitting an application to a licensed recruitment agency through the POEA.⁵⁶⁶

The law on the Pre-Employment Orientation Seminar in the Philippines is in compliance with the ICMW’s General Comment No. 1, which recommends that State Parties take appropriate measures to disseminate information to nationals considering

⁵⁶⁴ At [29(a) and (b)].

⁵⁶⁵ POEA *Guidelines on the Implementation of the Mandatory Online Pre-Employment Orientation Seminar For Land based Overseas Work Application* (Memorandum Circular No 02 Series of 2016).

⁵⁶⁶ POEA, above n 565.

whether to migrate for domestic work. This information includes the risks of domestic work outside the country of origin, migration-related fees and debt, and basic knowledge of national and transnational legal frameworks.⁵⁶⁷ The Seminar for Filipina MDWs includes topics such as how to avoid illegal recruitment, required documents and fees for an overseas job application, the provisions required in an employment contract, and destination country-specific information. As such, the content of the Seminar largely adheres to the standards prescribed in international law.

An advantage of the Seminar, as stated by a representative of the POEA during our interview, is that “*it is given a long time before the worker is actually deployed.*”⁵⁶⁸ As a result, the prospective migrant has time to process the information and make an informed decision. However, the representative’s choice of the word ‘deployed’ to describe the overseas employment of a migrant worker is notable. Deployment is defined as “bringing resources into effective action”⁵⁶⁹ and is commonly used by the military for sending troops into duty for a specific mission.⁵⁷⁰

The word ‘deployment’ is frequently used throughout the law governing MDWs in the Philippines, with section 4 of the Republic Act 8042 being titled ‘Deployment of Migrant Workers’. Equating the overseas employment of migrants with the utilisation of resources for action dehumanises such workers and corresponds with the notion of commodification. The word ‘deployed’ is also congruent with both the Philippine government’s depiction of overseas Filipino workers as ‘*bagong bayani*’ or ‘modern-day heroes of the economy’, as well as the Sri Lankan government’s adoption of the term ‘*rativiru*’ meaning ‘migrant hero’ which mirrors the local Sri Lankan term ‘*ranaviru*’ meaning ‘war hero’. Such labelling implies that migrant workers are being exported overseas as an economic army doing duty for the state, which highlights the government’s interest in asserting control over their movement and subsequent remittances.

⁵⁶⁷ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers*, [28]; ICMW, art 33.

⁵⁶⁸ Interview with an official at the Philippine Overseas Employment Administration (The author, Manila the Philippines, 20 March 2018) Transcript on file.

⁵⁶⁹ Oxford English Dictionary “Definition of Deployment” <www.oxforddictionaries.com>.

⁵⁷⁰ Oxford English Dictionary, above n 569.

Sri Lanka

In contrast to the Philippines, there is no Pre-Employment Orientation Seminar in Sri Lanka. Its absence was criticised by an advocate from Lawyers Beyond Borders in Sri Lanka: “*there is only pre-departure training once you decide to take up the job but what about the pre-employment decision like in the Philippines? There is no such thing here.*”⁵⁷¹ An advocate from Helvetas in Sri Lanka added:⁵⁷²

One of the main issues we see at the moment is that before decision-making migrant workers have no opportunity to hear accurate information on safer migration ... Since there is a lack of information, recruitment agencies have an upper hand in influencing migration and taking them through processes that are not regular or legal.

5.1.2.2 Pre-Departure Orientation Seminar

After completing the Pre-Employment Seminar, the Philippine government requires departing migrant workers to attend the mandatory Pre-Departure Orientation Seminar.⁵⁷³ The Seminar was transferred from the POEA to the Overseas Workers Welfare Administration (OWWA) in 2002, including monitoring of all Seminar providers.⁵⁷⁴ Membership of the OWWA is mandatory for all overseas workers upon signing an employment contract with the POEA and continues until the termination of their contract. The US\$25 membership fee is chargeable to the hiring employer for each departing documented contract worker, which in turn funds OWWA’s services and programmes.⁵⁷⁵

The OWWA accredits numerous NGOs, recruitment agencies and other private service providers to conduct the seminar on their behalf.⁵⁷⁶ The increase of private

⁵⁷¹ Interview with an advocate from Lawyers Beyond Borders (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

⁵⁷² Interview with an advocate from Helvetas (The author, Colombo Sri Lanka, 15 June 2018) Transcript on file.

⁵⁷³ POEA Memorandum Circular No 3 Series of 1983.

⁵⁷⁴ POEA-OWWA Joint Circular No 4.

⁵⁷⁵ POEA Rules and Regulations (2016), s 129.

⁵⁷⁶ OWWA Policy and Program Development Office: Pre-Departure Orientation Seminar Development and Monitoring Unit “Updated List of Accredited PDOS Providers” (1 April 2018).

sector actors in the role of educators has raised concern amongst advocacy groups, who question how they can promote migrant rights while in the business of recruitment.⁵⁷⁷ Domestic workers have their own programme under OWWA, entitled the Comprehensive Pre-Departure Education Programme. The Programme is either a four or six-day seminar jointly conducted by accredited NGO providers and OWWA. In compliance with CEDAW GR 26, that Programme is provided for free by the OWWA while non-government providers charge PHP 100 (NZD 2.80), which is supposed to be shouldered by the recruitment agent.⁵⁷⁸ It includes sessions on language, culture and stress management.

In Sri Lanka, the SLBFE requires prospective domestic workers to attend a mandatory Pre-Departure Seminar, namely the Domestic House Keeping Assistant National Vocational Qualification Level 3. The 21-day Residential Programme costs RS 14,235 (NZD 132.67) for domestic workers planning to work in Gulf States. It provides training in food preparation, first aid, work place behaviour, customs and traditions of host countries, and cleaning techniques and methods.⁵⁷⁹ The same course is provided for domestic workers planning to migrate to Europe and East Asia, although the cost is more expensive at RS 17,755⁵⁸⁰ (NZD 165.48). In comparison to the Philippines, both courses are costly and arguably not affordable as required by international law. Despite this, in compliance with CEDAW GR 26, many of the SLBFE's training centres are decentralised and so workers can attend the Seminar in a number of districts throughout Sri Lanka.⁵⁸¹

In terms of the legal framework, both the Philippines and Sri Lanka offer a comprehensive Pre-Departure Seminar with a rights-based curriculum. However, interviews and focus groups with advocates in the three fieldwork countries revealed that the Seminar is inadequate in practice and falls short of international standards. The two advocacy groups interviewed in Hong Kong emphasised that upon arrival MDWs are unprepared and unaware about what is happening in Hong Kong, with an

⁵⁷⁷ Asis and Agunias, above n 560, at 5.

⁵⁷⁸ Battistella and Asis, above n 50, at 19-20.

⁵⁷⁹ Sri Lanka Bureau of Foreign Employment "Domestic House Keeping Assistant National Vocational Qualification-03 (Middle East)" <www.slbfe.lk>.

⁵⁸⁰ Sri Lanka Bureau of Foreign Employment "Domestic House Keeping Assistant National Vocational Qualification-03 (Europe and East Asia)" <www.slbfe.lk>.

⁵⁸¹ Sri Lanka Bureau of Foreign Employment "Training Centres" <www.slbfe.lk>.

advocate at United Filipinos stating: “*when we spoke to people who had this orientation (in the Philippines), they are not actually equipped in understanding where they are coming to and their rights in the host country.*”⁵⁸² Further interviews revealed a number of factors contributing towards their lack of knowledge and preparation.

First, advocates in the Philippines and Sri Lanka mentioned that Pre-Departure Seminar providers often shorten the sessions and many workers fail to attend the entire course. An advocate from DAWN in the Philippines stated: “*workers are given certificates without even undergoing the orientation.*”⁵⁸³ This was reiterated by advocates at Caritas in Sri Lanka who observed: “*some women do not participate in the programme yet the agency will provide her with an illegal certificate of participation so she can go without training, and so they fall into difficulty.*”⁵⁸⁴

Second, for workers who do actually attend the Seminar, the content of the course in practice often differs from what is required by law. This was highlighted by an advocate from Migrante International in the Philippines during our focus group discussion:⁵⁸⁵

There is a curriculum that is supposed to be given during the Pre-Departure Seminar but in actuality it is very different, because it is given mainly by recruitment agencies and they teach workers to be submissive, where to remit and how they will send money to their families. They will not provide information about their rights or who to ask for assistance whenever they are in trouble.

The Seminar has become “*a medium to turn prospective applicants into economically profitable workers*” by teaching them to be submissive in order to “*add value to the*

⁵⁸² Interview with an advocate from United Filipinos (The author, Hong Kong, 14 March 2018) Transcript on file.

⁵⁸³ Interview with an advocate from DAWN (The author, Manila the Philippines, 20 March 2018) Transcript on file.

⁵⁸⁴ Focus group discussion with an advocate from Caritas (The author, Colombo Sri Lanka, 14 June 2018) Transcript on file.

⁵⁸⁵ Focus group discussion with an advocate from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

labourer”.⁵⁸⁶ Similarly in Sri Lanka, several advocacy groups spoke about the absence of a rights-based curriculum. An advocate from Community Development Services observed that “*there is a session on financial literacy and financial management in terms of how to open a savings account before you leave and with which bank, but what is not discussed or not discussed adequately is your rights as a citizen of this country.*”⁵⁸⁷

A consensus exists among advocacy groups in both sending states that financial information during the Seminar regarding banking and how to remit while overseas is taking priority over a gender and rights-based education required by international law. The Pre-Departure Seminar is increasingly being used as a marketing outlet by private banks and remittance companies to promote their businesses.⁵⁸⁸ This detracts from a focus on rights and diminishes women migrant workers’ awareness of potential exploitation.

The Seminars’ emphasis on remittances corresponds with Lee’s theory of sending state intervention, specifically the accommodating regimes. Such regimes involve policies or programmes that adapt around existing migration flows to maximise national gains from migration. She identifies the “creation and regulation of financial institutions that facilitate remittances and the development of projects that promote, and sometimes coerce, remittances” as one such accommodating intervention.⁵⁸⁹ The involvement of financial institutions and the pressure they exert in order to ensure MDWs remit or invest their incomes back home and through certain state-owned channels, is illustrative of an accommodating intervention and reflective of the remittance-dependent economy in the Philippines and Sri Lanka.

In an attempt to maximise remittances and advance economic development, both states are sacrificing the welfare of domestic workers by failing to ensure that they are

⁵⁸⁶ Akiko Watanabe “The Question of Well-Informedness in the Pre-Departure Programs to the Overseas Filipino Workers Bound for the Middle East: A Case of the United Arab Emirates” (2014) 24 *Journal of the Faculty of International Studies Bunkyo University* 25 at 27.

⁵⁸⁷ Interview with an advocate from Community Development Services (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

⁵⁸⁸ The Philippine Department of Labor and Employment “Baldoz Orders OWWA to Review the PDOS” (3 July 2014) <www.dole.gov.ph>.

⁵⁸⁹ Lee, above n 32, at 1459.

adequately informed during the Seminar about their rights under domestic and international law. This lack of information and knowledge deficit renders workers more susceptible to situations of abuse and rights violations by recruitment agencies and employers overseas.

I found no evidence to suggest that the Pre-Departure Seminar is gender-sensitive or adopts an intersectional approach to address the specific and multiple ways different women are disadvantaged and discriminated against throughout the migration cycle. Such an intersectional approach could involve informing and preparing outgoing women domestic workers about the marginalisation and stereotyping they might face overseas as a result of their gender, race, class, nationality and religion, and how to cope if and when it occurs. Pre-Departure Seminars that fail to adopt a rights-based intersectional lens disproportionately affect women MDWs and exacerbate their risk of abuse. This in turn results in situations of structural violence facilitated by the state on the grounds of their multiple identities.

5.1.2.3 Post-Arrival Orientation Seminar

In contrast to Sri Lanka, the Philippine government offers another layer of legal protection for migrant workers in the form of a Post-Arrival Orientation Seminar.⁵⁹⁰ The Post-Arrival Seminar is offered once the worker arrives in the destination country and is conducted by labour attachés at the Philippine Overseas Labour Office (POLO), as well as by accredited NGOs. The labour attaché at the POLO in Hong Kong stated that the Seminar provides Filipino migrants with continuing education about “*their rights and responsibilities, how to assert their rights against their employers and recruitment agencies, what services are available to them, which NGOs they can run to and shelters where they can stay.*”⁵⁹¹ The Seminar is therefore in accordance with the CEDAW GR 26, which requires states to develop an education and awareness-raising programme in close consultation with NGOs.⁵⁹²

⁵⁹⁰ Republic Act 8042, s 19, as amended by Republic Act 10022, s 18.

⁵⁹¹ Interview with an official from the Philippine Overseas Labour Office (The author, Hong Kong, 13 March 2018) Transcript on file.

⁵⁹² Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008) [24(b)]; CEDAW, arts 3, 5, 10 and 14.

The Philippines' labour attaché in Hong Kong emphasised the importance of the Post-Arrival Seminar:⁵⁹³

I think there is still a lot of room for improvement as to the amount of knowledge they get in the Philippines because the Pre-Employment and Pre-Departure Seminars are very generic and not destination-specific so we try to remedy that through the Post-Arrival Seminar ... I have actually just been through a session upstairs. We do it everyday here.

The two advocacy groups interviewed in Hong Kong applauded the regular occurrence of the Seminar at the POLO in Hong Kong. Implementation of the Seminar in other destination countries, however, is slow and irregular. Many POLO's are only just beginning to conduct their first Post-Arrival Seminar in recent months.⁵⁹⁴ When I questioned an advocate at Migrante International about the implementation of Post-Arrival Seminars in destination countries other than Hong Kong, he revealed: *"most of the time once the worker arrives in the host country, they will be picked up by their employer and taken straight to the workplace. We have not heard of any overseas Filipino worker who has gone through a Post-Arrival Seminar."*⁵⁹⁵

Therefore, although the Post-Arrival Seminar seemingly adopts a more rigorous rights-based framework to compensate for the inadequate Pre-Departure Seminar, it is not mandatory by law and so many workers do not make use of it.⁵⁹⁶ If the government made the Post-Arrival Seminar compulsory for migrant workers and monitored their participation, akin to the Pre-Departure Seminar, this would help to ensure attendance and prevent any obstruction from employers.

⁵⁹³ Interview with an official from the Philippine Overseas Labour Office (The author, Hong Kong, 13 March 2018) Transcript on file.

⁵⁹⁴ Philippine Embassy in Brunei "PHL Embassy Conducts First Post-Arrival Orientation Seminar" (7 March 2018) <www.pebrunei.org>; Philippine Department of Foreign Affairs "PHL Embassy in Yangon Conducts First Post-Arrival Orientation Seminar" (15 March 2018) <www.dfa.gov.ph>.

⁵⁹⁵ Focus group discussion with an advocate from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁵⁹⁶ Scalabrini Migration Center and the International Organization for Migration *Country Migration Report: The Philippines* (2013); Jean Encinas-Franco "Filipino Women Migrant Workers and Overseas Employment Policy: An Analysis From Women's Rights Perspective" (2016) 8 Asian Politics and Policy at 498.

The Sri Lankan government has failed to implement Pre-Employment and Post-Arrival Seminars for migrant workers. Sri Lankan domestic workers are thus more vulnerable to abuse and rights violations during pre-departure and while overseas on account of their lack of knowledge and training. I contend that this inaction by the government constitutes structural violence by *omission* as it creates the conditions for recruitment agencies and employers to more easily exploit and abuse unprepared and unprotected women domestic workers.

5.2 Restrictions on Migration

The second issue impacting on the rights of domestic workers during the pre-departure stage is restrictions on their ability to migrate overseas. Women domestic workers are often subject to policy restrictions on migration abroad because of concerns surrounding their risk of exploitation and abuse. Restrictions range from bans on the migration of domestic workers to certain receiving countries as seen in the Philippines, to bans on women with children under five years of age from migrating for domestic work as seen in Sri Lanka through the Family Background Report.

While recognising that the purpose of such migration bans enforced by both governments are either to ‘protect’ women MDWs against abuse in receiving countries or to safeguard the rights of their children left behind, this analysis reveals how such bans can put women MDWs at greater risk by violating their rights under international law. Closure of legal options prompts domestic workers to migrate through irregular and precarious channels,⁵⁹⁷ which heightens their vulnerability to exploitation and rights violations overseas and is thus evidence of structural violence on behalf of the state.

5.2.1 International Law

⁵⁹⁷ Napier-Moore, above n 232, at xiv.

Restrictions on women's migration contravene a range of international laws. Both CEDAW GR 26⁵⁹⁸ and the ICMW's General Comment No. 1⁵⁹⁹ specifically call on labour-sending states to "repeal sex-specific bans and discriminatory restrictions on women's migration on the basis of age, marital status, pregnancy or maternity status." They also assert that State Parties "should lift restrictions that require women to get permission from their spouse or male guardian to obtain a passport or to travel."⁶⁰⁰

Restrictions on the migration of women MDWs also contravene three rights afforded under international law: freedom of movement or the right to leave a country, the right of domestic workers to employment with conditions equal to those of other workers, and rights related to non-discrimination against women. First, with regards to freedom of movement, Article 8 of the ICMW provides that "migrant workers and members of their families shall be free to leave any State, including their State of origin."

Second, under the ILO's Domestic Workers Convention (C189), Member States are required to take appropriate measures to ensure that domestic workers enjoy equal treatment and conditions that are not less favourable than those applicable to workers generally.⁶⁰¹

Third, the CEDAW requires the elimination of discrimination against women in all its forms. The provisions particularly relevant to restrictions on women's migration are Article 11, which requires states to eliminate discrimination against women in the field of employment and to ensure the right to work⁶⁰² and the right to the same employment opportunities as men,⁶⁰³ and Article 15, which requires State Parties to accord to men and women the same rights with regard to the law relating to the movement of persons.

⁵⁹⁸ [24(a)].

⁵⁹⁹ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers*, [61]; ICMW, arts 1 and 7.

⁶⁰⁰ Above n 599; CEDAW art 2(f).

⁶⁰¹ Articles 10 and 14.

⁶⁰² Article 11(a).

⁶⁰³ Article 11(b).

5.2.2 *Domestic Law in The Philippines and Sri Lanka*

The Philippines

Section 4 of RA 8042 (as amended by section 3 of RA 10022) provides that “the State shall allow the deployment of overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected.” It adds that the government recognises any of the following as a guarantee on the part of the receiving country for the protection of the rights of overseas Filipino workers: that it has existing labour and social laws protecting the rights of workers; it is a signatory to and/or ratifier of multilateral conventions relating to the protection of workers; and it has concluded a bilateral agreement or arrangement with the government on the protection of the rights of overseas Filipino workers.⁶⁰⁴ If the destination country fails to demonstrate the existence of any of the aforementioned guarantees, “no permit for deployment will be issued by the POEA.”⁶⁰⁵

During our interview, a representative of the POEA stated that when the government implements a migration ban “*the purpose is to send out a clear message to the destination country that when we speak of the protection and life of our overseas Filipino workers it is a non-negotiable issue.*”⁶⁰⁶ Bans on the migration of women domestic workers have long been a key feature of overseas employment in the Philippines. It was the first country in the Asia region to use bans as a form of ‘labour diplomacy’ through withholding labour force resources in order to bargain for labour rights protections and signal to Filipino citizens that it is committed to taking strong action.⁶⁰⁷ The Philippines’ long history of migration and the global labour market’s demand for well-educated and English-speaking Filipina domestic workers has helped to increase the state’s influence and emboldened the Philippines to mount a more forceful defence of their interests with host country officials.

⁶⁰⁴ Republic Act 8042, s 4(a), (b) and (c).

⁶⁰⁵ At s 4.

⁶⁰⁶ Interview with an official at the Philippine Overseas Employment Administration (The author, Manila the Philippines, 20 March 2018) Transcript on file.

⁶⁰⁷ Napier-Moore, above n 232, at 47.

The government first imposed a worldwide ban on the migration of Filipina domestic workers in 1988 amid complaints of abuse. This had mixed results in terms of policy pressure to improve migrant workers' conditions in destination countries.⁶⁰⁸ Countries seeking to hire Filipina domestic workers had to negotiate with the Philippine government regarding the terms of employment that would have to be met for the ban to be lifted.⁶⁰⁹ Sixteen host nations, including Canada, Hong Kong and Singapore, signed bilateral agreements with the Philippines detailing labour protections.⁶¹⁰ However, many other countries retaliated by either slowing down visa processing for *all* Filipino nationals or imposing bans on the recruitment of workers from the Philippines, with Kuwait enforcing a ban against hiring overseas Filipino workers that lasted ten years.⁶¹¹ Interestingly, countries in West Asia where domestic workers experienced most violations did not agree to any bilateral negotiations.⁶¹² In 1995, the Philippine government once again temporarily banned the migration of domestic workers to Singapore following the execution of Filipina domestic worker Flor Contemplacion.⁶¹³

Since then, the government has repeatedly enforced country-specific bans on the migration of women domestic workers in response to increasing complaints of exploitation. It imposed a ban on the migration of domestic workers to Lebanon in 2006, to Jordan in 2008 and to Saudi Arabia in 2011. The most recent ban on the migration of domestic workers to Kuwait occurred in February 2018 following the death of seven domestic workers and high-profile murder of Filipina domestic worker Joanna Demafelis, whose body was found in a freezer in the Gulf State.⁶¹⁴ The Philippine government lifted the ban in May 2018 having signed a Memorandum of Understanding with the Kuwaiti government, in an attempt to provide overseas Filipino workers, particularly women MDWs, with additional rights protection.

⁶⁰⁸ Sayres, above n 55, at 9.

⁶⁰⁹ At 9.

⁶¹⁰ Napier-Moore, above n 232, at 47.

⁶¹¹ Sayres, above n 55, at 9.

⁶¹² Napier-Moore, above n 232, at 47.

⁶¹³ Bienvenida M. Amarles "Female Migrant Labor: Domestic Helpers in Singapore" (1990) 4 *Philippine Journal of Public Administration* 365 at 378.

⁶¹⁴ The Telegraph "Duterte permanently bans Filipinos going to work in Kuwait after maid found stuffed in freezer" (online ed, London, 29 April 2018) <www.telegraph.co.uk>.

However, abuse against domestic workers overseas has persisted, highlighting the ineffectiveness of the agreement. In December 2019, Filipina domestic worker Jeanelyn Villavende was raped and murdered by her Kuwaiti employers. In response, the Philippine government announced in January 2020 that it would once again stop sending domestic workers to Kuwait despite the failure of previous bans to address the mistreatment of workers.

While bans are successful in pushing for better labour outcomes on some occasions, such pressure does not always result in the implementation of systematic changes to prevent future exploitation and deaths. The country-specific bans have often been lifted by the Philippine government after the receiving state responds by increasing its recruitment of domestic workers from competing labour-sending countries, rather than agreeing to improve protection. After the Philippine government banned domestic workers from migrating to Jordan in 2008, the Jordanian government announced that it would start recruiting domestic workers from Vietnam.⁶¹⁵ This further strengthens calls for labour-sending states to collaboratively engage in regional consultative processes as a ‘high road’ to achieving protections for migrant workers and enhance their bargaining power with key receiving countries.

Further, the consequences of the migration bans in practice are counter to those intended by the government. While the bans appear to reduce the number of women migrating through *regular* channels into vulnerable situations, they increase the number migrating *irregularly*.⁶¹⁶ This was acknowledged by the POEA representative who stated, “*if you block the legal pathway for migration then you increase the chances of the irregular pathway of migration, that’s the reality. Because you cannot prevent the workers who are in dire need of financial help.*”⁶¹⁷ Phil Marshall and Susu Thatun describe a ‘push-down pop-up’ effect surrounding trafficking interventions, whereby the problem is reduced or pushed down in one place only for it to emerge

⁶¹⁵ Dovelyn Rannveig Agunias “Running in Circles: Progress and Challenges in Regulating Recruitment of Filipino and Sri Lankan Labor Migrants to Jordan” (July 2011) Migration Policy Institute: Washington D.C.

⁶¹⁶ At 2.

⁶¹⁷ Interview with an official at the Philippine Overseas Employment Administration (The author, Manila the Philippines, 20 March 2018) Transcript on file.

somewhere else.⁶¹⁸ The migration bans are having the same effect by displacing a problem but not solving it.

It is well documented that when women domestic workers bypass regular migration processes they are more vulnerable to rights violations and abuse during recruitment and while overseas, as a result of their irregular status. The bans provide unscrupulous recruiters and employers with more power to profit from the worker's undocumented position given the lack of government oversight.⁶¹⁹ Many MDWs deal with local agents engaged in illicit recruitment and transport practices, involving fake itineraries, circuitous travel routes, bribing corrupt officials and paying middlemen for escort services.⁶²⁰ Therefore, as Bridget Anderson observes, migration restrictions “are not only insufficient to reduce migrant precarity, but actively produce and reinforce it.”⁶²¹

By banning women domestic workers from migrating overseas, while at the same time failing to provide decent employment opportunities within the home country, the government is leaving women with no choice but to migrate for domestic work irregularly. This was highlighted by an advocate at DAWN in the Philippines who stated, “*the government has no right to ban because the workers have no alternatives. How will the people eat and live? If the government had prepared for gainful job opportunities here then the workers have choices.*”⁶²² As noted earlier, the Philippine government's reliance on remittances has undermined any motivation to industrialise, modernise infrastructure and create sustainable domestic jobs.

The government does, however, provide repatriated overseas Filipino workers with alternative employment opportunities in other destination countries. For example, domestic workers who returned to the Philippines following the migration ban in Kuwait were informed by the Department of Labour and Employment that “a group

⁶¹⁸ Phil Marshall and Susu Thatun “Miles away: The trouble with prevention in the greater Mekong sub-region” in Kamala Kempadoo, Jyoti Sanghera, and Bandana Pattanaik (eds) *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (London: Paradigm Publishers, 2015) at 44.

⁶¹⁹ Napier-Moore, above n 232, at 37.

⁶²⁰ Katherine Hamill “Structural Violence and Human Trafficking: Migrant Domestic Workers in Lebanon” (2010) *Al Raida Journal* 55 at 59.

⁶²¹ Bridget Anderson “Migration, Immigration Controls and the Fashioning of Precarious Workers” (2010) 24 *Work, Employment and Society* 300 at 314.

⁶²² Interview with an advocate from DAWN (The author, Manila the Philippines, 20 March 2018) Transcript on file.

of Japanese businessmen have offered to hire 1,000 overseas Filipino workers from Kuwait for their flight catering business.”⁶²³ The Department added that “many are domestic workers who do cooking and cleaning, so they will not have a hard time adjusting in the catering business.”⁶²⁴

This redirection of migration flows to new markets is consistent with Lee’s directing regimes. These involve labour-sending states actively seeking out opportunities for their migrant workers and initiating negotiations with governments and businesses to gain access to those opportunities as they arise.⁶²⁵ In doing so, the Philippine government is attempting “to exercise control over the kinds of migration that occur and to protect the rate of migration and remittances against shifts in labour market conditions or immigration policy in the destination country.”⁶²⁶

Rather than providing employment for such workers in the Philippines, the government is continuing to facilitate the export of women domestic workers to the next receiving country. This perpetuates their vulnerability to abuse and exploitation and thus runs contrary to the state’s obligation to protect the rights of MDWs under domestic and international law. Ultimately, the Philippine government’s promotion of women domestic workers as a certain type of worker that fulfils the demand of foreign employers, demonstrates the profit-oriented trading of workers as viable commodities of the state.

The Philippine government’s restrictions on the migration of women domestic workers embody structural violence, as they foster conditions in which recruitment agents and employers are able to exploit and abuse the rights of irregular MDWs. During migration bans, prospective domestic workers do not have access to pre-departure information, standard employment contracts, complaint mechanisms, and government assistance.⁶²⁷ In the absence of a supportive home state, poorly trained and ill-informed migrant workers are forced to rely on unlicensed recruiters at high

⁶²³ Samuel P. Medenilla “Jobs in Japan Await Repatriated OFWs from Kuwait – Department of Labour and Employment” *Business Mirror* (online ed, The Philippines, 19 March 2018) <www.businessmirror.com.ph>.

⁶²⁴ Medenilla, above n 623.

⁶²⁵ Lee, above n 32, at 1463.

⁶²⁶ At 1463.

⁶²⁷ Napier-Moore, above n 232, at 55.

financial costs, and tolerate high levels of abuse to avoid the risk of detection and imprisonment.⁶²⁸

While the government's failure to intervene to protect workers against abuse overseas could be considered to constitute structural violence by omission, I argue that generating secure jobs that pay living wages and allow workers and their families to live decently at home in the Philippines would be preferable to a ban and prevent the irregular migration of women domestic workers where one is imposed. Two reports published by the ILO, UN Women, and the IOM in 2017 recommend a range of alternative measures to the restrictions on women domestic worker's migration, which would address the causes and sources of exploitation without restricting their freedom of movement and right to work. These measures include: the ratification and enforcement of international conventions; effective regulation, licensing and monitoring of recruitment agencies and intermediaries; ensuring that bilateral agreements include enforcement of human and labour rights; and the involvement of women migrant workers and civil society in formulating gender-sensitive rights-based migration policies that promote safe migration.⁶²⁹

Sri Lanka

The Sri Lankan government has also implemented various restrictions on the migration of women domestic workers but through a different approach compared to the Philippines. In many labour-sending states in Asia, the social cost of maternal migration on families and children 'left behind' has become a major concern for policymakers and society. Dominant patriarchal gender ideologies in the Philippines play an instrumental role in constructing 'transnational mothers' as morally complicit when children face difficulties or abuse at home.⁶³⁰ In Sri Lanka, the moral panic about the lack of adequate alternative care arrangements for children 'left behind' after their mothers migrate for work led the government to intervene with domestic legislation. The Ministry of Foreign Employment issued two Circulars in July 2013 –

⁶²⁸ Kodoth, above n 43, at 102.

⁶²⁹ Jenna Hennebray *For Their Own Good? Addressing Exploitation of Women Migrant Workers* (2017) International Organization for Migration: Geneva; Napier-Moore, above n 232.

⁶³⁰ Maria Platt "Migration, Moralities and Moratoriums: Female Labour Migrants and the Tensions of Protectionism in Indonesia" (2018) 42 *Asian Studies Review* 89 at 94.

the first to Licensed Foreign Employment Agents,⁶³¹ followed by a second Circular to Divisional Secretariats in Sri Lanka⁶³² – pertaining to the employment of women domestic workers in foreign countries. The Circulars instructed all migrant women seeking overseas employment in the domestic sector to complete a Family Background Report.

The Report sets out several provisions to limit the migration of domestic workers. These include: raising the minimum age limit for women domestic workers to 25 years to Saudi Arabia, 23 years to other Middle Eastern countries, and 21 years to all other countries; a maximum age of 55 years old for women migrating as domestic workers for the first time; the prevention of women with children under five years of age from migrating for domestic work; the endorsement of the migration of women with children over five years of age *only* if satisfactory arrangements for the care and protection of her children are made by the migrant worker; a mandatory Level 3 National Vocational Qualification for women domestic workers; and establishing a chain of approval involving a number of government officials, employment agents, the guardian appointed to look after the child (if it is not the husband), and the husband of the migrant worker to endorse the employment of the domestic worker.⁶³³ Therefore, women’s mobility is seen as incompatible with their maternal role.

The Report has received overt opposition for its patriarchal and discriminatory nature. The restrictions violate the rights of women domestic workers under international law, particularly the provisions of the CEDAW GR 26 and the ICMW General Comment No. 1, which require sending states to repeal sex-specific bans and discriminatory restrictions on the basis of age. The UN in Sri Lanka asserts that the Report does not apply to men seeking employment in similar ‘low-skilled’ areas of work. Therefore, it discriminates against women by “impinging on their equal access to employment, decision-making and freedom of movement”⁶³⁴ included in the CEDAW, ICMW and C189.

⁶³¹ Circular No 13 (2013); Circular No 19 (2013).

⁶³² Circular MF/RAD/1/3 (15 January 2013).

⁶³³ Sri Lanka Ministry of Foreign Employment *Annual Performance Report* (2015).

⁶³⁴ At 11.

The restrictions in the Report also infringe on the government's National Policy commitments to gender equality and the right to employment to be enjoyed by all women and men in Sri Lanka.⁶³⁵ The National Policy affirms that "the State shall apply gender-sensitive criteria in the formulation and implementation of policies affecting migrant workers",⁶³⁶ and that the "policies and programmes will aim towards the empowerment of migrant workers in exercising the right to informed decision-making and the full enjoyment of all rights and benefits of migration."⁶³⁷

However, the Report fails to apply "gender-sensitive criteria" and disregards a rights-focused approach to women's equality in the realms of employment and movement. Paul Farmer describes structural violence as social and economic forces that constrain individual agency.⁶³⁸ This corresponds with the discriminatory provisions in the Report, which are woven around gender stereotyped patriarchal attitudes that diminish women's empowerment and interfere with their individual decision-making and agency.⁶³⁹

Furthermore, the Report is not applicable to *all* women migrating for employment overseas. It specifically targets women who migrate for domestic work. The target group that comes under the purview of the policy are poor women who fall under the 'low-skilled worker' category.⁶⁴⁰ As a result, I argue that in addition to gender, the restrictions in the Report also discriminate against women on the grounds of their social class, with a representative of the Asia Foundation in Colombo asserting that "*in our research we say that it is a class issue as well because the women who migrate for domestic work are poor women who have no options here.*"⁶⁴¹ By only restricting the migration of 'low-skilled' domestic workers, the Report suggests that poor women, unlike women from a middle or upper-class background, do not

⁶³⁵ At 6.

⁶³⁶ Ministry of Foreign Employment Promotion and Welfare *National Labour Migration Policy for Sri Lanka* (October 2008) at 7.

⁶³⁷ At 7.

⁶³⁸ Paul Farmer "An Anthropology of Structural Violence", above n 34, at 305; Paul Farmer "On Suffering and Structural Violence: A View from Below" (2009) 3 *Race/Ethnicity: Multidisciplinary Global Contexts* at 11.

⁶³⁹ United Nations Sri Lanka *Sri Lankan Migrant Domestic Workers: The Impact of Sri Lankan Policies on Workers' Right to Freely Access Employment* (2015) at 24.

⁶⁴⁰ At 25.

⁶⁴¹ Interview with a representative of the Asia Foundation (The author, Colombo Sri Lanka, 7 June 2018) Transcript on file.

prioritise the protection of their children and are more likely to make uninformed and irresponsible decisions.⁶⁴² This creates a “state-sanctioned authoritative environment to discriminate, stereotype and marginalise a select group of women from low-income backgrounds in Sri Lanka.”⁶⁴³

The trade-off between the freedom of women to migrate for employment and the wellbeing of children ‘left behind’ has made the Report particularly controversial, with the state giving precedence to women’s gendered care obligations over their constitutional rights to mobility and work. In regulating women, and not men, the provisions reinforce traditional gender norms by placing the responsibility of childcare and family welfare squarely on the woman’s shoulders, disregarding the role of the father and the consequences that his absence has on the wellbeing of children.⁶⁴⁴ While the state has obligations to protect the rights and best interests of the child under international law, and constraints on the migration of women are potentially legitimate in achieving that aim, the Report fails to address the underlying cause of the problem. Rather, the restrictions only serve to perpetuate gender inequalities in the division of labour in the household and society by rendering women solely responsible for the social reproduction of families.

Comparable with the impact of the migration bans in the Philippines, the Report has resulted in unintended consequences for the migration of domestic workers in practice. Bilesha Weeraratne conducted an impact analysis on the restrictions and found “evidence that women bypass the Family Background Report and migrate outside the purview of the SLBFE to evade restrictions.”⁶⁴⁵ Several advocacy groups in Sri Lanka confirmed during interviews that the Report has caused women to migrate through irregular channels. An advocate from the Women and Media Collective informed me, “*what is happening now is that women are going on visit*

⁶⁴² Asha L. Abeyasekera and Ramani Jayasundere “Migrant Mothers, Family Breakdown, and the Modern State: An Analysis of State Policies Regulating Women Migrating Overseas for Domestic Work in Sri Lanka” (2013) 4 *The South Asianist* at 11.

⁶⁴³ United Nations Sri Lanka, above n 639, at 33.

⁶⁴⁴ At 37.

⁶⁴⁵ Bilesha Weeraratne “Protecting the Welfare of Children and its Causal Effect on Limiting Mother’s Labour Migration” (2016) 54 *International Migration* 59 at 72.

*visas. They are not going through any formal process, not registered anywhere, they have no insurance and have not been through any training.”*⁶⁴⁶

The Report “disallows participation in ‘survival migration’ – a path that is a direct result of previous and continuing government policy to promote foreign employment.”⁶⁴⁷ Far from protecting women the restrictions “create new vulnerabilities by relinquishing regulatory control over the circumstances under which MDWs are recruited, employed, and repatriated”,⁶⁴⁸ leaving them more susceptible to trafficking. Consequently, akin to the bans in the Philippines, the migration restrictions enforced by the Sri Lankan government embody structural violence as they create the conditions for discrimination and the violation of rights.

However, when I questioned an official at the SLBFE about whether the Report is forcing women domestic workers to migrate irregularly, they asserted that “*if anyone is trying to escape from this Report and go on a visit visa and they are being trafficked, then it is not due to the Family Background Report but due to the fact that they are not listening to the required rules and regulations.*”⁶⁴⁹ I contend that the government has failed to consider that women are likely circumventing the restrictions and putting themselves at risk by migrating irregularly because of the limited decent employment opportunities afforded by the state within Sri Lanka. This pushes women who are driven to migrate as domestic workers, for reasons such as poverty, debt, or to flee domestic violence, to do so illegally and at great risk to their safety and security. A representative of the ILO in Colombo confirmed this view:⁶⁵⁰

Most of the women who try to go overseas have tried working in a garment factory and the wages are just not enough, and at best the options given to them are traditional compartmentalised assumptions of what women like to

⁶⁴⁶ Interview with an advocate from Women and Media Collective (The author, Colombo Sri Lanka, 14 June 2018) Transcript on file.

⁶⁴⁷ Withers and Piper, above n 123, at 595.

⁶⁴⁸ Withers, above n 202, at 326.

⁶⁴⁹ Interview with an official from the Sri Lanka Bureau of Foreign Employment (The author, Colombo Sri Lanka, 15 June 2018) Transcript on file.

⁶⁵⁰ Interview with a representative of the International Labour Organization (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

do such as sewing and cooking, which does not give women much of an option.

Crucially, the absence of any support towards alleviating the underlying problems that prompt their migration shows signs of difficulty in achieving the ultimate goal of ensuring the wellbeing of women domestic workers who face restrictions, and that of their children. During his visit to Sri Lanka in 2014, the UN Special Rapporteur on the Human Rights of Migrants stated “the fact that Sri Lankan women have small children cannot be used as a reason to deny them the right to leave their country, provided for in the International Covenant on Civil and Political Rights”⁶⁵¹ and the ICMW ratified by Sri Lanka. He urged the state to focus on other means to protect the wellbeing and rights of women migrants and their children ‘left behind’, such as creating more income-generating opportunities for women in Sri Lanka, including in rural areas, diversifying child-care support measures, and enhancing gender equality and men’s participation in their children’s upbringing to redress gender imbalances in care provision.

5.3 Recruitment of Migrant Domestic Workers

The failure to regulate recruitment agencies in the Philippines and Sri Lanka effectively is the third issue that impacts on the rights of women MDWs, as revealed by the data collected during the fieldwork. Illegal recruitment remains one of the leading challenges faced by both labour-sending states. The interviews and focus groups with advocacy groups and international organisations revealed two major issues occurring in each country. In the Philippines, excessive placement fees are being charged by recruitment agencies, despite the government’s no-placement fee policy for domestic workers, and in Sri Lanka, women domestic workers are being exploited by unregulated and illegal sub-agents.

5.3.1 International Law

⁶⁵¹ Office of the High Commissioner for Human Rights United Nations “Press Release: Special Rapporteur on the Human Rights of Migrants Concludes Country Visit to Sri Lanka” (26 May 2014) <www.ohchr.org>.

Article 15 of the ILO's Domestic Workers Convention (C189) states that to protect MDWs who are recruited or placed by private employment agencies against abusive practices, each Member shall "ensure that adequate machinery and procedures exist for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies in relation to domestic workers." Members are also required to "take measures to ensure that fees charged by private employment agencies are not deducted from the remuneration of domestic workers."⁶⁵²

The CEDAW Committee in GR 26 acknowledges that "exploitative fees may be charged by employment agents, which sometimes cause women, who generally have fewer assets than men, to suffer greater financial hardships and make them more dependent." The Committee further adds that "if they are heavily burdened by debt from recruitment fees, women migrant workers may not be able to leave abusive situations since they have no other way to repay those debts."⁶⁵³ Therefore, GR 26 provides that "State Parties should adopt regulations and design monitoring systems to ensure that recruitment agencies respect the rights of all women migrant workers."⁶⁵⁴

Similarly, the ICMW General Comment No. 1 provides that in accordance with Article 66 of the ICMW, "State Parties have an obligation to effectively regulate and monitor recruitment agencies and other intermediaries to ensure that they respect the rights of domestic workers."⁶⁵⁵ In addition, states are encouraged "to adopt codes of conduct on the recruitment of MDWs, including specific rules governing fees and salary deductions." Notably, General Comment No. 1 specifies that "states should ban recruitment fees charged to MDWs, including through salary deductions."⁶⁵⁶

5.3.2 Domestic Law in The Philippines and Sri Lanka

⁶⁵² Article 15 (a), (b) and (e).

⁶⁵³ UN Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008), [15].

⁶⁵⁴ At [10].

⁶⁵⁵ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers* (23 February 2011), [33].

⁶⁵⁶ At [36].

The Philippines

The POEA regulates private sector participation in overseas employment through a comprehensive tripartite system. First, recruitment agencies must be licensed by the POEA. Second, foreign placement agencies must be accredited by the POEA and each job order verified. Third, the POEA sets the standards for workers' fitness for overseas employment, including skills testing in a centre accredited by the Technical Education and Skill Development Authority and a medical/health examination.⁶⁵⁷ Unlike 'skilled' migrants, Filipina domestic workers are not permitted to find employment through direct hiring and must go through one of the private recruitment agencies licensed by the POEA to find jobs abroad.⁶⁵⁸

The POEA prescribes a strict system of Rules for any private recruitment agency wishing to obtain a license. Prospective agencies must prove that they have sufficient capital to pay fees, as well as cash and surety bonds, at various stages of the application process. Upon completing the requirements of the application, agencies must pay a PHP 25,000 (NZD 706.75) filing fee, undergo a panel interview, pay a license fee of PHP 100,000 (NZD 2,827) and also post an escrow amount of PHP 1,000,000 (NZD 28,270).⁶⁵⁹

Severe penalties for any person found guilty of illegal recruitment are outlined in section 7 of RA 8042, as amended by section 6 of RA 10022. These include a minimum of 12 years imprisonment and a fine of no less than 1 million pesos. The POEA also has a system of assessment for compliance with labour laws. Depending on the nature of the violation and whether it is a repeat offence, a private employment agency can be reprimanded, receive a fine or a suspension order, or have its license revoked.⁶⁶⁰

In 2006, the POEA implemented a series of resolutions to improve the protection of MDWs against rights violations. The most significant was Governing Board

⁶⁵⁷ POEA *Rules and Regulations* (2016), Rule VI, ss 56 and 57.

⁶⁵⁸ POEA *Memorandum Circular No 8* (26 April 2018).

⁶⁵⁹ POEA *Rules and Regulations* (2016), Rule II Issuance of License.

⁶⁶⁰ At Rule III, s 143.

Resolution No. 6, which stipulates that Filipinos employed overseas as domestic workers will not be charged a placement fee. Violation of the no-placement fee policy is penalised under section 6(a) of RA 8042, which states that illegal recruitment includes “to charge or accept directly or indirectly any amount greater than that specified in the schedule of allowable fees ... or to make a worker pay or acknowledge any amount greater than that actually received by him as a loan or advance.” The POEA considers any violation of the no-placement fee policy a grave offence that will result in the cancellation of the agency’s license, irrespective of the number of complainants or amount of placement fee collected.⁶⁶¹

While the legal framework governing the regulation of recruitment agencies in the Philippines appears to be formally compliant with the standards established by international law, effective implementation is lacking in practice. The policies comprised in RA 8042 and the POEA’s system of regulation and licensing have not eliminated rights violations during the recruitment process for MDWs. A representative of the POEA admitted during our interview, “*many agencies comply, but there are countless agencies that do not comply. If they fail to comply then there are sanctions we impose, such as suspension or cancellation of their license.*”⁶⁶²

Advocacy groups in the Philippines refute the POEA’s alleged efforts to regulate and penalise non-compliant recruiters. Advocates from Migrant International argued: “*what the POEA does is ceremonial – the government just gives best practice guidelines about recruitment activities and that’s it.*”⁶⁶³ Research carried out by the Progressive Labour Union of Domestic Workers in Hong Kong revealed that during 2014-2015, the POEA only charged officers/employees of 11 licensed recruitment agencies for illegal recruitment, including violations of the no-placement fee policy. Yet, none of these cases led to a successful prosecution.⁶⁶⁴

⁶⁶¹ Hong Kong Federation of Asian Domestic Workers and the Progressive Labour Union of Domestic Workers in Hong Kong *Between a Rock and a Hard Place: The Charging of Illegal Agency Fees to Filipino Domestic Workers in the Philippines and Hong Kong* (October 2016) at 12.

⁶⁶² Interview with an official at the Philippine Overseas Employment Administration (The author, Manila the Philippines, 20 March 2018) Transcript on file.

⁶⁶³ Focus group discussion with an advocate from Migrant International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁶⁶⁴ Hong Kong Federation of Asian Domestic Workers and the Progressive Labour Union of Domestic Workers in Hong Kong, above n 661, at 5.

However, a Trafficking in Persons Report published by the US government in June 2019 revealed that between April 2018 and March 2019 the POEA investigated 278 cases of alleged illegal recruitment and recommended 123 cases for filing in the courts, 11 of which resulted in convictions.⁶⁶⁵ The Report also discloses that the POEA filed 1,432 administrative charges against licensed recruitment agencies for fraudulent employment practices and/or exorbitant fees, resulting in the cancellation of 40 agencies' licenses.

Despite the government's ban, the charging of placement fees continues to be one of the leading rights violations against domestic workers in the Philippines.⁶⁶⁶ The Progressive Labour Union of Domestic Workers in Hong Kong discovered that 84% of the 68 Filipina domestic workers interviewed between October 2015 and June 2016 specifically paid an agency fee, which was on average PHP 52,644 (US \$1,135).⁶⁶⁷ This was confirmed by an advocate I interviewed at United Filipinos in Hong Kong.⁶⁶⁸

There is a policy of no agency fees but in reality it is not true. The payment is not described by the agency as "agency fees", but they say you have to undergo training or an assessment when actually it is agency fees. So it is just a cover to escape the problem of illegally collecting money from the workers.

Recruitment agencies are bypassing the no-placement fee policy by charging excessive fees disguised as payment for skills training. In some instances, MDWs are not able to pay the full amount and the remainder is either collected through salary deductions or the worker is forced to take out a high-interest loan from a bank or private moneylender.⁶⁶⁹ This burdens workers with significant debt, which in turn compels them to work for abusive employers and remain in exploitative employment

⁶⁶⁵ US Department of State *Trafficking in Persons Report 2019* (20 June 2019) at 382.

⁶⁶⁶ Battistella and Asis, above n 49, at 13.

⁶⁶⁷ Hong Kong Federation of Asian Domestic Workers and the Progressive Labour Union of Domestic Workers in Hong Kong, above n 661, at 3.

⁶⁶⁸ Interview with an advocate from United Filipinos (The author, Hong Kong, 14 March 2018) Transcript on file.

⁶⁶⁹ Hong Kong Federation of Asian Domestic Workers and the Progressive Labour Union of Domestic Workers in Hong Kong, above n 661, at 13.

situations that violate their rights in order to pay off their loans.⁶⁷⁰ Benjamin San Jose observes how it is often only during their second or third contract renewal that domestic workers have repaid their debts and can start earning money for their families.⁶⁷¹

The vulnerability of domestic workers to exploitation, forced labour and debt bondage has significantly increased as a result of the Philippine government's failure to enforce laws to regulate recruitment agencies effectively and fully implement the ban on placement fees. Accordingly, such inaction by the state constitutes structural violence by *omission*. This is because the lack of legal protection provided by the government enables unscrupulous recruiters to charge and collect illegal fees with impunity and violate the rights of women MDWs.

In addition to debt issues, MDWs are also made more vulnerable to abuse by the government's failure to provide them with pre-departure information and education about their rights and how to assert their rights. This impedes the ability of ill-informed workers to avoid being charged prohibited placement fees and to speak out against illegal recruitment activities.⁶⁷² An advocate from Migrante International emphasised during our focus group discussion that “*violations will only be given attention when a worker files a complaint to the POEA against the recruitment agency, but the workers will not file a complaint because their main objective is to find work and go abroad.*”⁶⁷³ Unless workers file a complaint to the POEA and risk the double threat of debt-laden unemployment, the government will continue to be passive in protecting the rights of domestic workers and combatting exorbitant placement fees.⁶⁷⁴

Ultimately, despite ratifying key conventions to protect domestic workers against exploitative recruitment agencies and their fee-charging practices, the Philippine

⁶⁷⁰ Farbenblum, above n 33, at 157.

⁶⁷¹ San Jose, above n 78, at 6.

⁶⁷² Migrant Forum in Asia “Recruitment Fees and Migrants’ Rights Violations” (June 2015) The Open Working Group on Labour Migration and Recruitment: Policy Brief No 1.

⁶⁷³ Focus group discussion with an advocate from Migrante International (The author, Manila The Philippines, 21 March 2018) Transcript on file.

⁶⁷⁴ Philippine Migrant Rights Groups *Written Replies to the List of Issues Relating to the Consideration of the Initial Report of the Philippines: Submitted to the UN Migrant Workers Committee for its 10th Session in Geneva* (March 2009).

government has failed to fulfil its international obligations in practice and adequately monitor, investigate and prosecute recruitment agencies that violate domestic legislation. Such inaction against recruiters demonstrates the state's continuing prioritisation of labour export above the rights and welfare of women MDWs.

Sri Lanka

The legal provisions relating to recruitment practices in Sri Lanka are outlined in the SLBFE Act 21 of 1985. Article 15 provides that the Bureau shall issue licenses to foreign recruitment agencies for conducting the business of recruitment for employment outside Sri Lanka, and to determine the terms and conditions of such licenses. The SLBFE is required to closely scrutinise the affairs of recruiters with Article 24(1) stipulating that, “a person other than the Bureau shall not carry on the business of a foreign employment agency without a license issued under the provisions of the Act.”

Section 54 of the Act establishes the Association of Licensed Foreign Employment Agencies, which oversees private recruitment agencies and is the dominant channel for overseas labour migration.⁶⁷⁵ Its main objectives envisaged by the Act are to advise on and assist the Bureau in the promotion and regulation of employment outside Sri Lanka and to formulate and enforce a code of conduct for licensees. Following the amendment of the SLBFE Act in October 2009, licensed foreign agencies are no longer required to register with the Association.

Despite the fact that the Association is under the Act, there have been instances where the SLBFE and the Association have not been able to reach a compromise on issues regarding the protection of migrant workers.⁶⁷⁶ For example, the Association does not provide a welfare assistance programme for migrant workers, including the prevention of excessive recruitment fees frequently charged by its members.⁶⁷⁷ This excessive fee payment breaches section 34 of the Act, which stipulates that “a

⁶⁷⁵ Sri Lanka Bureau of Foreign Employment Act (No 21 of 1985), s 54.

⁶⁷⁶ International Labour Organization Country Office for Sri Lanka and the Maldives *Recruitment Practices of Employment Agencies Recruiting Migrant Workers: A Review Aimed at Improving Recruitment Regulations and Drafting Recruitment Guidelines* (March 2013) at 15.

⁶⁷⁷ At 15.

licensee shall not charge any fee, otherwise than as provided in section 54 for providing or securing employment for any person in a country outside Sri Lanka.”

Though the provisions designed to tighten the regulation of recruitment agencies appear to be in accordance with international law, their implementation is deficient in practice with agencies continuing to thrive within a loosely regulated environment. This is particularly evident in the case of unlicensed sub-agents, who form another level of the institutional structure surrounding domestic worker migration. Sub-agents are typically residents of rural villages who work at the community level by linking potential migrants in the villages with licensed recruitment agents in Colombo.⁶⁷⁸ They are paid a large commission for each prospective migrant they bring to the agency.⁶⁷⁹

Sub-agents are yet to be regulated by the government, despite previous attempts at regulation by the SLBFE.⁶⁸⁰ In 2012, the Bureau issued identification cards to sub-agents through respective licensed recruitment agencies. However, unethical and unregulated activities continued, as there were more sub-agents operating in the field than registered. As a result, in 2016 the Bureau issued a circular requesting all agencies to return the identification cards issued to their sub-agents, effectively giving up on its attempt to regulate sub-agents.⁶⁸¹ Since then, the SLBFE has not taken action against agencies that failed to return their sub-agents’ identification cards or the continued operation of sub-agents.⁶⁸²

There is now a renewed interest in regulation, with the Ministry of Foreign Employment submitting a Cabinet Paper in March 2017 including recommendations to regularise sub-agents. Despite this, when I questioned an official at the SLBFE about the government’s plans to regulate sub-agents they stated, “*there are so many requests by national and international organisations but there cannot be a practical*

⁶⁷⁸ Migrant Forum in Asia, above n 237, at 12.

⁶⁷⁹ Transparency International Sri Lanka “Integrity in Foreign Employment: An Analysis of Corruption Risks in Recruitment” (2010).

⁶⁸⁰ International Labour Organization Country Office for Sri Lanka and the Maldives, above n 676, at 24.

⁶⁸¹ Bilesha Weeraratne “Sub-agents and Migrants: Dissecting their Relationship to Guide Regulation” *Daily FT* (online ed, Sri Lanka, 23 May 2018) <www.ft.lk>.

⁶⁸² Weeraratne, above n 681.

system of regulating sub-agents.” The official added, “*how can you have a pool of registered sub-agents? Because maybe today we register some people but tomorrow new people come on to the scene and mislead prospective workers.*”⁶⁸³ Therefore, the official rejected any future plans by the government to register and regulate sub-agents.

The exploitation of domestic workers by sub-agents in Sri Lanka remains a concern that is yet to be adequately addressed by the government. Similar to the exorbitant placement fees charged by recruitment agencies in the Philippines, women MDWs are at the mercy of sub-agents in Sri Lanka who often charge illegal and excessive fees for a range of services beyond the fees charged by the recruitment agency. Such services include assistance with finding a job, processing paperwork and passport applications, and arranging transportation to the airport.⁶⁸⁴ Sub-agents also charge domestic workers for the falsification of documents, particularly in relation to the age of the worker and the documents that women domestic workers are required to submit for the Family Background Report.⁶⁸⁵ An advocate interviewed at Lawyers Beyond Borders in Sri Lanka described the common illegal practice of sub-agents:⁶⁸⁶

As a rural woman you have never been out of the household or to Colombo. They are told that you need to get your passport and the first violation is when the sub-agent takes money from you so they can take you to Colombo. They often have to stay the night before in Colombo while they are waiting for their passport and this is the time where some of these women are sexually abused.

On account of their delayed involvement in temporary labour migration owing to decades of civil war, Sri Lankan Tamil women residing in remote communities are particularly vulnerable to exploitation by recruiters and sub-agents. They lack experience and understanding of migration practices and recruitment procedures, making them more likely to be deceived with misinformation, inflated recruitment

⁶⁸³ Interview with an official from the Sri Lanka Bureau of Foreign Employment (The author, Colombo Sri Lanka, 15 June 2018) Transcript on file.

⁶⁸⁴ Gamburd, above n 498, at 59.

⁶⁸⁵ Migrant Forum in Asia, above n 237, at 12.

⁶⁸⁶ Interview with an advocate from Lawyers Beyond Borders (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

costs and dependent on taking loans from moneylenders that result in crippling debt repayments.⁶⁸⁷ Their deficient knowledge is exacerbated by poorly distributed migrant services and resource centres in the Eastern Province, allowing sub-agents and labour brokers to exploit the gaps in government coverage.⁶⁸⁸ The experience of Sri Lankan Tamil women stands in contrast to Sri Lankan Muslim migrants whose specific ethno-religious characteristics have produced favourable migration practices. West Asian employers exhibit a preference for Muslim workers, on account of the same religious affinity, which tends to amount to lower recruitment fees and higher wages.⁶⁸⁹

Comparable with the indebtedness of Filipina domestic workers, the excessive fees charged by illegal sub-agents in Sri Lanka force MDWs to continue working in abusive employment situations until they can repay their debts to banks and moneylenders.⁶⁹⁰ Human Rights Watch also discovered that because there is no written agreement, the sub-agent is able to continually deduct payments from their salary since the worker has no idea about the amount of debt owed.⁶⁹¹ This generates a form of hyper-dependence upon employers and vulnerability to various forms of violence and coercive practices.

The problem of sub-agent malpractice is exacerbated by the regulatory framework in Sri Lanka that impedes licensed recruitment agencies based in central urban areas, such as Colombo, from establishing subsidiary offices in remote areas.⁶⁹² Recruitment agencies are faced with costly legislative and capacity constraints, which require agencies to obtain another license, submit documentation and pay further licensing fees to set up a new agency in a different location.⁶⁹³ This necessitates the cheaper alternative of unlicensed sub-agents and labour brokers to play a critical role in recruiting migrants from distant regions for foreign employment on their behalf. An advocate from Helvetas in Sri Lanka affirmed this during our interview: “*one of the main problems is that the recruitment process is not decentralised, it is only confined*

⁶⁸⁷ Withers, above n 96, at 56.

⁶⁸⁸ At 88.

⁶⁸⁹ At 55.

⁶⁹⁰ Turner, above n 45, at 22.

⁶⁹¹ At 29.

⁶⁹² Weeraratne, above n 681.

⁶⁹³ Sri Lanka Bureau of Foreign Employment “How to Obtain a License” <www.slbfe.lk>.

to areas such as Colombo and Gampaha. So how the recruitment agencies are recruiting and finding migrant workers is through sub-agents.”⁶⁹⁴

The absence of an effective regulatory response to prosecute the activities of sub-agents leads to highly coercive forms of exploitation of domestic workers throughout the migration cycle. The state’s inaction with regards to regulation constitutes structural violence, as it is enabling sub-agents to thrive and profit from workers at the expense of their rights and welfare overseas. While compulsory registration with the SLBFE is required for all workers, which confers access to the Bureau’s dispute settlement process for complaints regarding recruiters and employers, the process does not cover complaints relating to the practice of sub-agents.⁶⁹⁵ Thus, the government’s failure to hold sub-agents accountable for their actions against MDWs further heightens their risk to abuse.

The market for the services of recruitment agencies and their sub-agents in Sri Lanka is a by-product of the government’s reliance on an exported labour force, and its efforts to facilitate and sustain a globalised service economy through state agencies and migration policies. Limited decent employment opportunities for women in Sri Lanka leave prospective domestic workers with no choice but to succumb to a situation of “debt-financed state-sanctioned indentured labour.”⁶⁹⁶ While recognising that the government has taken some steps to implement a regulatory framework for licensed recruitment agencies, it has so far failed to monitor, regulate and punish sub-agents. The absence of a proper monitoring mechanism allows recruiters to hire and delegate duties to sub-agents, but avoid liability for their illegal actions.⁶⁹⁷

5.4 Conclusion

This chapter revealed how the inaction of both states to inform women MDWs about their rights during pre-departure seminars, and effectively enforce laws to regulate the

⁶⁹⁴ Interview with an advocate from Helvetas (The author, Colombo Sri Lanka, 15 June 2018) Transcript on file.

⁶⁹⁵ Judith Shaw “Housemaid Remittances in Rural Sri Lanka: Development Policy Issues” (paper presented to the 17th Biennial Conference of the Asian Studies Association of Australia in Melbourne, 1-3 July 2018).

⁶⁹⁶ At 184.

⁶⁹⁷ Turner, above n 45, at 96.

illegal activities of recruiters and sub-agents, constitutes structural violence by *omission*. This is because it results in workers being more susceptible to situations of abuse and rights violations by recruitment agencies and employers. The market-oriented approach of the Philippine and Sri Lankan governments with regards to their regulation of the rights of women domestic workers during the pre-departure stage of the migration process corresponds with Lee's tripartite typology for theorising state interventions. The two states utilise *accommodating* regimes through their systems of training and education, administered by dedicated agencies, which are specifically tailored to support the competitiveness of their domestic workers and promote the accumulation and investment of remittances.

This chapter also highlighted the instrumental role of both labour-sending states in influencing and producing international migration and remittance flows to improve their competitive position in relation to other states in the global economy. Restrictions on the migration of women domestic workers illustrate how the Philippines and Sri Lanka have the capacity to intervene and exert political control to manage migration. In particular, the Philippines employs *directing* regimes when banning the migration of women domestic workers to certain receiving states and sending them to other host countries with new or growing markets to meet the needs of global capital. The success of such bans in achieving better rights protection, however, has been modest and episodic – undermined in large part by economic constraints on the maintenance of migration bans. By trading on the cultural capital of Filipina domestic workers, this approach hinges upon and reinforces a racialised hierarchy of MDWs in the Gulf, to the effect of impeding other labour-sending states from emulating this strategy.

Chapter Six

Employment Overseas

The previous chapter examined three dominant issues violating the rights of domestic workers during the pre-departure stage of the migration process in the Philippines and Sri Lanka: inadequate training and education, restrictions on their migration, and the malpractice of recruitment agencies. This chapter explores these issues further by analysing how they contribute to the vulnerability of domestic workers to rights violations onsite in the receiving state.

The first part of this chapter outlines the rights of women domestic workers under international and domestic legal frameworks during employment overseas. Following this, the chapter discusses the leading rights violations experienced by domestic workers in the host state, as revealed by data collected during the fieldwork and secondary sources, in order to assess how the legal frameworks in the Philippines and Sri Lanka are safeguarding the rights of domestic workers in practice.

The second part of this chapter examines two ways in which both governments are attempting to address such rights violations during employment overseas: first, through government assistance in the form of support services provided by embassies and labour attachés in the host country, and second, through government negotiation in the form of bilateral labour agreements and memoranda of understanding.

The chapter reviews the domestic law on government assistance and negotiation in the two sending states to assess the extent to which the governments are formally complying with international standards. It finds that both governments fail to provide sufficient government assistance through trained labour attachés and gender-sensitive welfare officers in receiving countries, while continuing to promote foreign employment. The resulting gaps in rights protections and gender-responsive support mechanisms render women domestic workers more vulnerable to being placed in homes where there are unsafe working conditions and abuse.

This chapter also interprets the failure of the Philippine and Sri Lankan governments to sign binding bilateral labour agreements with receiving countries as evidence that both states are willing to sacrifice the rights of women domestic workers, in order to gain a competitive labour-market advantage above other labour-sending countries. The small number of non-binding agreements that do cover MDWs incorporate gender-blind provisions, which largely ignore the multiple forms of discrimination faced by women domestic workers overseas.

6.1 Rights Violations Overseas

My fieldwork supports the findings of other researchers that contract infringements and exploitative working conditions are the leading rights violations committed by employers and recruitment agencies against domestic workers during their employment overseas. I argue that such violations are largely a consequence of the two sending states' inaction to regulate recruitment agencies and sub-agents, and provide domestic workers with sufficient rights-based training and education pre-departure, discussed in chapter five.

6.1.1 *International Law*

The provisions in the ILO's Domestic Workers Convention (C189) seek to address the specific vulnerabilities unique to women MDWs and the particular challenges they face in the workplace. Article 8 of C189 aims to ensure that domestic workers recruited in one country for work in another receive a written contract of employment or job offer that is enforceable in the country in which the work is to be performed. Article 7 adds that domestic workers should be informed of the terms and conditions of the contract, including the name and address of the employer, the duration of employment, the remuneration, hours of work, rest periods and provision of food and accommodation. Articles 11 and 12 stipulate that domestic workers should enjoy minimum wage coverage, which should be paid at regular intervals at least once a month. With regards to working conditions, Article 10 takes into account the special characteristics of domestic work by ensuring that MDWs enjoy fair terms of

employment and decent working conditions, as well as decent living conditions that respect their privacy if they reside in the household. Article 9 provides that domestic workers are entitled to keep in their possession their travel and identity documents.

The ICMW General Comment No. 1 strengthens the protections provided in C189. It recognises that even where contracts have been signed pre-departure, many migrant workers are “compelled to sign new contracts upon arrival, nearly always for less pay and often for different conditions of employment than had been agreed upon, and often in a language they do not understand.”⁶⁹⁸ The Committee advises State Parties to ensure that before departure domestic workers have explicit, written terms of employment, in a language they understand, outlining their specific duties, hours, remuneration, days of rest, in contracts that are free, fair and fully consented to.⁶⁹⁹

Both General Comment No. 1 and the CEDAW GR 26 highlight how the withholding of passports by employers is widespread. This reinforces isolation and dependence, preventing the domestic worker from leaving the house and country.⁷⁰⁰ Therefore, “State Parties should protect the right of women MDWs to freedom of movement and ensure that they retain possession of travel and identity documents.”⁷⁰¹

6.1.2 Domestic Law in The Philippines and Sri Lanka

The Philippines

The Philippine government authorises the POEA to formulate employment standards in accordance with the welfare objectives of the overseas employment programme. Republic Act 10022 provides that the state shall allow the deployment of overseas Filipino workers provided that the standards and conditions of employment are in

⁶⁹⁸ UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers*, [11].

⁶⁹⁹ At [40].

⁷⁰⁰ At [12].

⁷⁰¹ At [39] and art 21; Committee on the Elimination of Discrimination Against Women *General Recommendation No 26 on Women Migrant Workers* (5 December 2008), [24(e)]; CEDAW, art 2(d).

accordance with the employment contracts prescribed by the POEA and with internationally accepted standards.⁷⁰²

The minimum provisions included in employment contracts are outlined in the POEA's Rules and Regulations of 2016, which state that "the Administration shall secure the best possible terms and conditions of employment for overseas Filipino workers ... and it shall develop and review employment standards in accordance with policy thrusts and market developments."⁷⁰³ The POEA-approved employment contract must reflect the names and details of the contracting parties (foreign employer, local agent and the worker) who voluntarily bind themselves to the terms and conditions of employment. These include, among others, the workplace, contract duration, employee's position, monthly salary, regular working hours and overtime pay, leave credits, insurance, repatriation and termination procedures, settlement of disputes and applicable law on the contract.⁷⁰⁴

The POEA often requires additional terms and conditions to be included in employment contracts for women MDWs. These include requiring that domestic workers: have custody of their passport at all times; be treated humanely by the employer and others in the household; be given a separate sleeping room and a daily rest of at least eight continuous hours; be made to work only in the residence of the employer; be allowed to freely communicate with her family in the Philippines or with the Philippine embassy; be taken to the Philippine embassy when so required; be given one day of rest per week; and be informed about procedures for settling disputes.⁷⁰⁵

In accordance with standards comprised under international law, section 137 of the POEA's Rules and Regulations stipulates that the recruitment agency shall, prior to the signing of the employment contract, inform the worker of their rights and obligations, and disclose the full terms and conditions of employment.

⁷⁰² Republic Act 8042, s 4 as amended by Republic Act 10022, s 3.

⁷⁰³ POEA, above n 438, at s 134.

⁷⁰⁴ At s 135.

⁷⁰⁵ Julyn S. Ambito and Melissa Suzette L. Banzon "Review of Philippine Migration Laws and Regulations: Gains, Gaps, Prospects" (December 2011) Philippine Institute for Development Studies.

When questioned about how the POEA verifies and approves employment contracts for women MDWs, a representative of the POEA stated:⁷⁰⁶

After the contract is verified and accredited by the labour attaché at the job site, it goes through more scrutiny at the POEA. We ensure that the provisions in the employment contract are above the standard conditions, meaning to say that when we speak of wages it should be the minimum, there must be a rest day, the workers must be entitled to food and lodging, and the worker has to be able to communicate with their family.

Sri Lanka

Comparable with the role of the POEA, the SLBFE is empowered to set standards for and negotiate contracts of employment, to formulate and implement a model contract of employment for MDWs, and to examine the authenticity of documentation issued to Sri Lankan workers going abroad for employment.⁷⁰⁷ In accordance with standards under international law, section 40 of the SLBFE Act stipulates that before the contract of employment is signed, it must be read by and explained to the worker by the recruitment agency. Following this, the Act requires the contract to be forwarded to the Bureau for certification prior to the domestic worker's departure from Sri Lanka.

The Sri Lankan government introduced a model contract between migrant workers and employers in an effort to curb exploitation against women domestic workers. The model contract formulated by the SLBFE includes the same minimum provisions as the POEA approved-contract in the Philippines, as well as a "job scope sheet" pertaining to their specific duties, number of persons in the household, size of the house and the number of bedrooms.⁷⁰⁸

As a result of several memoranda of understanding signed between Sri Lanka and recruitment agencies in West Asia, Singapore and Hong Kong, it is compulsory for

⁷⁰⁶ Interview with an official at the Philippine Overseas Employment Administration (The author, Manila The Philippines, 20 March 2018) Transcript on file.

⁷⁰⁷ Sri Lanka Bureau of Foreign Employment Act (No 21 of 1985), s 15.

⁷⁰⁸ Sri Lanka High Commission *Standard Employment Contract for Sri Lankan Housekeepers*.

employers wishing to hire Sri Lankan domestic workers to sign a model contract. This contract must be endorsed by the relevant Sri Lankan embassy before the domestic worker can leave the country.⁷⁰⁹ The contract registration scheme requires labour attachés to verify the credibility of prospective employers prior to registration, while the foreign agent has to sign an agreement, which is authenticated at the concerned embassy.⁷¹⁰ The intention behind the agreement is to help monitor activities and accelerate grievance settlements by binding the employer and agent to fulfil their obligations.

6.1.3 Domestic Law in Practice

While the safeguards enforced by both governments in the form of model employment contracts and minimum provisions demonstrate a positive rights-based practice in accordance with international law standards, the provisions are not implemented effectively. The most common violation in both sending states is contract substitution, whereby employers or recruitment agencies replace the original ‘model’ contract and force the worker to sign a new contract, which stipulates less favourable terms, upon arrival in their country of destination.⁷¹¹ An advocate I interviewed at Lawyers Beyond Borders in Sri Lanka explained this problem:⁷¹²

The workers actually sign twice – they sign here in their language and then when she goes abroad there is another contract to sign, which she does not understand. Those things are there on paper but in practice she has to work 14-16 hours per day, her passport is confiscated, and they do not allow her to use a mobile phone so she cannot communicate with the embassy.

This was substantiated by an advocate from the Center for Migrant Advocacy in the Philippines: “they do not receive their salaries or are underpaid, because in the Gulf

⁷⁰⁹ Institute of Policy Studies of Sri Lanka *International Migration Outlook: Sri Lanka* (May 2009) International Organization for Migration: Colombo at 40.

⁷¹⁰ Sri Lanka Bureau of Foreign Employment “Approval Before Departure” <www.slbfe.lk>; Dias and Jayasundere, above n 193.

⁷¹¹ Migrant Forum in Asia, above n 237, at 51.

⁷¹² Interview with an advocate from Lawyers Beyond Borders (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

they have a contractual salary of US\$400 but in reality they do not receive that amount. They are overworked with insufficient food.”⁷¹³

Contract substitution results in the domestic worker being on duty for an excessive amount of hours with no rest day and often for more than one household. An advocate from ACTFORM in Sri Lanka stressed how “*the contract says you clean one house, but she goes abroad and has to clean five houses – the mother’s house and father’s house etc.*”⁷¹⁴ Thus, despite the provision of model contracts, workers are still being forced to endure conditions that do not reflect the minimum standards. Migrante International in the Philippines admitted that “*those kinds of violations are part of being a woman migrant worker. It is lucky for you if you fully enjoy those rights written in your contract or in the law – it is the exception rather than the norm.*”⁷¹⁵

Fearing deportation and often burdened with significant debt owed to poorly regulated recruitment agencies and sub-agents, domestic workers will accept contractual violations and less pay rather than face unemployment and rising debt in the Philippines and Sri Lanka.⁷¹⁶ The failure of the two sending states to regulate and penalise the malpractice of recruitment agencies and sub-agents provides a favourable legal environment for agencies to violate standardised labour contracts and protective provisions.

In addition, inadequate Pre-Departure Seminars in the two states, which often focus on teaching domestic workers how to remit their wages while overseas as opposed to informing them about their rights, render them more susceptible to contractual infringements and rights violations overseas. This lack of protection by the Philippine and Sri Lankan governments during pre-departure and post-arrival creates the conditions for employers, recruiters and sub-agents to more easily exploit unprepared and uninformed women MDWs.

⁷¹³ Interview with an advocate from the Center for Migrant Advocacy (The author, Manila the Philippines, 19 March 2018) Transcript on file.

⁷¹⁴ Interview with an advocate from ACTFORM (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

⁷¹⁵ Focus group discussion with an advocate from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁷¹⁶ International Human Rights Clinic *The Protection of the Rights of Migrant Domestic Workers in a Country of Origin and a Country of Destination: Case Studies of the Philippines and Kuwait* (2013) at 14.

Resistance to Regulation in Receiving States

It could be contended that the ability of labour-sending states to protect women domestic workers overseas is limited due to problems of jurisdiction and uneven labour regulations across countries of origin and destination. Asha D'Souza contends that it is difficult for governments in the Philippines and Sri Lanka to enforce model employment contracts when many receiving countries, particularly in West Asia, exclude domestic workers from the scope of their national labour laws.⁷¹⁷ In addition, when the sending state adopts measures to set minimum labour standards and rates of remuneration for women MDWs, receiving countries simply expand recruitment from other source countries, which further contributes to the 'race to the bottom'.⁷¹⁸ For example, in response to the Philippine government proposing a higher minimum wage for Filipina domestic workers overseas, Malaysia simply increased its recruitment of 'cheaper' domestic workers from Cambodia.⁷¹⁹

Bahrain and Jordan are currently the only Gulf States to have amended their labour laws to include MDWs, guaranteeing protections such as monthly payment of salaries into a bank account, a weekly day of rest and a ten-hour workday.⁷²⁰ However, the provisions for domestic workers in these countries still fall short of providing rights equal to those granted to other workers. For example, domestic workers cannot leave the workplace without permission from their employer even while off-duty.⁷²¹

Recent reforms in Qatar are a promising way forward with the Council of Ministers' recent adoption of Law No. 19 on 30 August 2020, allowing migrant workers to freely change jobs without first having to obtain a 'No Objection Certificate' from their employer.⁷²² This new law, coupled with the removal of exit permit

⁷¹⁷ D'Souza, above n 18; International Trade Union Confederation "Facilitating Exploitation: A Review of Labour Laws for Migrant Domestic Workers in Gulf Cooperation Council Countries" (2017) at 13.

⁷¹⁸ Piper, Rosewarne and Withers, above n 210, at 6.

⁷¹⁹ Rosewarne, above n 118, at 93.

⁷²⁰ Human Rights Watch "Slow Reform: Protection of Migrant Domestic Workers in Asia and the Middle East" (April 2010) at 14.

⁷²¹ At 4.

⁷²² International Labour Organization Press Release "Dismantling the Kafala System and Introducing a Minimum Wage Mark New Era for Qatar Labour Market" (30 August 2020) <www.ilo.org>.

requirements earlier in 2020, effectively dismantles the kafala sponsorship system. The Council of Ministers has also adopted Law No. 17 of 2020, establishing a non-discriminatory minimum wage of 1,000 Qatari riyals for all sectors and nationalities including domestic workers, the first of its kind in West Asia. To ensure compliance with the minimum wage, the government is “enhancing detection of violations, enacting swifter penalties and further strengthening the capacity of inspectors.”⁷²³

Despite uneven labour regulations across receiving states, I maintain that labour-sending states can play a critical role in protecting the rights of domestic workers abroad, for instance through government assistance provided by labour attachés and welfare officers, and by government negotiation through bilateral labour agreements and memoranda of understanding, both of which will be discussed in turn.

6.2 Government Assistance Overseas

One way that the Philippine and Sri Lankan governments can address rights violations against domestic workers in receiving countries, particularly contract substitution, is through government assistance in the form of support services provided by embassies and labour attachés. Embassies situated in receiving countries are primary sources of support for migrant workers in distress by providing a range of welfare services to assist their nationals. Labour attachés serve as a point of contact between workers in countries of destination and the embassy of their respective home governments. Due to their location, the responsibility falls on labour attachés to fulfil the obligations of sending states to their nationals abroad in promoting and ensuring respect for the rights of women MDWs.⁷²⁴

6.2.1 International Law

The CEDAW GR 26 acknowledges the importance of consular assistance and recommends that State Parties “must properly train and supervise their diplomatic and

⁷²³ Above n 722.

⁷²⁴ C.R. Abrar, S. Irudaya Rajan, L.K. Ruhunage and Tasneem Siddiqui “Institutional Strengthening of the Office of Labour Attaché: Research Findings from Bangladesh, India and Sri Lanka” (November 2014) Working Paper 23. Migrating Out of Poverty Research Programme Consortium at 14.

consular staff to ensure that they fulfil their role in protecting the rights of women migrant workers abroad.”⁷²⁵ Such protection should involve “quality support services available to women migrants, including medical care, counselling, legal aid and shelter when needed.”⁷²⁶

The ICMW General Comment No. 1 recognises that while receiving states “have the primary responsibility to protect the rights of domestic workers abroad, embassies and consulates of states of origin should also play an active role.”⁷²⁷ In particular, embassies present in countries where domestic workers are employed are encouraged to ensure adequately trained staff, mechanisms to receive and address complaints made by migrant workers, and to cooperate with each other to identify abusive recruitment agencies and promote appropriate protection policies for MDWs.⁷²⁸

The ILO’s C189 does not refer to consular assistance overseas, but includes provisions on consular support services in its accompanying Recommendation No. 201. The Recommendation supplements the Convention and provides Member States with non-binding guidance for strengthening protections for domestic workers and ensuring conditions of decent work. The Recommendation details a range of additional measures for states, such as providing pre-placement visits to households in which domestic workers are to be employed and raising employers’ awareness of their obligations by providing information on good employment practices and the potential sanctions in cases of violation.⁷²⁹

6.2.2 Domestic Law in The Philippines and Sri Lanka

The Philippines

Currently, the Philippine government has 68 embassies, 186 consulates and 38 Philippine Overseas Labour Offices (POLOs) that assist migrant workers living and

⁷²⁵ [24(j)].

⁷²⁶ [24(j)].

⁷²⁷ [62].

⁷²⁸ [62] and [63].

⁷²⁹ [21(a)-(e)].

working abroad.⁷³⁰ The POLOs, headed by labour attachés who supervise labour officials and welfare officers, serve as the Department of Labour and Employment's overseas operating arm in the implementation of Philippine labour policies and programmes for the protection of the rights of Filipinos working abroad.

Under the POEA Rules and Regulations, the POLO has delegated authority to accredit employers in the receiving country, including the validation of job orders, and offer information and advisory programmes such as the Post-Arrival Orientation Seminar.⁷³¹ The labour attaché at the POLO is tasked with ensuring that all employment rights and benefits and the welfare of Filipino migrant workers at the worksite are duly protected.⁷³² It is also the responsibility of the labour attaché to ensure that each employment contract is consistent with the prevailing employment laws, standards and practices in both the Philippines and the host country.⁷³³ The POLO issues an Accreditation Certificate to the employer upon full compliance with the requirements, which then permits the employer to be registered by the POEA.⁷³⁴

Employers intending to hire women domestic workers must meet additional requirements, including being interviewed by an official at the POLO or embassy in the host country and attending a pre-employment orientation. They must also provide a photo of themselves and their spouse, their address and size of the residence, proof of income and a clean criminal record with police clearance.⁷³⁵

Sri Lanka

Sri Lanka has 51 embassies and 104 consulates situated in receiving countries. In order to ensure the protection and welfare of Sri Lankan nationals employed overseas, the National Labour Migration Policy emphasises the need to provide and strengthen

⁷³⁰ Arisman and Ratnawati Kusuma Jaya "Protection of Human Rights and Labour Migration for Employment Purposes Across ASEAN" (2018) Indonesia: Center for Southeast Asian Studies at 47.

⁷³¹ POEA Rules and Regulations (2016) Part III, Rule I Accreditation and Registration of Employers, s 95.

⁷³² At s 95.

⁷³³ At s 95.

⁷³⁴ At ss 97 and 98.

⁷³⁵ United Nations Women *Review of Laws, Policies and Regulations Governing Labour Migration in Asian and Arab States: A Gender and Rights-Based Perspective* (2013) United Nations Asia and the Pacific Regional Office: Bangkok at 226.

services offered by Sri Lankan embassies in labour receiving countries.⁷³⁶ The law has enabled the SLBFE to provide welfare measures for migrant workers employed overseas, including the appointment of labour attachés and welfare officers through Sri Lanka’s diplomatic missions in host countries.⁷³⁷

The Policy further compels embassies to have a well-defined system for being in contact with all migrant workers in each country. In accordance with international law standards, the Labour Sections within embassies “shall have the special capacity and ability to handle grievances of migrant workers and to work towards their protection in a proactive manner.”⁷³⁸ Similar to the role of labour attachés at the POLOs, the assigned functions of Sri Lankan labour attachés include registration of recruitment agencies and migrant workers employed in the host country; authentication and verification of employment contracts; approval of job orders and documents pertaining to recruitment; blacklisting of unscrupulous employers and recruiters involved in abusive labour practices; counselling and assistance to workers in settling disputes related to employment contracts; market exploration; and repatriation of stranded migrant workers.⁷³⁹

In terms of protecting the rights of women MDWs, Sri Lankan labour attachés have been entrusted with the responsibility of dealing with host country authorities, employers and recruitment agencies. They attend to complaints such as non or under-payment of wages, breach or substitution of employment contracts and physical and sexual abuse.⁷⁴⁰ After recording the complaint through the web-based complaint management system, the labour official has to decide the appropriate avenue for redress. This might include negotiating with the worker, employer and agent, or

⁷³⁶ Ministry of Foreign Employment Promotion and Welfare *National Labour Migration Policy for Sri Lanka* (October 2008) at 21.

⁷³⁷ At 49.

⁷³⁸ At V.

⁷³⁹ International Labour Organization Country Office for Sri Lanka and the Maldives and the Sri Lanka Ministry of Foreign Employment *Operational Manual for Labour Sections of Sri Lankan Diplomatic Missions in Destination Countries: Ensuring the Protection and Welfare of Migrant Workers* (2nd ed, December 2013).

⁷⁴⁰ Abrar, Rajan, Ruhunage and Siddiqui, above n 724.

taking legal action within the system, such as referring the matter to the Police, Immigration, and/or legal officials of the host country.⁷⁴¹

6.2.3 *Domestic Law in Practice*

Limited Government Personnel Overseas

While the domestic legal frameworks governing assistance from Filipino and Sri Lankan labour attachés and welfare officers in receiving countries are in accordance with international standards, the law falls short in practice. When questioned about how the Philippine government protects the rights of women MDWs through its labour attachés, a representative of the POEA stated:⁷⁴²

It is really difficult to monitor especially if we speak of millions of workers, we deploy hundreds of thousands of overseas Filipino workers. We have limited personnel in the labour offices and the welfare officer has to take care of so many workers.

Advocates at the Center for Migrant Advocacy in the Philippines confirmed the number of labour attachés overseas was inadequate:⁷⁴³

One of the main issues onsite is that protective measures become more difficult to enforce, especially when the government has been lax in its duties to monitor or because they have to attend to so many workers, and they do not have the time to do due diligence and check on these workers.

There is currently a ‘ratio distortion’ between the number of government personnel in the receiving state on one hand, and the number and needs of migrant workers on the

⁷⁴¹ International Labour Organization Country Office for Sri Lanka and the Maldives and the Sri Lanka Ministry of Foreign Employment, above n 739.

⁷⁴² Interview with an official at the Philippine Overseas Employment Administration (The author, Manila the Philippines, 20 March 2018) Transcript on file.

⁷⁴³ Interview with an advocate from the Center for Migrant Advocacy (The author, Manila the Philippines, 19 March 2018) Transcript on file.

other hand.⁷⁴⁴ A study conducted by the Philippine Institute for Development Studies reported that officials at the Philippine embassies in host countries admit that it is difficult to monitor the implementation of standard employment contracts due to lack of resources and manpower.⁷⁴⁵ The insufficient number of personnel from the OWWA deployed in overseas offices undoubtedly undermines the quality of the services provided by the Administration. In March 2018, the Deputy Administrator of the OWWA, Arnell Ignacio, called for 500 more personnel after admitting that there are currently only 120 officials from the OWWA deployed outside the Philippines.⁷⁴⁶ The Southeast Asia Women’s Caucus on the ASEAN also reported that there is only one welfare officer assigned for every 20,000 overseas Filipino workers.⁷⁴⁷

Gaining access to the limited number of welfare officers available to assist migrant workers in distress at the embassy is an added difficulty. The location is often too remote, there may be no mass transportation system available, and the telephone system can be unreliable.⁷⁴⁸ Human Rights Watch has documented gaps in the services provided to MDWs who seek assistance from Sri Lankan embassies, including failure to provide rescue assistance to domestic workers who contact the embassy after escaping from an abusive employer, lack of follow-up on cases after workers have requested assistance, and failure to provide information about avenues for redress available to those who have suffered abuse.⁷⁴⁹

Lawyers Beyond Borders in Sri Lanka substantiated such problems, with one advocate who had recently visited the Sri Lankan embassies in Saudi Arabia and Dubai informing me.⁷⁵⁰

⁷⁴⁴ Ambito and Banzon, above n 705, at 20.

⁷⁴⁵ At 6.

⁷⁴⁶ UNTV “OWWA Needs 500 Additional Personnel for Overseas Offices” (23 March 2018) <www.untvweb.com>.

⁷⁴⁷ Southeast Asia Women’s Caucus on the ASEAN “Compliance with Women’s Rights Standards: The Case of Migration of Domestic Workers from Indonesia and the Philippines in Brunei Darussalam” (2013) at 51.

⁷⁴⁸ Philippine Migrant Rights Groups’ *Written Replies to the List of Issues Relating to the Consideration of the Initial Report of the Philippines: Submitted to the UN Migrant Workers Committee for its 10th Session in Geneva* (March 2009); Abrar, Rajan, Ruhunage and Siddiqui, above n 724.

⁷⁴⁹ Turner, above n 45, at 102.

⁷⁵⁰ Interview with an advocate from Lawyers Beyond Borders (The author, Colombo Sri Lanka, 13 June 2018) Transcript on file.

I had a discussion with those labour attachés and they said that they do not have enough money to visit different places, which are 400-500 kilometres away, and they do not have enough people. They have no vehicles to use or overtime payments from the government, so some of them work on a voluntary basis.

It is apparent that both sending states are continuing to promote labour export policies and facilitate the overseas employment of women domestic workers, yet failing to provide sufficient government assistance in the form of labour attachés and welfare officers to protect their rights while overseas. It seems clear that the Philippine and Sri Lankan governments are prioritising the pursuit for remittances by sending too many women overseas for limited personnel to monitor adequately. The resulting gaps in rights protections, such as weak monitoring of the recruitment industry and the employer's household, leaves domestic workers highly vulnerable to being placed in homes where there are unsafe working conditions and abuse.⁷⁵¹ This runs contrary to standards set out under international law, particularly the ICMW General Comment No. 1, which stipulates that embassies should play an active role in protecting the rights of their nationals employed overseas as domestic workers.

Structural violence exists when the structures of the state support the unequal distribution of power and resources,⁷⁵² which systematically disadvantages those who do not hold as much, if any, power.⁷⁵³ Such a situation corresponds with the disproportionately small amount of the annual national budget devoted to fund the agencies charged with securing the rights and welfare of migrant workers,⁷⁵⁴ despite the substantial amount of remittances such workers send back to the Philippines and Sri Lanka. Without adequate funding, the ability of government agencies and labour

⁷⁵¹ Coordination of Action Research on AIDS and Mobility (CARAM) Asia and Community Development Services "Study on Relation Between Contribution of Migrants to Development and Governments' Budget Allocation for Protection of Migrants" (2011).

⁷⁵² Amanda Cahill-Ripley "Challenging Neoliberalism: Making Economic and Social Rights Matter in the Peacebuilding Agenda" in Gillian MacNaughton and Diane F. Frey (eds) *Economic and Social Rights in a Neoliberal World* (Cambridge University Press, 2018) at 195.

⁷⁵³ Kathleen Ho "Structural Violence as a Human Rights Violation" (2007) 4 Essex Human Rights Review at 4.

⁷⁵⁴ CARAM Asia and Community Development Services, above n 751. Government agencies in the Philippines receive 0.17% of the countries annual national budget and Sri Lanka 0.01%.

attachés to fulfil their roles in protecting women migrants abroad is severely diminished.

Moreover, Migrante International in the Philippines revealed in 2012 that while the protective mechanisms and direct services for overseas Filipino workers had decreased, the budget for marketing and job placement of the POEA and Department of Labour and Employment had increased.⁷⁵⁵ This highlights an inherent conflict of interest as government agencies in both sending states serve dual-functions with potentially conflicting roles: the promotion of labour export to foreign labour markets alongside the protection of the rights of their nationals.

I maintain that without appropriate protections in place, the labour export policies in both sending states are essentially treating women domestic workers as dehumanised commodities, rather than as rights holders. The failure to ensure that there are a sufficient number of labour attachés and welfare officers to provide assistance and protect the rights of women MDWs exacerbates their risk of abuse by recruitment agencies and employers in the receiving country.

Lack of Training and Knowledge

Advocacy groups in both the Philippines and Sri Lanka further raised concerns about the competency of the limited number of labour attachés appointed overseas. According to Migrant Forum in Asia, labour attachés are not equipped with proper training by the governments and lack knowledge of processes in the host country. This leads to them offering insufficient and insensitive assistance to women domestic workers in particular.⁷⁵⁶ An advocate from Community Development Services in Sri Lanka confirmed this:⁷⁵⁷

Labour attachés still have a long way to go in terms of conflict mitigation and training, knowing the labour laws of the host country, and knowing the various conventions that the Sri Lankan government has signed – that

⁷⁵⁵ CARAM Asia and Community Development Services, above n 751, at 69.

⁷⁵⁶ Migrant Forum in Asia, above n 237, at 52.

⁷⁵⁷ Interview with an advocate from Community Development Services (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

knowledge is important for you to become a labour attaché. But these are political appointees, they are not necessarily qualified personnel who can handle a labour situation.

The failure of the two sending states to provide labour attachés with a rights-based education compromises their ability to adequately monitor and protect migrant workers against rights violations overseas and resolve cases of abuse. In addition, data collected in the three fieldwork countries revealed that many labour attachés have not received gender-responsive training to assist with the particular challenges faced by women domestic workers. An advocate from ACTFORM in Sri Lanka stated, “*the government officials are not gender-sensitive, the problem is that the embassy is dominated by men and they are not trained, so they have no understanding of the needs of women migrants.*”⁷⁵⁸

A lack of women labour attachés and welfare officers, coupled with deficient training in how to support women migrant workers in the destination country, is likely to result in inadequate protection of domestic workers against rights violations and abuse. Without gender-sensitive support available, women domestic workers are less likely to report situations of physical and sexual abuse.⁷⁵⁹ This was emphasised by an advocate at Community Development Services in Sri Lanka:⁷⁶⁰

Let's look at the situation where the woman migrant domestic worker was sexually abused, how do you come and talk about it to a male labour attaché? There was a time when we had a case of a woman who was sexually abused and she complained and the authorities asked her to show evidence. That is how bad it is.

Ultimately, both governments are not only failing to provide enough welfare officers and labour attachés to support the increasing number of women domestic workers in receiving countries, but they are also failing to ensure that the labour attachés who are

⁷⁵⁸ Interview with an advocate from ACTFORM (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

⁷⁵⁹ Migrant Forum in Asia, above n 237, at 26.

⁷⁶⁰ Interview with an advocate from Community Development Services (The author, Colombo Sri Lanka, 12 June 2018) Transcript on file.

employed are provided with sufficient resources and gender-sensitivity training to be better prepared and able to respond to the needs of women migrant workers who have been subjected to gender-based violence.

6.3 Government Negotiation

The second way that labour-sending states play a critical role in protecting the rights of women domestic workers in receiving countries is through government negotiation in the form of bilateral labour agreements. A formal bilateral agreement between origin and destination countries aims at facilitating and managing the cross-border movement of temporary, mainly ‘low-skilled’ migrant workers while protecting their rights and welfare.⁷⁶¹ A less formal arrangement is a memorandum of understanding, which most countries of destination prefer because, as non-binding agreements, they are easier to negotiate and modify according to changing economic and labour market conditions.⁷⁶² However, both types of agreement can vary significantly in scope in terms of the sectors and issues covered, and their effectiveness is often diminished due to a lack of implementation and monitoring mechanisms.

6.3.1 International Law

The CEDAW Committee recommends that State Parties who are sending or receiving countries should enter into bilateral or regional agreements or memoranda of understanding to protect the rights of women migrant workers.⁷⁶³ State Parties are also encouraged to share their experience of best practices and relevant information to promote the full protection of the rights of women migrant workers.⁷⁶⁴ Similarly, the ICMW General Comment No. 1 provides that in line with Articles 64 and 65 of the ICMW, sending and receiving states are encouraged to cooperate on protective and

⁷⁶¹ International Labour Organization *Gender Equality in Labour Migration Law, Policy and Management* (2016) International Labour Organization Regional Office for Asia and the Pacific: Bangkok at 97.

⁷⁶² International Labour Organization “Bilateral Agreements and Regional Cooperation” <www.ilo.org>.

⁷⁶³ [27(a)]; CEDAW, art 3.

⁷⁶⁴ [27(b)(i)]; CEDAW, art 3.

transparent frameworks and agreements, including bilateral, multilateral and regional agreements.

In addition, the ILO's Domestic Workers Recommendation No. 201 states that Members "should cooperate at bilateral, regional and global levels for the purpose of enhancing the protection of domestic workers", particularly in matters concerning the prevention of forced labour, monitoring the activities of employment agencies, and the dissemination of good practices and the collection of statistics on domestic work.⁷⁶⁵

6.3.2 Domestic Law in The Philippines and Sri Lanka

The Philippines

Section 4 of RA 8042 provides that "the State shall allow the deployment of overseas Filipino workers only in countries where the rights of Filipino migrant workers are protected." It continues that the government recognises any of the following as a guarantee on the part of the receiving country for the protection of rights of overseas Filipino workers: (a) it has existing labour and social laws protecting the rights of migrant workers; (b) it is a signatory to or ratifier of multilateral conventions relating to the protection of migrant workers; and (c) it has concluded a bilateral agreement or arrangement with the government on the protection of the rights of overseas Filipino workers. In the absence of any of the aforementioned guarantees in the country of destination, "no permit for deployment shall be issued by the POEA."⁷⁶⁶

Lee explicitly identifies the Philippines as a key interventionist sending state when outlining her tripartite typology. She notes that the Philippine government can be distinguished for its use of *directing* interventions such as proactive engagement and negotiation with receiving country governments and initiation of new migration relationships through labour agreements.⁷⁶⁷ The Philippines is perceived as a pioneer by other countries of origin for being the most active labour-sending state with

⁷⁶⁵ [26(2)].

⁷⁶⁶ Republic Act 8042, s 4, as amended by Republic Act 10022, s 3.

⁷⁶⁷ Lee, above n 32, at 1464.

regards to the number of general bilateral agreements and memoranda of understanding it has negotiated with receiving states on the recruitment of migrant workers. A representative of the POEA stated:⁷⁶⁸

We have no less than 35 bilateral agreements with different countries on different job categories. We ensure that vulnerable employees, like our domestic workers, get full protection through this bilateral labour agreement or regional agreements that we have with other countries.

However, domestic workers are excluded from the majority of these general labour agreements pertaining to the employment of foreign workers. In fact, only a select few exclusively concern domestic workers.⁷⁶⁹

The Philippine government signed its first official bilateral labour agreement on the recruitment of domestic workers with Saudi Arabia in May 2013. This agreement also marked the first time that Saudi Arabia had signed a bilateral agreement on the employment of domestic workers with a labour-sending country. The labour agreement lays down areas of cooperation between the Philippines and Saudi Arabia. These areas include recruitment of domestic workers through agencies that practice ethical recruitment and are licensed by their respective governments, and a prohibition on charging or deducting from the salary of the domestic worker any cost attendant to recruitment.⁷⁷⁰ The Agreement also establishes specific responsibilities for the Saudi Arabian government. These include ensuring the authenticity of the employment contract, opening a bank account in the name of the domestic worker, maintaining a 24-hour mechanism for domestic workers' assistance, and facilitating exit visas for repatriation upon contract completion or during emergency situations.⁷⁷¹

⁷⁶⁸ Interview with an official at the Philippine Overseas Employment Administration (The author, Manila The Philippines, 20 March 2018) Transcript on file.

⁷⁶⁹ Center for Migrant Advocacy "Bilateral Labour Agreements and Social Security Agreements: Forging Partnerships to Protect Filipino Migrant Workers' Rights" (2010) Quezon City: The Philippines.

⁷⁷⁰ *The Agreement on Domestic Worker Recruitment between the Ministry of Labour of the Kingdom of Saudi Arabia and the Department of Labour and Employment of the Republic of the Philippines* (20 May 2013).

⁷⁷¹ Above n 770.

Following the signing of a bilateral labour agreement, the Philippine government is required to conduct Joint Committee Meetings to “discuss action points on the implementation of the instrument and issues governing the provisions of the agreement in relation to the deployment of domestic workers.”⁷⁷² Four Joint Committee Meetings between the Philippines and Saudi Arabia have occurred so far to review issues such as the recruitment process of domestic workers and to amend the standard employment contract.

The Philippine government has also signed separate agreements with Jordan⁷⁷³ and Lebanon in 2012 and the United Arab Emirates⁷⁷⁴ in 2017. However, these agreements are in the form of a ‘Protocol on the Agreement for Recruitment of Domestic Workers’, which is an Annex to the general Memoranda of Understandings on Labour Cooperation.⁷⁷⁵ The Philippine government has not conducted any Joint Committee Meetings to review and monitor the implementation of the agreements with these three receiving countries since signing.

The most recent agreement was a memorandum of understanding signed between the Philippines and Kuwait in May 2018 titled ‘the Agreement on the Employment of Domestic Workers.’ The Agreement follows a ban on the migration of women domestic workers to Kuwait in light of widespread abuse in the Gulf State. The Memorandum of Understanding details the responsibilities of each country in ensuring that the rights of domestic workers are protected while in Kuwait. For example, Article 2 of the Agreement specifies that the Kuwaiti government shall ensure that the employer provides food, housing and clothing, and allows the worker to use a mobile phone to communicate with family and the state. The employer must not keep in his/her possession any of the domestic workers’ personal identity documents. The POEA reports that there are pending proposed agreements concerning domestic workers for Qatar, Bahrain, Oman and Israel.⁷⁷⁶

⁷⁷² POEA *Negotiating Bilateral Labour Agreements for Migrant Domestic Workers: The Philippines Experience* (25-26 October 2017) The 10th ASEAN Forum on Migrant Labour: Manila, Philippines.

⁷⁷³ Department of Labor and Employment “Jordan-Philippines Signs Protocol to Regulate HSWs’ Employment” (30 January 2012) <www.dole.gov.ph>.

⁷⁷⁴ Samihah Zaman “More Filipino Maids Coming to UAE Soon” *Gulf News* (15 September 2017) <www.gulfnews.com>.

⁷⁷⁵ The full text of the Protocols are not accessible online, but a vague outline of the rights guaranteed under the Protocols are available on certain websites.

⁷⁷⁶ POEA, above n 772.

Sri Lanka

Sri Lanka's National Labour Migration Policy provides that the state acknowledges the role of bilateral labour agreements and memoranda of understanding in the protection of migrant workers.⁷⁷⁷ In particular, the Policy adds that "memoranda of understanding between labour-sending and recruiting parties serves to ensure rights and benefits for workers and protection in specific work conditions."⁷⁷⁸

Comparable with the Philippines, Sri Lanka has entered into multiple formal and semi-formal agreements with countries of destination for the benefit of its migrant workers generally. For example, formal bilateral labour agreements with Italy⁷⁷⁹ and Qatar, and memoranda of understanding signed with the Republic of Korea, Malaysia, the United Arab Emirates, Libya, Jordan and Bahrain,⁷⁸⁰ all aim to better regulate recruitment processes and procedures for migrant workers in these countries of destination.

However, the Sri Lankan government has only signed three memoranda of understanding, and no formal binding bilateral agreements, to regulate the working conditions specifically of domestic workers in receiving states. In December 2012, Sri Lanka's Human Rights Commission signed a memorandum of understanding with the Qatar National Human Rights Committee to provide greater rights protection for Sri Lankan migrants and domestic workers in Qatar. In 2014, a memorandum of understanding was signed between Sri Lanka and Saudi Arabia to safeguard the rights of 12 categories of domestic workers, including housemaids, drivers, cleaners and waiters employed by Saudis. Under the agreement, employers are required to remit the workers' salaries to their bank accounts instead of paying in cash and domestic workers cannot be required to surrender their passports to the employer.⁷⁸¹

⁷⁷⁷ Ministry for Foreign Employment Promotion and Welfare *National Labour Migration Policy for Sri Lanka* (October 2008) 10.

⁷⁷⁸ At 10.

⁷⁷⁹ *Agreement on Bilateral Cooperation on Labour Migration Between the Government of the Italian Republic and the Government of the Democratic Socialist Republic of Sri Lanka* <www.lavoro.gov.it>.

⁷⁸⁰ International Organization for Migration UN Migration Data Portal "Migration Governance Snapshot: The Democratic Socialist Republic of Sri Lanka" (May 2018) at 4.

⁷⁸¹ Migrant Rights "Sri Lanka and Saudi Sign 'Landmark' Agreement on Migrant Domestic Worker Rights" (online ed, 16 January 2014) <www.migrant-rights.org>.

Most recently in February 2018, Sri Lanka signed a memorandum of understanding with the United Arab Emirates to foster cooperation in the fields of labour and manpower. A protocol agreement attached to the memorandum of understanding aims to facilitate the recruitment of domestic workers in accordance with the laws and regulations enforced in both countries.⁷⁸² Under the protocol agreement, only recruitment agencies registered at the Ministry of Human Resources in the United Arab Emirates and Ministry of Foreign Employment in Sri Lanka are able to offer recruitment for domestic workers.

Similar to the Philippines, the Sri Lankan government is also supposed to conduct Joint Committee Meetings, a requirement under many bilateral labour agreements, in order to monitor and follow-up on agreements and memoranda of understanding with receiving countries.⁷⁸³ The government conducted its second Joint Committee Meeting with Qatar in May 2017,⁷⁸⁴ and its third Joint Committee Meeting with Saudi Arabia in February 2019.⁷⁸⁵

6.3.3 Domestic Law in Practice

Interviews and focus groups with advocates in the Philippines and Sri Lanka, as well as secondary sources, revealed two particular issues regarding the effectiveness of bilateral labour agreements in protecting the rights of women domestic workers in receiving states. First, the non-binding nature of memoranda of understanding prevents sending states from being able to guarantee the content of the agreements. Second, there is a lack of monitoring and implementation of the agreements by both sending and receiving countries.

Non-Binding Informal Agreements

⁷⁸² The Gulf Times: Emirates Business “UAE and Sri Lanka Sign MOU to Foster Cooperation on Labour, Manpower Fields” (online ed, 18 February 2018) <www.emirates-business.ae>.

⁷⁸³ Piyasiri Wickramasekara *Bilateral Agreements and Memoranda of Understanding on Migration of Low-Skilled Workers: A Review* (2015) International Labour Office: Geneva at 29.

⁷⁸⁴ Sri Lanka Ministry of Foreign Employment *Annual Performance Report* (2017) at 98.

⁷⁸⁵ Sri Lanka Ministry of Foreign Affairs “Sri Lanka Embassy Holds Discussions with the Saudi Ministry of Labour and Social Development” (3 April 2019) <www.mfa.gov.lk>.

It can be observed that the Philippine and Sri Lankan governments have been largely using informal and non-binding memoranda of understanding or ‘protocols’ as an alternative to binding bilateral labour agreements. In contrast to bilateral labour agreements, memoranda of understanding are not as comprehensive and tend to be more general in scope with regards to areas of cooperation on protecting the rights of migrant workers.⁷⁸⁶ In addition, such agreements do not require ratification by the Senate of the receiving country and are merely signed by the concerned ministries. Their less stringent nature is preferred by receiving states who do not intend to bind themselves with international obligations.⁷⁸⁷ Wickramasekara observes that destination countries would rather use memoranda of understanding to manage irregular migration and promote orderly labour movements, while addressing the labour market needs of employers and certain sectors.⁷⁸⁸ Non-binding agreements are also more flexible and easier to modify with changing economic and labour market conditions.

Despite being a softer option, Wickramasekara contends that the existence of memoranda of understanding has political value and signals growing cooperation between sending and receiving countries.⁷⁸⁹ However, an advocate from Migrant International in the Philippines criticised non-binding agreements:⁷⁹⁰

Even though we have bilateral agreements, most of the agreements are non-binding documents. So the Philippine government cannot even ensure the content of those agreements, because those terms are merely consensual in nature. Even with those agreements, the prevailing laws of the host countries will be followed by migrant domestic workers.

The frequent use of non-binding and informal labour agreements highlights the prevailing power asymmetry between sending and receiving states. It could be argued

⁷⁸⁶ Scalabrini Migration Center and the International Organization for Migration, above n 461, at 180.

⁷⁸⁷ At 180.

⁷⁸⁸ Piyasiri Wickramasekara “Something is Better than Nothing: Enhancing the Protection of Indian Migrant Workers through Bilateral Agreements and Memoranda of Understanding” (February 2012) Migrant Forum in Asia at 6.

⁷⁸⁹ Wickramasekara, above n 788, at 31.

⁷⁹⁰ Focus group discussion with an advocate from Migrant International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

that host states have little incentive to change their labour laws and engage in bilateral negotiations with sending countries because of their relative bargaining power, which hinges on the abundance of low-cost labour available to be sourced from countries of origin across Asia and, increasingly, Africa.⁷⁹¹ Fearing the loss of market share and in order to gain a competitive advantage above other labour-sending states in Asia, many countries of origin are reluctant to take an aggressive stance on improving labour standards that could impede the employment of their citizens and reduce foreign revenue from remittances.⁷⁹² Structural dependence upon an overseas labour force constrains the extent to which sending countries are able to take meaningful action and strengthen the rights of workers abroad. This often results in many sending governments ‘under-selling’ the rights of workers and accepting conditions imposed by receiving states that violate human rights, such as the kafala system prominent across West Asia.

For example, Sri Lanka and Indonesia have eroded the Philippines’ previously dominant share of the market in Singapore and Hong Kong by negotiating a lower wage for women domestic workers than the government-mandated minimum salary in the Philippines.⁷⁹³ This reaffirms the ‘race to the bottom’ mentality amongst labour-sending states. In other words, to remain internationally competitive, state involvement in labour migration is manifestly biased towards capital accumulation and legislation that provides workers with fewer rights and benefits.⁷⁹⁴ Thus, when used in this neoliberal compatible way, competing labour agreements and memoranda of understanding become inherently non-transformative by cementing structural inequalities that perpetuate women’s subordination.

Inadequate Monitoring and Implementation

⁷⁹¹ Froilan T. Malit and George S. Naufal “Asymmetric Information under the Kafala Sponsorship System: Impacts on Foreign Domestic Workers’ Income and Employment Status in the GCC Countries” (2016) 54 *International Migration* 76 at 80.

⁷⁹² Jorge V. Tigno “At the Mercy of the Market? State Enabled, Market-Oriented Labor Migration and Women Migrants from the Philippines” (2014) 35 *Philippine Political Science Journal* 19 at 31.

⁷⁹³ Manolo I. Abella “Labour Migration in East Asian Economies” (paper presented to the Annual Bank Conference on Development Economics, 10-11 May 2004) at 6.

⁷⁹⁴ Christine B.N. Chin “Visible Bodies, Invisible Work: State Practices Toward Migrant Women Domestic Workers in Malaysia” (2003) 12 *Asian and Pacific Migration Journal* 49 at 52.

While the effectiveness of bilateral labour agreements depends to an extent on how legally binding they are, how well they are monitored and enforced by the contracting countries is more important. This is because binding agreements do not automatically translate into adequate implementation. Therefore, in the absence of an effective implementation and monitoring mechanism, there is little in the agreements to prevent the continuation of widespread violations of labour laws by employers and recruiters.⁷⁹⁵

Joint Committees in labour-sending countries have a major role to play in making agreements effective by ensuring concrete implementation and enforcement through monitoring procedures. However, Joint Committees in the Philippines and Sri Lanka have received criticism from migrant worker advocacy groups for not meeting with host countries frequently enough.⁷⁹⁶ There is also a lack of transparency in the negotiation process, despite Articles 64 and 65 of the ICMW encouraging sending and receiving states to cooperate on transparent frameworks and agreements.

The Center for Migrant Advocacy in the Philippines reports that “*the exchange of notes, minutes of consultations and meetings, drafts and implementing guidelines, which are essential to review and revise the agreements, cannot be found.*”⁷⁹⁷ Such meetings normally comprise only government officials from the relevant ministries and do not involve workers or advocacy groups. While researching such agreements for this thesis, there was a notable lack of information on the content of the agreements signed by the Philippines and particularly Sri Lanka, as well as details on Joint Committee Meetings that have taken place.

Therefore, while such agreements appear to be good practice in theory, this does not automatically translate into effective implementation. The persistence of widespread abuse and exploitation in receiving states, as confirmed by advocacy groups and international organisations interviewed in the Philippines, Sri Lanka and Hong Kong, indicates that bilateral labour agreements and memoranda of understanding have not

⁷⁹⁵ Wickramasekara, above n 783, at 18.

⁷⁹⁶ At 22.

⁷⁹⁷ Center for Migrant Advocacy, above n 769.

been implemented effectively by the two sending states to result in the necessary reforms in law and in practice.

In addition to ineffective implementation, there are a scarce number of agreements specifically concerning the labour standards and rights of women MDWs between the two sending states and receiving countries. The exclusion of domestic workers from the coverage of most bilateral labour agreements and memoranda of understanding serves to shore-up the marginalisation of socially reproductive labour and the non-recognition of domestic workers as ‘workers’. Of the few agreements analysed that do specifically cover the rights of domestic workers from the Philippines and Sri Lanka, I observed that they do not incorporate a gender perspective or provisions that address the intersecting inequalities frequently faced by women throughout the migration cycle.

It seems that many of the agreements “have been conceived, negotiated and implemented in a gender-biased and gender-blind way”, and they largely ignore intersectional discrimination that women domestic workers may face overseas as a result of their gender, race and nationality, while also lacking gender responsive measures and monitoring mechanisms.⁷⁹⁸ The enforcement of gender-sensitive labour agreements and memoranda of understanding is particularly important to protect women domestic workers who are disadvantaged because of the nature of their work and often excluded from the ambit of national labour legislation in the receiving country.

6.4 Conclusion

This chapter has bridged the first two stages of the migration cycle to illustrate how both states’ inaction at the pre-departure stage, including their failure to regulate and penalise recruitment malpractice and disseminate rights-based information, results in contract substitution and rights violations in labour-receiving countries.

⁷⁹⁸ International Labour Organization, above n 761 at 97; Piyasiri Wickramasekara *Bilateral Agreements and Memoranda of Understanding on Migration of Low-Skilled Workers: A Review* (2015) International Labour Organization: Geneva.

I acknowledge that labour-sending countries' limited legal and administrative capacity to protect migrants, combined with receiving states' embedded autonomy to exclude domestic workers from the scope of their labour laws, undermines their bilateral labour cooperation. The few labour agreements or memoranda of understanding that states do manage to negotiate concerning domestic workers often tilt in favour of the host state, employers and recruiters, failing to regulate and prevent rights abuses against workers.⁷⁹⁹ Such a situation arises from fundamental inequality: the wealthier receiving state is in a stronger bargaining position and tends to view labour migration as an economic strategy with little interest in protecting migrants.

Despite the power imbalance between sending and receiving states, this chapter has illustrated how the Philippines and Sri Lanka are not passive actors and are able to intervene through *directing* regimes to facilitate migration flows and the commodification of migrant labour. While expanding the recruitment and placement of migrant workers, however, both states have failed to ensure that there are a sufficient number of welfare officers and labour attachés to provide assistance and support the increasing number of workers in receiving countries. In addition, the small handful of labour agreements that specifically concern women domestic workers lack effective monitoring and implementation processes. This inaction and prioritisation of a market-oriented approach to migration creates the conditions for the exploitation of women domestic workers by recruitment agencies and employers, thereby constituting structural violence by *omission*.

Ultimately, the evidence supports the view that both states are willing to trade-off the rights of women domestic workers in exchange for economic benefits deriving from access to foreign labour markets. Intervening to protect the rights of migrant workers often comes at a detriment to the sending country with the receiving state refusing to negotiate and instead turning to competing sending states for its labour supply. The fundamental challenge is that labour-sending states continue to act alone through separate bilateral agreements, or in competition with one another, in a situation of pronounced power imbalance that mirrors capital-labour relations in the Gulf. Regional dialogues between sending states are one way to transform systems and

⁷⁹⁹ Susan Kneebone "The Governance of Labor Migration in Southeast Asia" (2010) 16 International Migration 383 at 387.

structures that perpetuate inequality, by helping to strengthen their leverage when negotiating with host countries for better rights protections under international law, without sacrificing their market share and inflow of remittances.

Chapter Seven

Return and Reintegration

This chapter considers the protection of women domestic workers during the return phase of the migration cycle. It first outlines the rights of women domestic workers during this phase as safeguarded by the three international conventions. It then describes the legal and institutional frameworks governing returnees in the Philippines and Sri Lanka. The second part of this chapter uses the data collected from the interviews and focus groups with the research participants in the Philippines, Sri Lanka and Hong Kong to illustrate how the legal frameworks are failing to protect the rights of women MDWs.

The thematic data analysis reveals three dominant issues impacting on their rights during reintegration: first, both governments' prioritisation of economic and business services for returnees to the detriment of psychosocial support; second, failure to provide information on return services and the legal mechanisms through which workers can recover unpaid wages and report abuse; and third, a lack of coordination between government agencies, particularly with regards to sharing data on returnees, which leads to a one-size-fits-all approach to reintegration with little insight into the individual needs and capabilities of women returnees.

7.1 Return Migration Policies

The UN defines returning migrants as “persons returning to their country of citizenship after having been international migrants in another country and who are intending to stay in their own country for at least a year.”⁸⁰⁰ The protection of MDWs is not limited to the regulation of recruitment agencies pre-departure, nor does it end by providing government assistance in the receiving state. The reintegration of

⁸⁰⁰ United Nations *Recommendations on Statistics of International Migration* (1998) Department of Economic and Social Affairs Statistics Division Series M, No 58: New York. UN Doc ST/ESA/STAT/SER.M/58/Rev.1.

migrant workers is an equally important stage of the migration cycle, particularly for women domestic workers as they are more likely to return distressed and have less access to the financial capital and skills required for successful reintegration.⁸⁰¹

However, policies pertaining to returnee migrants have been a low priority for the Philippine and Sri Lankan governments. Only belatedly did both states begin to consider the need to address issues related to the reintegration of returned migrants.⁸⁰²

Programmes and regulations governing return in both sending states emerged long after the first wave of labour migration. The programmes aim to help migrant workers break the cycle of circular migration and utilise the potential contribution and skills of returnees for the development of the country.

Graziano Battistella identified four types of return with respect to timing and decision-making. The first involves voluntary return at the end of the migration project, which implies that migrant workers' economic objectives were achieved.⁸⁰³

In the second type, other factors such as unsatisfactory or intolerable working conditions and family issues prompt a return before the end of the contract. In the third, the end of the contract coincides with the completion of the economic activity for which the migrant worker was hired, as in the case of project-tied workers. The final type is generated by crises, such as repatriation for health, legal reasons or situations of war.⁸⁰⁴ Battistella observes that while economic factors are the most relevant motivation for the decision to migrate, personal and family aspects prompting a premature return seem to play a more important role in the decision to leave the host country.⁸⁰⁵

7.1.1 International Law

The CEDAW GR 26 addresses a worker's right to return and recommends that states "should ensure that women who wish to return to their countries of origin are able to

⁸⁰¹ Encinas-Franco, above n 596, at 498.

⁸⁰² Ireland, above n 7, at 330.

⁸⁰³ Graziano Battistella "Return Migration in the Philippines: Issues and Policies" in Douglas S. Massey and J. Edward Taylor (eds) *International Migration: Prospects and Policies in a Global Market* (Oxford Scholarship Online, 2004).

⁸⁰⁴ Battistella, above n 803.

⁸⁰⁵ Battistella, above n 803.

do so free of coercion and abuse.”⁸⁰⁶ It also focuses on services to women upon return and provides that governments “should design or oversee comprehensive socio-economic, psychological and legal services aimed at facilitating the reintegration of women who have returned.”⁸⁰⁷ GR 26 goes on to add that governments “should monitor service providers to ensure that they do not take advantage of the vulnerable position of women returning from work abroad”, and implement “complaint mechanisms to protect women against reprisals by recruiters, employers or former spouses.”⁸⁰⁸

The Committee for the ICMW highlights that many domestic workers return to their country of origin with less pay than they are due and with no possibility of seeking compensation. The Committee also draws attention to those who return to their countries of origin in order to escape an abusive work relationship, often with no access to support mechanisms and no possibility of seeking legal remedies.⁸⁰⁹ Therefore, General Comment No. 1 includes an obligation for states to ensure that all domestic workers have access to mechanisms for bringing complaints about violations of their rights.⁸¹⁰ In particular, the Committee considers that MDWs “should be able to access courts and other justice mechanisms” in the country of origin and destination, as well as “access to temporary shelter when needed due to the abusive circumstances of their employment.”⁸¹¹

The ILO’s Domestic Workers Convention (C189) includes similar provisions to General Comment No. 1. Article 8(4) requires Members to specify by means of laws, regulations and other measures, the conditions under which domestic workers are entitled to repatriation on the expiry or termination of the employment contract. Article 16 stipulates that each Member shall ensure “all domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.” Article 21(e) of Recommendation 201 adds that states should take steps to ensure that

⁸⁰⁶ Article 3.

⁸⁰⁷ Articles 2(c) and 3.

⁸⁰⁸ Articles 2(c) and 3.

⁸⁰⁹ [17].

⁸¹⁰ [49].

⁸¹¹ [50].

domestic workers have access to complaint mechanisms and the ability to pursue legal civil and criminal remedies both during and after employment, irrespective of departure from the country of employment.

7.1.2 Domestic Law in The Philippines and Sri Lanka

The Philippines

The reintegration of Filipino migrant workers first became a concern of the government in the 1980s. Traditionally, reintegration programmes were assigned to the OWWA with several livelihood and credit programmes piloted to provide assistance to returning migrant workers.⁸¹² A more structured approach was established from the 1990s when the government made supporting returnees part of its policy priorities through Republic Act 8042. The OWWA currently offers a reintegration programme⁸¹³ for returning migrants who are paying and active members of the Administration. The OWWA sustains its operations and services through the biannual \$25 contributions from its members, which are pooled into a trust fund. Migrant workers can become members of the Administration after processing their contract at the POEA, or while at the job site overseas.⁸¹⁴

Economic reintegration is highest on the list of government concerns regarding returning migrants. The economic component of the OWWA's reintegration service includes preparation programmes for livelihood projects, skills training and credit lending. The Balik-Pinas! Balik-Hanapbuhay! programme provides immediate financial relief to returnees who are displaced from their jobs due to political conflicts, policy reforms or illegal recruitment. The programme provides members of the OWWA with a package of livelihood assistance amounting to ten thousand pesos (NZD 280.00), consisting of techno-skills or entrepreneurial training and starter kits.

⁸¹² Stella P. Go *Policies Programs and Services: Towards a Sustainable Return and Reintegration Program in the Philippines* (2 December 2012) International Labour Organization: Bangkok.

⁸¹³ Required by Republic Act 8042, s 23(b), as amended by Republic Act 10022, s 14.

⁸¹⁴ Overseas Workers Welfare Administration "About OWWA: FAQs" <www.owwa.gov.ph>.

Active members of the OWWA can also avail themselves of the Enterprise Development and Loan Programme, which is a loan facility in partnership with Land Bank of the Philippines. This programme is intended to aid enterprise development among overseas Filipino workers and their families. Applicants have to submit business plans and complete entrepreneurial development training before being eligible to borrow up to two million pesos (NZD 55,994) for viable projects. However, collateral for the loan is required in case the worker defaults on the loan, such as property and motor vehicles.

The psychosocial welfare component of the OWWA's reintegration service primarily involves the Repatriation Assistance Programme. This facilitates the immediate repatriation of Filipino migrant workers who are distressed or physically/mentally ill.⁸¹⁵ They are accorded temporary shelter at the Administration's Halfway House, psychosocial counselling and stress debriefing. All Filipino migrant workers, regardless of whether they are members of the OWWA, can avail themselves of the Repatriation Programme.

A major turning point occurred in 2007 with the establishment of the National Reintegration Center for Overseas Filipino Workers (NRCO) under the Department of Labour and Employment. The structure and functions of the NRCO are provided in Republic Act 10022, which affords much needed attention to the reintegration stage of the migration process. The Act states that the National Reintegration Center "shall provide a mechanism for their reintegration into Philippine society, serve as a promotion house for their local employment, and tap their skills and potentials for national development."⁸¹⁶

The types of services provided for returnees in the Philippines noticeably overlap, particularly since the NRCO is an attached agency of the OWWA. Since the OWWA is a membership-based organisation, most returnees who approach the Reintegration Center are non-members of the OWWA and undocumented overseas Filipino

⁸¹⁵ Overseas Workers Welfare Administration "Social Services and Family Welfare Services: Repatriation Assistance Program" <www.owwa.gov.ph>.

⁸¹⁶ Republic Act 8042, s 17, as amended by Republic Act 10022, s 10.

workers.⁸¹⁷ Section 15 of Republic Act 10022 stipulates that the NRCO shall “develop programmes and projects for livelihood, entrepreneurship, savings, investments and financial literacy for returning Filipino migrant workers and their families.”

Accordingly, the Reintegration Center’s programmes are focused on economics and business, including the Livelihood Development Assistance Project, which is a “livelihood grant intervention intended to bring about improved socio-economic well-being of undocumented overseas Filipino workers.”⁸¹⁸ In addition, the Small Business Management Training and Financial Awareness Seminar “serves as an avenue for migrant workers to achieve effective financial planning and management of their earnings from overseas employment.”⁸¹⁹

Section 14 of Republic Act 10022 provides that the NRCO will “serve as a One-Stop Center that shall address the multi-faceted needs of overseas Filipino worker-returnees and their families.” However, when I questioned a representative of the NRCO about the lack of welfare services and psychosocial programmes during our focus group discussion they responded:⁸²⁰

Most of the welfare services are being provided by the Overseas Workers Welfare Administration, but I am sad to say that most are for their members so that is why we have some NGOs as invited partners of the NRCO to provide welfare services.

This service gap casts doubt on the ability of the Reintegration Center to protect the rights and welfare of women MDWs, as returnees are required to turn to the OWWA or NGOs for welfare assistance. Instead, through the NRCO, “the state seeks to facilitate ‘brain gain’ and maintain the competitiveness of the Philippines as a labour source by not only generating productive workers but also enlisting entrepreneurial

⁸¹⁷ National Reintegration Center for Overseas Filipino Workers *Presentation on Programs and Services (presented during my research visit to Manila, March 2018)*.

⁸¹⁸ Above n 817.

⁸¹⁹ Above n 817.

⁸²⁰ Focus group discussion with officials from the National Reintegration Center for Overseas Filipino Workers (The author, Manila the Philippines, 21 March 2018) Transcript on file.

returnees”.⁸²¹ In marking the launch of the NRCO in 2007, Labour Secretary Arturo Brion asserted:⁸²²

Other migrant sending countries may compete with us, and imitate some components of our overseas employment programme, but our National Reintegration Center will keep us at the number one position [as labour providers], giving the Philippines a total edge from deployment to the productive social and economic reintegration of overseas Filipino workers on their return.

Sri Lanka

The Sri Lankan government’s interest in return migration can be traced back to 1981 with the establishment of the Return Migration Branch at the research development division of the Ministry of Labour.⁸²³ However, not much was done to build on that initial interest until recently. The National Labour Migration Policy, adopted in 2009, recognised the need for a comprehensive return and reintegration plan to cover all processes and areas of reintegration of migrant workers. The Policy outlines that “the State shall duly recognise the contribution made by migrant workers and facilitate their return with opportunities for skill transfer, productive employment and conflict-free social integration.”⁸²⁴

Subsequently, in 2015 the Ministry of Foreign Employment developed a Sub-Policy and National Action Plan on Return and Reintegration of Sri Lankan Migrant Workers. The SLBFE is the main agency responsible for the implementation of the Action Plan. A special unit on Return and Reintegration is established within the Bureau under the guidance of the Ministry of Foreign Employment.⁸²⁵ The Action Plan specifies that reintegration needs to commence at the stage of pre-departure and

⁸²¹ Guevarra, above n 135, at 76.

⁸²² Republic of the Philippines Department of Labor and Employment “IOM Official to Lead National Reintegration Center for OFWs Launching” (11 March 2007) <www.dole.gov.ph>.

⁸²³ International Labour Organization “Reintegration with Home Community: Perspectives of Returnee Migrant Workers in Sri Lanka” (2013) Geneva: International Labour Organization at 4.

⁸²⁴ Sri Lanka Ministry of Foreign Employment *Sub Policy and National Action Plan on Return and Reintegration of Migrant Workers Sri Lanka* (November 2015) at 2.

⁸²⁵ At 31.

continue throughout the migration cycle.⁸²⁶ For instance, pre-departure training is supposed to incorporate sessions on planning for return, while mechanisms and procedures are established in Sri Lankan Missions overseas to provide migrants with information on reintegration.

The National Action Plan adopts a holistic approach that includes aspects of social, economic and psychological reintegration of migrant workers. Social reintegration of migrant returnees is purported to be fundamental to all other components of reintegration, as the worker has experienced years of absence from their family, community, society and country.⁸²⁷ A gender-sensitive approach is also highlighted as key in the social reintegration programmes. Initiatives include an insurance scheme for migrants and a social security/pension scheme for ‘low-skilled’ workers, particularly domestic workers; a wide-range of services available for migrant worker’s children, including an educational scholarship programme; and clear procedures established by the SLBFE to assist in the return of migrant workers who have ended their contract prematurely.⁸²⁸

Economic reintegration of migrant workers incorporates issues related to promotion of skills, re-employment and re-entry into the national labour force, savings and investment and developing entrepreneurial skills. The Action Plan highlights how “skill assessment and enhancement, recognition of prior learning and skill upgrading and certification add value to the re-employability of migrant workers and promote decent working conditions.”⁸²⁹ Initiatives include an entrepreneur development programme for ‘low-skilled’ women returnees; a credit and loan scheme that caters to the needs of migrant entrepreneurs in collaboration with financial institutions; and financial literacy training on saving and bank schemes.⁸³⁰

The Action Plan states that physical and psychological wellbeing of migrant workers is a priority area in reintegration and ought to include not only migrant workers but also their family members. A comprehensive health awareness component is

⁸²⁶ Sri Lanka Ministry of Foreign Employment *Annual Performance Report (2017)* at 82.

⁸²⁷ Sri Lanka Ministry of Foreign Employment, above n 824, at 6.

⁸²⁸ At 7.

⁸²⁹ At 14.

⁸³⁰ At 15 and 16.

incorporated in Pre-Departure Seminars, and migrant workers are assisted upon return to access a health assessment with medical and counselling staff manning an airport help desk.⁸³¹ In addition, there are special programmes operated by NGOs with the SLBFE to support trafficked, abused and exploited returnees who need particular attention upon return.⁸³²

7.2 Domestic Law in Practice

7.2.1 *Prioritisation of Economic/Business Programmes*

In terms of their legal and institutional frameworks in theory, Sri Lanka and particularly the Philippines offer a range of services to assist women domestic workers upon return home. However, interviews and focus groups with advocates, and interviews with government officials, in the three fieldwork countries revealed that programmes for returnees are heavily focused on creating entrepreneurs and increasing economic capital for development. This is to the detriment of welfare services for distressed returnees. An advocate from Mission for Migrant Workers in Hong Kong stated:⁸³³

The reintegration programmes in Sri Lanka and the Philippines are more focused on business and not everyone is keen on doing this or they are not gifted to do business ... Sometimes the migrant domestic workers say what can we save when we have nothing to save? Or what can we budget when there is nothing to budget?

In the Philippines, returned migrant workers may be eligible for skills training and loan programmes designed to enable individuals to become self-sustaining and realise their capacity for entrepreneurship.⁸³⁴ Similarly, the SLBFE provides its returnee domestic workers with training courses for entrepreneurship and a self-employment

⁸³¹ At 21.

⁸³² At 22.

⁸³³ Interview with an advocate from Mission for Migrant Workers (The author, Hong Kong, 11 March 2018) Transcript on file.

⁸³⁴ Nicola Piper and Denise L. Spitzer “Retrenched and Returned: Filipino Migrant Workers during Times of Crisis” (2014) 48 *Sociology* 1007 at 1018.

loan scheme.⁸³⁵ However, Spitzer and Piper report that economic programmes for migrant worker returnees in the Philippines remain somewhat ineffective because the livelihoods that have been targeted, such as sausage making and lipstick preparation, require on going access to affordable supplies and a market for such products.⁸³⁶ This was confirmed during a focus group discussion with advocates from Migrante International in the Philippines: *“the problem is that it is very difficult to start a business with a small amount of money and given the very intricate problem of the market and selling of goods here, it is difficult to survive if you are a small inexperienced entrepreneur.”*⁸³⁷

While support for entrepreneurship may be useful for a minority, such initiatives only consider the ideal situation of a migrant worker: that is a worker who has completed the migration process or who has achieved the economic objectives set forth at the beginning, in terms of saving their income. They neglect other situations where return is premature and determined by exploitation, meaning the worker was unable to fulfil their remittance priorities and psychosocial support and welfare initiatives are necessary. This type of return is common amongst women domestic workers, who are more likely to experience rights violations and abuse overseas as they work in the private sphere of the home, are often excluded from labour law protection, and receive low-wages or are unpaid.⁸³⁸

Therefore, women MDWs are generally unable to garner sufficient resources to adequately finance the operation of a business. Moreover, it is questionable as to what kind of skills are developed overseas that could be useful in promoting sustainable entrepreneurial activities at home.⁸³⁹ The programmes are solely focusing on credit, yet both governments have failed to provide the required support systems such as skills development in business and financial management to prepare migrant workers

⁸³⁵ Jayaratne et al., above n 58.

⁸³⁶ Piper and Spitzer, above n 834, at 1018.

⁸³⁷ Focus group discussion with advocates from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁸³⁸ D’Souza, above n 18, at 17; Oelz, Muller and Preiser, above n 16.

⁸³⁹ Piper and Spitzer, above n 834, at 1018.

to receive credit and run a business venture.⁸⁴⁰ This was emphasised by an advocate from Women and Media Collective in Sri Lanka:⁸⁴¹

In terms of investing her earnings, there is this idea that when you have some money you become an entrepreneur with business skills. I think there is a mismatch between the skills they think the women should have in order to invest their money and what the women actually want to do or can do.

Recruitment malpractice discussed in chapter five, including illegal and excessive recruitment fees, multiple layers of intermediaries, and bureaucratic procedures result in high debt burdens for MDWs.⁸⁴² Migrante International highlighted how before leaving the country “they owe money so that they can process their documents to work overseas. By the time they get back here they are offered by the government to avail of these business loans so that they will be buried in debt again.”⁸⁴³ Such government-sponsored loans, with high collateral in the form of property and motor vehicles, may only deepen the indebtedness of migrant workers particularly if their enterprise fails. This may be a likely outcome for ‘low-skilled’ and low-wage workers given their lack of entrepreneurial skills. The struggle to make business investments tenable is often a trigger for repeat migration, in order to recoup the money they have lost.

Chapters five and six showed that both sending states are promoting labour export in order to generate foreign exchange by way of increased remittances during the first two stages of the migration cycle, as a means to alleviate national debt and unemployment. This objective also extends to the reintegration stage, with both governments pushing migrant workers to become productive contributors to the domestic economy through entrepreneurship. Often valorised as ‘heroes’ for supporting the national economy with their remittances,⁸⁴⁴ migrant workers are “now

⁸⁴⁰ Michael Collyer and Nazeeha Ansar “Return Migrants in Sri Lanka” (July 2009) Institute for Public Policy Research at 11.

⁸⁴¹ Interview with an advocate from Women and Media Collective (The author, Colombo Sri Lanka, 14 June 2018) Transcript on file.

⁸⁴² Farbenblum, above n 33, at 157.

⁸⁴³ Focus group discussion with advocates from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁸⁴⁴ Guevarra, above n 441, at 524.

increasingly responsabilized for stimulating the economy with their entrepreneurial activities upon their return as ‘agents of development’.”⁸⁴⁵

Such programmes for returnees are illustrative of Lee’s *accommodating* regimes. She observes how “the promotion of continued national identification and return migration”,⁸⁴⁶ for instance through social or economic projects, can constitute an accommodating intervention. Withers contends that this continued espousal of migrant entrepreneurship “effectively outsources the onus of development from the state to the poor themselves, in a manner that undermines the entitlement to decent local work.”⁸⁴⁷

These business-focused programmes do not address the root causes of migration and re-migration, including poverty, lack of decent employment opportunities and local industries, and ethnic and gendered subordination.⁸⁴⁸ Instead, such initiatives provide migrant workers with no alternatives beyond business and do not seem to be logically applicable to low-income women domestic workers who frequently return without any savings, increased indebtedness, psychological trauma, social exclusion and a sense of financial insecurity.⁸⁴⁹ This is especially the case for Sri Lankan and Indian Tamil women located in Sri Lanka’s impoverished and remote North and East. Their lack of experience and knowledge of migration processes heightens their vulnerability to exploitation and deception from recruitment intermediaries, often resulting in crippling debt and insecurity. Therefore, recruitment costs and debt repayments typically account for the majority of their remittance expenditures, with business investments being the least common.⁸⁵⁰ Consequently, women domestic workers require reintegration programmes that recognise their multiple converging identities, lived experiences and specific needs, while focusing first and foremost on their physical and psychosocial wellbeing.

⁸⁴⁵ Piper and Spitzer, n 834, at 1018.

⁸⁴⁶ Lee, above n 32, at 1459.

⁸⁴⁷ Withers, above n 96, at 140.

⁸⁴⁸ Center for Migrant Advocacy and Friedrich Ebert Stiftung “The Philippines: A Global Model on Labor Migration?” (2nd ed, June 2009) at 68.

⁸⁴⁹ Caritas Sri Lanka “Migration of Sri Lankan Women: Analysis of Causes and Post-Arrival Assistance” (2012) Social and Economic Development Centre at 72.

⁸⁵⁰ Withers, above n 96, at 66.

7.2.2 *Return Services: Information and Assistance*

Chapter five discussed the importance of information dissemination in the form of Pre-Departure Orientation Seminars for MDWs. These seminars can be used as a tool to provide departing migrant workers with rights-based information in order to protect them against rights violations and abuse throughout the migration cycle. The Philippines' Republic Act 8042 stipulates that the pre-departure programme for domestic workers should cover matters relating to reintegration, while the SLBFE states that the content of its Domestic Housekeeping Assistant National Vocational Qualification course includes a 'reintegration and family day'.⁸⁵¹

Reports by the ILO and the Southeast Asia Women's Caucus on the ASEAN⁸⁵² revealed, however, that reintegration programmes in the Philippines have been met with little success due to the lack of information on and limited knowledge by migrant workers of the existence of such services. To ensure effective social and economic reintegration, migrant workers need to be prepared and planning is required before and during migration. Yet, sufficient time is not allocated to the topic of reintegration and the options for returnees during Pre-Departure Seminars in the Philippines.⁸⁵³

Similarly in Sri Lanka, advocates from Caritas noted deficiencies in the provision of information on the reintegration services provided by the SLBFE, such as housing and self-employment loans.⁸⁵⁴ This is likely due, in part, to the fact that the Pre-Departure Seminars are being used as a marketing outlet by banks and remittance companies to promote their services.⁸⁵⁵ This detracts from a focus on rights and diminishes women migrant workers' awareness of how to plan for both the social and financial aspects of return.

⁸⁵¹ Sri Lanka Bureau of Foreign Employment "Pre-Departure Training for Middle East bound Domestic Sector Female Housekeepers" <www.slbfe.lk>.

⁸⁵² Rene E. Ofreneo and Isabelo A. Samonte *Empowering Filipino Migrant Workers: Policy Issues and Challenges* (2005) International Labour Organization: Geneva; Southeast Asia Women's Caucus on the ASEAN, above n 747, at 54.

⁸⁵³ Maria Angela Villalba *The Philippines: Good Practices for the Protection of Filipino Women Migrant Workers in Vulnerable Jobs* (2002) International Labour Office: Geneva. Gender Promotion Programme Working Paper No 8 at 42.

⁸⁵⁴ Caritas Sri Lanka, above n 849, at 65.

⁸⁵⁵ The Philippine Department of Labor and Employment "Baldoz Orders OWWA to Review the PDOS" (3 July 2014) <www.dole.gov.ph>.

Information dissemination to MDWs in both labour-sending states is particularly deficient with regards to the legal mechanisms for bringing complaints about violations of their rights. In the Philippines, labour attachés and welfare officers employed in Overseas Labour Offices are tasked with assisting workers to file complaints while overseas. Filipino migrant workers are also entitled to file complaints upon returning to the Philippines. Criminal cases, which include cases of physical and sexual abuse, are prosecuted in the Philippine courts, while administrative cases are handled by the POEA. Civil cases, such as those involving non-payment of wages, are sent to the National Labour Relations Commission, which acts as a quasi-judicial employment tribunal.⁸⁵⁶ The complaints are issued against the employer and recruitment agent, both of whom are held equally responsible for rights violations under the joint and several liability principle.⁸⁵⁷

However, officers at the POLOs are ineffective in assisting and informing migrant workers of the legal mechanisms through which they can recover unpaid wages and other benefits.⁸⁵⁸ A 2011 study by the Philippine Institute for Development Studies reported how twenty Filipino migrant workers in Qatar sought assistance from the Philippine embassy for unpaid wages, but were instead forced to sign a waiver in Qatar stipulating that they would not file a case against their employer.⁸⁵⁹ They were told that their passports would not be returned to them and exit clearance and other documentary requirements would not be issued if they refused to execute the waiver. An advocate from Migrante International in the Philippines confirmed during our focus group discussion that this situation remains a common occurrence:⁸⁶⁰

They (government officials) have this practice of preparing a document where the worker will be forced to sign a waiver, stating: “I was given assistance by the embassy and the problem between me and my employer has been settled, I will return to my employer and I have no complaints against them anymore”. Even on the successful repatriation of the worker,

⁸⁵⁶ Center for Migrant Advocacy “Access to Justice: Part 1” (July 2015) <www.centerformigrantadvocacy.com>.

⁸⁵⁷ Republic Act 10022, s 7.

⁸⁵⁸ Ambito and Banzon, above n 705, at 7.

⁸⁵⁹ At 7.

⁸⁶⁰ Focus group discussion with advocates from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

the embassy keeps those records and when the worker files a complaint in the Philippines, the embassy itself uses these records to dismiss the case here.

Another advocate from Migrante International added:⁸⁶¹

For the Filipino migrant worker they do not know that it is a waiver, but because they do not know about their rights and because of their desperation for money, they will sign the documents and they do not know the consequence of their signature.

These accounts support the contention that the government is failing to provide a rights-based education pre-departure, and the necessary assistance in the host country, to ensure that all domestic workers have access to mechanisms overseas and on return for bringing complaints about violations of their rights as required by international law.⁸⁶²

In Sri Lanka, the government has also instituted complaint mechanisms and victim services to assist returning migrant workers. Labour officials employed at the Sri Lankan embassies are tasked with receiving different types of complaints from migrant workers within the host country. In addition, the SLBFE operates a 24-hour service counter at the airport to receive complaints from returnee migrants when they arrive home from overseas, as well as a nearby shelter named ‘*Sahana Piyasa*’ for returnees in need of support.⁸⁶³

While such programmes are an important step in providing assistance to abused migrant workers, Human Rights Watch reports that none of the 100 women domestic workers it interviewed had received information at the airport desk or ‘*Sahana Piyasa*’ shelter regarding institutions and programmes that provide counselling. Nor was there

⁸⁶¹ Focus group discussion with advocates from Migrante International (The author, Manila the Philippines, 21 March 2018) Transcript on file.

⁸⁶² UN Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families *General Comment No 1 on Migrant Domestic Workers* (23 February 2011), [49].

⁸⁶³ International Labour Organization Country Office for Sri Lanka and the Maldives *Strengthening Grievance and Complaint Handling Mechanisms to Address Migrant Worker Grievances in Sri Lanka: A Review and Analysis of Mechanisms* (January 2013) International Labour Office: Geneva at 14.

any provision of legal assistance for workers wishing to pursue legal action against recruiters or employers.⁸⁶⁴ Rather, services at the shelter are limited to contacting the migrant worker's relatives and arranging transport to send them home.⁸⁶⁵

Labour attachés in Sri Lankan embassies in host countries are also criticised for failing to disseminate information to migrant workers who have suffered abuse about complaint mechanisms and avenues for redress. This could be attributed to the lack of structural guidelines and a manual of procedures regarding the handling of grievances and complaints by labour attachés.⁸⁶⁶ In the absence of a structured mechanism to attend to migrant worker complaints, labour officers are reported to have been following their own methods to mitigate grievances. For example, the Sri Lankan embassy in Riyadh, Saudi Arabia adopted a policy to only accept runaway women domestic workers during working hours, which was subject to high condemnation by the media and Sri Lankan diaspora.⁸⁶⁷

Accordingly, labour attachés in the Philippines and Sri Lanka are either unwilling or not equipped with knowledge about uniform procedures and minimum standards to respond adequately to complaints, inform migrant workers about their rights to redress, and enable access to courts and other justice mechanisms. Their pervasive lack of understanding and limited access to redress prevents migrant workers from challenging abusive actions by employers and submitting complaints.⁸⁶⁸ Without effective grievance mechanisms and appropriate sanctions, unscrupulous recruitment agencies and employers have little incentive to abide by a contract's terms and conditions and respect the rights of women domestic workers.⁸⁶⁹ I argue that this inaction by both governments constitutes another instance of structural violence by *omission*.

7.2.3 *Sharing Data on Returnees to Inform Services*

⁸⁶⁴ Turner, above n 45, at 108.

⁸⁶⁵ At 109.

⁸⁶⁶ International Labour Organization Country Office for Sri Lanka and the Maldives, above n 806, at 42.

⁸⁶⁷ At 43.

⁸⁶⁸ Agunias, above n 615, at 40.

⁸⁶⁹ At 26.

The deficiency of information and assistance provided by both governments to returnees is exacerbated by the lack of data on migrant workers who are returning home. This hampers the effective targeting and design of reintegration programmes. Neither the Philippine nor Sri Lankan government has a mechanism for systematically collecting data on returnee migrants, including data on the magnitude of return migration, the rate of re-migration, the characteristics and skills of returnees and the circumstances under which they return.⁸⁷⁰

This lack of attention paid to returnees and generating or utilising returnee data stands in contrast to the comprehensive records the Philippine government collects on departing workers, who are required to register and complete detailed government processes.⁸⁷¹ An advocate from the Center for Migrant Advocacy in the Philippines highlighted the problems associated with the lack of government data on returnees:⁸⁷²

Do they keep track of people who are returning? Where is the database for that? Do they take stock of the skills that people have acquired abroad? How can you develop a programme if you do not know the constituents that are supposed to benefit? What are the profiles of the people that you intend to serve or intend to provide services to? It does not give you a very good database to inform strategies and programmes for reintegration.

I contend that knowing the scale of return migration and the profile of returnees is pivotal to the formulation of policies for the different types of returning migrants and tailoring programmes to meet their individual needs. This is particularly important for returning women domestic workers of a low socio-economic class who tend to be restricted to menial and low-paid ‘female’ professions, and for whom there are few decent local employment opportunities on return home.⁸⁷³

⁸⁷⁰ Stella P. Go *The Philippines and Return Migration: Rapid Appraisal of the Return and Reintegration Policies and Service Delivery* (2012) International Labour Organization: Regional Office for Asia and the Pacific: the Philippines at 14; Sri Lanka Bureau of Foreign Employment *Corporate Plan 2017-2021* Compiled by the Planning and Monitoring Division.

⁸⁷¹ Scalabrini Migration Center and the International Organization for Migration, above n 461, at 83.

⁸⁷² Interview with an advocate from the Center for Migrant Advocacy (The author, Manila the Philippines, 19 March 2018) Transcript on file.

⁸⁷³ Battistella, above n 803, at 225.

In addition, women domestic workers are more likely to experience unplanned return migration often determined by exploitation, making them unprepared psychologically and financially for successful reintegration.⁸⁷⁴ Their different needs and capabilities upon arriving back to their home country requires reintegration programmes that include gender-sensitive and intersectional provisions to address the vulnerable position of women returnees who are often forced to re-migrate.

The absence of data on returnees points to a further issue preventing the successful psychosocial and economic reintegration of women domestic workers: the lack of coordination and collaboration between government agencies on matters relating to return. In the Philippines, Republic Act 10022 encourages inter-departmental government cooperation on data gathering. In particular, section 18(c) of the Act empowers the NRCO to “institute, in cooperation with other government agencies concerned, a computer-based information system on returning Filipino migrant workers.”

However, enrolment in the various programmes and seminars offered by the Reintegration Center is voluntary and there does not appear to be an inter-agency effort to combine data on returnee migrants. This was confirmed by a representative of the NRCO during our focus group discussion.⁸⁷⁵

Our system is not in sync with the OWWA. It is a different system here. We do not have the data of the OWWA’s members who ask them for assistance, we only have the data of those workers who seek assistance of the NRCO. The data is a big challenge, because it should be a collaborative effort of the government. For one, I think the Department of Foreign Affairs also need to work with us in terms of data because the workers are not mandated to report to the NRCO or the OWWA to fill out forms of skill profiling.

⁸⁷⁴ Frances Antoinette Cruz, Janina Clare Tan and Yvan Ysmael Yonaha “Assisting the Reintegration of Philippine Return Migrants through Mobile Technology” (2015) A Submission to the Geneva Challenge: University of the Philippines at 5.

⁸⁷⁵ Focus group discussion with officials from the National Reintegration Center for Overseas Filipino Workers (The author, Manila the Philippines, 21 March 2018) Transcript on file.

The situation is similar in Sri Lanka. Caritas reported in 2012 that there was no coordinating mechanism between the SLBFE in central Colombo and stakeholders at District and Divisional levels.⁸⁷⁶ This led to service gaps for returnee women domestic workers and their families at the community/village level in terms of information on state services and legal and psychological counselling.

In 2015 both the Ministry of Foreign Employment and the ILO, through the Sub Policy and National Action Plan on Return and Reintegration of Migrant Workers, identified inadequate information management as a key gap in the migration sector. They called for a systematic approach to collect, record, store and retrieve information at national and sub-national levels.⁸⁷⁷ In doing so, the Ministry of Foreign Employment stated that “coherent coordination and planning of services to migrant returnees is needed, and in order to be effective, a multi-stakeholder approach is necessary.”⁸⁷⁸ The Policy aimed to “establish a special unit to support safe and dignified return and reintegration at the Bureau and a regional and district coordination mechanism with links to other relevant agencies.”⁸⁷⁹ Thus far, there has been no implementation review of the National Action Plan on Return in order to assess whether the SLBFE’s reintegration unit has addressed the information and data gaps.

7.3 Conclusion

Ultimately, the Philippine and Sri Lankan governments are failing to protect the rights and welfare of returnee women domestic workers. This is due to a lack of information dissemination and assistance given to migrant workers by government agencies, particularly with regards to the legal mechanisms for bringing complaints about rights violations. This prevents returnees from challenging abusive actions and submitting complaints, giving unscrupulous recruitment agencies and employers little incentive to abide by a contract’s terms and conditions and respect the rights of women migrants. I contend that inadequate and inaccessible grievance mechanisms increase

⁸⁷⁶ Caritas Sri Lanka, above n 849, at 72.

⁸⁷⁷ Sri Lanka Ministry of Foreign Employment, above n 768, at 28.

⁸⁷⁸ At 28.

⁸⁷⁹ At 7.

the vulnerability of women MDWs to rights violations and exploitation, which constitutes structural violence by *omission*.

Despite some positive initiatives and policy reforms, the lack of coordination between government agencies and absence of shared data on returnees results in reintegration programmes that fail to incorporate a gender perspective and consider the different circumstances, individual needs and capabilities of returnee women migrants. This one-size-fits-all approach assumes that all migrant workers are psychologically fit to work or engage in entrepreneurial activities upon return. This is a particular constraint for women domestic workers, who are more likely to return prematurely having being exploited and underpaid. Failing to provide the appropriate psychosocial and economic support for women returnees, therefore, leaves them with no choice but to resort to their own devices and “engage in repeat migration in order to sustain the remittance transfers that their household may now be reliant upon.”⁸⁸⁰

This chapter revealed the Philippine and Sri Lankan governments’ use of accommodating regimes by pushing returnee migrant workers to become productive contributors to the national economy as entrepreneurs and investors. Encouraging returnees to envision themselves as possessing the intellectual capacity to become entrepreneurs mirrors the idea that migrant workers are significant insofar as they are economically viable to the country and serve the state’s capitalist interests.⁸⁸¹ In the case of the Philippines, Rodriguez notes how the state needs migrants’ remittances, as well as their investments upon return in between employment contracts, to sustain the profitability of migration and to continue to benefit from and reproduce the labour brokerage regime.⁸⁸² By directing how workers should spend their overseas earnings and transforming them into investors, both states are deflecting responsibility and accountability for their struggling economies and inability to produce viable sources of local livelihood.

⁸⁸⁰ Withers, above n 96, at 69.

⁸⁸¹ Guevarra, above n 135, at 73.

⁸⁸² Rodriguez, above n 87, at 90.

Conclusion

Towards a Rights-Based Gender-Informed Approach to the Migration of Women Domestic Workers

Overseas employment of women domestic workers, and the subsequent inflow of their remittances, has long been of paramount importance for economic development in the Philippines and Sri Lanka. Both governments have institutionalised a labour export policy that espouses two key objectives with intrinsic tensions. The first is to achieve a greater share of the global labour market, in order to earn foreign exchange in the form of remittances. The second objective is the need to protect and promote the rights and welfare of migrant workers, especially women working as domestic workers, in compliance with international law norms.

The central research question posed by this thesis is: to what extent are women MDWs in the Philippines and Sri Lanka protected by the legal frameworks of their home states, consistent with the standards for protection under international law? In answering this question, I used the four elements of the theoretical framework (political economy, structural violence, rights and gender) to examine the proposition that the Philippine and Sri Lankan governments are prioritising their first policy objective by continuing to promote labour export and neoliberal market interests, above the protection of the rights of women domestic workers. My research has shown that tensions between these two conflicting policy priorities results in a formal commitment to a rights-based gender-informed approach to migration in theory, which fails to translate into domestic practice.

The Philippine and Sri Lankan governments are largely complying on paper with their obligations under the three international human rights conventions (C189, the CEDAW and the ICMW). However, empirical data collected during my fieldwork in the Philippines, Sri Lanka and Hong Kong exposed how both sending countries' legal frameworks fall short of international standards at each stage of the migration cycle in

favour of a market-driven neoliberal approach to migration. This heightens the vulnerability of women domestic workers to exploitation and abuse, and thus constitutes state-sanctioned structural violence by *commission* and *omission*. Accordingly, when states are responding to their international treaty obligations, they are arguably working within a paradigm that is compatible with the neoliberal economic order. Without effective implementation, comprehensive rights-based international legal frameworks do not by themselves lead to a cascade of social, political and economic transformation.

The tension between both states' policy priorities is explained by applying my underlying theoretical framework. While recognising that labour-sending states are at a structural labour market disadvantage, chapter one rejected the hyper-globalisation thesis for dismissing the relevance and influence of the state in governing international migration in the globalisation process. Neoliberal globalisation does not necessarily hollow the developing sending state.⁸⁸³ Rather, I employed realist political economy theory to contend that sending states are involved in, as active managers and producers of, migration flows by implementing labour export policies that channel economic forces in ways favourable to their national interests.

In meeting the demands of global capitalism I have argued that the Philippine and Sri Lankan governments have similarly crafted a neoliberal strategy of 'labour brokerage', involving the management and mobilisation of workers through a well-developed migration bureaucracy that seeks to channel their remittances into state development initiatives. I used Lee's tripartite typology of sending state interventions in labour migration (*accommodating*, *facilitating* or *directing*) as a framework to examine how both states engage in the brokerage of labour by influencing the volume and direction of migration and remittance flows. Such interventions expose the Philippine and Sri Lankan governments' ingrained reliance on remittances and prioritisation of labour export, premised on the commodification of social reproduction. Ultimately, this constrains their ability to fulfil their obligations under international law.

⁸⁸³ Rodriguez, above n 87, at 143.

During the pre-departure stage, my thesis revealed how both states are employing *accommodating* regimes by targeting existing migration flows in order to promote and facilitate remittances and maximise national gains from migration. Financial information provided through Pre-Departure Orientation Seminars, regarding banking and remittances, is taking priority over a rights-based education as required by international norms. The inaction of both states to inform women MDWs about their rights, and the multiple forms of discrimination they are likely to face overseas, constitutes structural violence by *omission*. This is because it creates the conditions for recruiters and employers to more easily exploit unprepared and unprotected workers.

Similarly, the bans on the migration of women domestic workers show that both states are able to intervene through *directing* regimes to restrict and redirect certain migration flows. I point to a paradox: while these bans appear to provide women MDWs with greater protection, in reality they systematically discriminate on the grounds of their gender, class and age and push them into irregular migration channels fraught with risk. Women domestic workers are more vulnerable to rights violations and abuse during recruitment and subsequently overseas as a result of their undocumented migration status. Therefore, the restrictions are an example of structural violence by *commission*.

During the second stage of the migration process, my thesis found that the Philippines and Sri Lanka are once again using *directing* regimes to shape migration flows by proactively engaging and negotiating with receiving country governments, and initiating new migration relationships through labour agreements. However, women domestic workers are noticeably excluded from the majority of binding bilateral labour agreements. The small number of informal and non-binding agreements or ‘protocols’ that do concern domestic workers fail to incorporate a gender perspective or provisions that address the intersecting inequalities faced by women migrants. This supports the view that the Philippines and Sri Lanka are willing to trade-off the rights of women domestic workers in exchange for economic benefits deriving from access to foreign labour markets.

In addition, while focusing on expanding the recruitment and placement of migrant workers through directing interventions, both states are failing to ensure that there are a sufficient number of gender-responsive labour attachés and welfare officers to provide assistance and support the increasing number of workers in receiving countries. The resulting gaps in protection, such as weak monitoring of the recruitment industry and the employer's household, leaves domestic workers highly vulnerable to being placed in homes where there are unsafe working conditions and a heightened risk of exploitation. The inaction of both states to protect domestic workers against rights violations overseas through government assistance and negotiation results in situations of structural violence by *omission*.

At the return stage of the migration process the Philippines and Sri Lanka are prioritising economic and business services for returnees, which encourage migrant entrepreneurship and investment, to the detriment of psychosocial support and welfare initiatives. Their promotion of continued national identification, by pushing migrant workers to become productive contributors to the domestic economy through their remittance expenditure, is another example of Lee's *accommodating* regimes. My research further revealed how both governments fail to disseminate information to migrant workers on return services, particularly with regards to the legal mechanisms through which workers can recover unpaid wages and report violations of their rights. This prevents workers from challenging abusive actions by employers and submitting complaints, which creates a culture of impunity and thus constitutes structural violence by *omission*.

However, while I have argued that both states play an active and central role in facilitating the international migration of domestic workers through their labour export institutions and policies, the historical context of labour migration and colonisation means that both countries differ in terms of their conditions, motivations and responses in defence of women MDWs. Building on the institutional legacy of the US colonial labour system, the Philippines has erected a 'model' programme of labour export to meet global demand for its educated and experienced domestic workers. Thus, human capital advantages have allowed the state to adopt a more

forceful and successful stance in the interests of Filipina domestic workers, as well as respond to civil society pressures in a context of relatively high gender equality.⁸⁸⁴

In contrast, Sri Lankan labour migration began more recently in the mid 1970s, following the lifting of restrictions on temporary migration and the embrace of a liberalised economy by the new pro-capital government. The country's delayed involvement in international labour migration coupled with the lower educational qualifications, race and religious makeup of its domestic workers, which renders them less desirable to employers, accounts for its more fragile market position. Sri Lanka is therefore more reluctant to exert pressure on receiving states and less receptive to calls from civil society to improve women migrants' working and living conditions. Rigid gender norms and prevailing inequality in Sri Lanka further dampen both the state's interest in addressing issues affecting women domestic workers and civil society's efforts to transform patriarchal attitudes and policies in support of women migrants.

Despite being in a stronger market position and pushed by a more active civil society compared to Sri Lanka, the Philippines still frequently fails to negotiate labour agreements with host states and fully implement policies to safeguard the rights of domestic workers. Thus, the challenge remains as to how to make both countries become more active in protecting and *implementing* the rights of women MDWs, given their over-reliance on a remittance economy and structurally weak position in the global labour market. This goes to questions of governments' political will to commit to migrant worker rights set out in the three conventions beyond formal compliance, and their capacity to act. The former is in many respects being increasingly fashioned by the political activism and advocacy efforts of civil society organisations by pushing sending states into reversing their current policy priorities and advance Cusack's and Pusey's two-pronged principle of transformative equality, involving (i) the transformation of "institutions, systems and structures that cause or perpetuate discrimination and inequality", and (ii) "the modification or transformation of harmful norms, prejudices and stereotypes that violate women's rights."⁸⁸⁵

⁸⁸⁴ Ireland, above n 7, at 330.

⁸⁸⁵ Cusack and Pusey, above n 39, at 10.

I suggest that the role of migrant worker advocacy groups can be strengthened by strategically engaging and mobilising through regional consultative processes to help transform institutions, systems and structures that cause or perpetuate discrimination and inequality, and by using international law norms and their compliance mechanisms to hold governments to account and challenge the harmful norms, prejudices and stereotypes surrounding domestic work. These transformative measures provide a possible pathway to shift both states' market-oriented approach to migration towards one that prioritises the rights and welfare of migrant workers. This in turn will help to tackle state-sanctioned structural violence by commission *and* omission against women MDWs.

Regional Consultative Processes and Civil Society

My thesis revealed how increasing competition between labour-sending states impedes the ratification and implementation of international standards of protection, specifically C189, the CEDAW and ICMW. Receiving countries often turn to and favour those sending states that are prepared to accept lower wages and inferior working conditions for women MDWs to enhance their 'competitive advantage'.⁸⁸⁶ This deters labour-sending states from enforcing greater rights protection and labour standards for their workers through international conventions. Rather, they engage in 'under-selling' the rights of migrant workers to receiving countries in order to ensure access to labour markets and remittance opportunities. For example, Sri Lanka's reluctance to ratify C189 and effectively implement its legal framework governing domestic workers abroad reflects its fear of losing market share to non-ratifying neighbours with less demanding migrant workers.

Collaboration and meaningful partnerships between sending countries, rather than competition, is imperative in order to transform such market-driven systems and structures that perpetuate discrimination and inequality. Adopting multilateral agreements and harmonised standards of protection would prevent host states from undercutting migrant rights and recruiting from other sending countries. By contrast, separate bilateral labour agreements between countries of origin and destination tend

⁸⁸⁶ Piper, Rosewarne and Withers, above n 210, at 6.

to increase competition between sending states and cement structural inequalities, with each country negotiating for greater access to the host country labour market often at the expense of rights protection. This approach hinges upon and reinforces an international division of labour-sending states and in turn a gendered and racialised hierarchy of women MDWs, which serves to devalue and legitimise their disposability as labour commodities.

The advantage of regional consultative processes lies in what has often been seen as a shortcoming: their informal nature and the non-binding character of their recommendations.⁸⁸⁷ States are more likely to participate in a voluntary process that can be used as a vehicle in which to decide upon a collective stance and more binding agreements. Therefore, regional dialogues represent a constructive supplement to the current management of international migration through formal international legal instruments, in order to advance policy coherence and concrete action on upholding migrant rights. Strengthening the capacity and bargaining power of sending states will undoubtedly require cooperative endeavor among the nations of the global South. The economic incentive for negotiating collectively is that it benefits *all* sending countries in the long-term, including those in a stronger market position, by challenging the ever-shifting hierarchy of remuneration rates and conditions of employment across different states. This in turn would help to preserve their migration and remittance flows without having to fear being undercut by neighbouring countries of origin when seeking to improve rights protection.

The ‘race to the bottom’ among labour-sending governments will not only be challenged by states adopting harmonised positions, but by the participation and activism of civil society in shaping the governance of migration through regional dialogues. Embracing civil society as partners at all stages of the process is key to transforming market-driven “institutions, systems and structures that cause or perpetuate discrimination and inequality.” By functioning as transnational pressure groups, their inclusion will help to “overhaul relationships of power and unsettle institutional norms of hierarchical organisation”,⁸⁸⁸ while translating the

⁸⁸⁷ Klekowski von Koppenfels, above n 394, at 50.

⁸⁸⁸ Atrey, above n 381, at 870.

governments' commitments under international law into political, economic and social action.

Following considerable lobbying activity since the initial phase of the Colombo Process in 2003, civil society groups were first invited to officially participate in the Colombo Process as observers at the ministerial conference in Dhaka in 2011. Since then, they have actively participated in the process through civil society consultations, although these take place separately from the governments' Senior Officials meeting. In a consultation report for the 4th Colombo Process meeting in 2011, the Migrant Forum in Asia network noted the lack of clarity in terms of impact and objectives regarding the involvement of civil society and the need for engagement throughout the entire process including preparations, actual meetings and follow ups.⁸⁸⁹

A major breakthrough occurred for civil society participating in the Colombo Process in 2016, and later at the Abu Dhabi Dialogue in 2018, when the Migrant Forum in Asia network was invited for the first time to send civil society representatives to participate as panel members in the Senior Officials Meeting, including advocates from the Philippines and Sri Lanka.⁸⁹⁰ Their inclusion as members of the panel, as opposed to observers, is a significant step in the promotion of a rights-based gender-informed approach to migration based on international standards of protection.

In a statement to governments following the 5th Colombo Process in 2016, civil society welcomed the invitation to participate in the ministerial meeting having only been offered limited spaces to participate previously. However, they reiterated their strong recommendation for the “genuine participation of migrants and civil society in Colombo Process meetings and processes to be institutionalised and included in its operating modality.”⁸⁹¹ Human Rights Watch, CARAM Asia and the Migrant Forum in Asia called for deeper consultations between governments and migrants' organisations, trade unions and NGOs as key stakeholders in migration debates. They

⁸⁸⁹ Migrant Forum in Asia “Report: Civil Society Consultation for the Colombo Process” (17-18 April 2011) Bangladesh: Dhaka.

⁸⁹⁰ Migrant Forum in Asia “MFA Attends the Abu Dhabi Dialogue Senior Officials' Meeting” (19 July 2018) <www.mfasia.org>.

⁸⁹¹ William Gois Regional Coordinator of Migrant Forum in Asia “Civil Society Statement to Colombo Process Governments” 5th Colombo Process Ministerial Meeting (24-25 August 2016) Sri Lanka: Colombo.

stressed how this will ensure that “policymakers are better aware of the realities on the ground and more responsive to the concerns and priorities of migrants.”⁸⁹² Established guidelines on how civil society can regularly and *meaningfully* engage in official discussions would help facilitate their collective voice to avoid being relegated to the sidelines.

While greater inclusion in the Senior Officials Meetings indicates that the dynamics are gradually shifting, it is imperative for civil society organisations to keep pushing forward and permanently secure their place at the ministerial negotiating table. Instead of civil society and migrant workers having to organise parallel events, Conveners of the Colombo Process should increase opportunities for them to participate in government discussions and interact with delegates.⁸⁹³ This would enable them to influence agenda setting and state-led discussions, while reframing neoliberal development policies.

According to Piper, civil society-led initiatives ‘from below’ through the formation of regional networks “are challenging ‘top-down’ projects of global migration governance by articulating alternative visions based on international human and labour rights principles.”⁸⁹⁴ Engaging in such networks is particularly important and beneficial for migrant worker advocacy groups in Sri Lanka given their limited influence and restricted access in migration policymaking, in contrast to civil society in the Philippines. When the channels between the state and civil society are blocked, joining transnational advocacy networks participating in regional processes allows domestic advocates to bypass their state and link with international society to exert pressure through alternative avenues.⁸⁹⁵ Piper and Rother observe that “while most of the input from civil society is advocacy work and discursive in nature, it has still made some progress towards an important goal – bringing the demands of a marginalised group to the regional agenda.”⁸⁹⁶

⁸⁹² Human Rights Watch, CARAM Asia and Migrant Forum in Asia “Protecting Asian Migrants’ Rights: Recommendations to Governments of the Colombo Process” (19 April 2011) at 4.

⁸⁹³ At 4.

⁸⁹⁴ Nicola Piper “Global Governance of Labour Migration: From ‘Management’ of Migration to an Integrated Rights-Based Approach” in Peter Drahos (ed) *Regulatory Theory: Foundations and Applications* (Canberra: ANU Press, 2017) at 386.

⁸⁹⁵ Hennebry, KC and Piper, above n 217, at 4.

⁸⁹⁶ Nicola Piper and Stefan Rother “Alternative Regionalism from Below: Democratizing ASEAN’s Migration Governance” (2015) 53 *International Migration* 36 at 46.

While addressing the underlying structural factors that lead to gender inequalities is a formidable challenge, the involvement of civil society in the drafting, implementation and monitoring of policies and programmes for migrants through regional dialogues would help to integrate gender and intersectional concerns in state policies. Deep-rooted structural inequalities and gender norms, which obstruct the full and equal participation of women migrant workers in all aspects of social, political and economic life, remain relatively untouched by states within regional dialogues.⁸⁹⁷ Instead, it is the globally connected and locally active networks of civil society that have been pushing governments to revisit gender-blind and gender-neutral approaches to governance, while challenging the commodification and devaluation of domestic/care work in both economic and social terms.⁸⁹⁸ This is critical to the achievement of policy that responds to women's needs and advances transformative equality.

International Law Norms and Compliance Mechanisms

Significant advancement in the implementation of a rights-based intersectional approach is contingent on pushing the governments of the Philippines and Sri Lanka to comply with and commit to the full range of migrant worker rights set out in C189, the CEDAW and the ICMW. These conventions afford women migrant workers a considerable degree of protection against discrimination, exploitation and rights violations that they would otherwise not receive. There is mounting evidence that 'governance from below', involving the strategic advocacy and political activism of civil society actors, is having a sizeable impact in prompting governments to implement minimum conditions and rights for women MDWs in accordance with international norms.⁸⁹⁹

However, feminist scholars draw attention to the way that international human rights treaties can reinforce injustice by excluding certain workers from their ambit of protection. This criticism is particularly applicable to women domestic workers whose

⁸⁹⁷ Hennebry, KC and Piper, above n 217, at 11.

⁸⁹⁸ At 11.

⁸⁹⁹ Piper, Rosewarne and Withers, above n 210, at 12.

social reproductive activity and association with the ‘informal’ private sphere falls outside conventional definitions of labour. Thus, the non-recognition of domestic workers as ‘workers’ and right-holders under national law, as is the case in Sri Lanka, limits the potential of international conventions to protect the most vulnerable and disadvantaged groups.

While I recognise these shortcomings, I argue that a rights-based framework retains considerable rhetorical and mobilising power. International norms strengthen the leverage of non-governmental actors and legitimise their demands when advocating for legislative reform. Their advocacy efforts also contest the application of neoliberal policies and go some way towards addressing the inequalities in human and labour rights embedded in globalising labour markets. Governments have become increasingly sensitive to being criticised for their failure to act, often “wary of the damage that can be done to their political standing and legitimacy when they fail to respond to calls” by migrant workers, civil society and international organisations to implement international standards of protection and address abuses of migrant rights.⁹⁰⁰

In their pursuit of migrant worker rights, both the CEDAW Committee and Committee on Migrant Workers play an important role in assessing state compliance with their international treaty obligations by overseeing reports submitted by State Parties to the conventions. Both the Philippines and Sri Lanka have submitted state reports every four years, as well as written replies to the list of issues and questions raised by the Committees during pre-sessional working group discussions. State Parties receive concluding observations in response, which commend positive measures and outline principal areas of concern with recommendations. The Committees request State Parties to provide written information on the steps undertaken to implement the recommendations within two years.

This monitoring process also allows and encourages NGOs and civil society to submit shadow reports as a tool to criticise official state reports and hold governments to account. Unlike government reports, which often highlight the progress of the state

⁹⁰⁰ Piper, Rosewarne and Withers, above n 210, at 12.

whilst downplaying violations, shadow reports point out critical issues neglected or misrepresented by respective governments. They also inform the treaty body committee about problems in implementation and areas of state non-compliance. This monitoring process provides civil society with the opportunity to work in coalition with other organisations and an international forum to raise their concerns.

Civil society organisations in both the Philippines and Sri Lanka actively use these opportunities, often submitting comprehensive shadow reports and participating in pre-sessional working group discussions.⁹⁰¹ Their reports are crucial in demanding accountability from the Philippine and Sri Lankan governments for violating their obligations and failing to implement provisions. Shadow reports paint a more accurate picture of how policies and programmes are working on the ground, while civil society can use the concluding observations to lobby the government and push for improvements in human rights protections.

Using the legal tools of the ILO and UN set of established labour standards for MDWs, civil society organisations can advance transformative equality by challenging the “harmful norms, prejudices and stereotypes” surrounding domestic work. The subordinate status of women domestic workers in Sri Lanka is perpetuated by the view that they are mere ‘servants’ under national law, and thus domestic work is not deemed to be a legitimate form of labour deserving of employment protection. This engenders prejudice in society and the accepted exclusion of domestic workers from the scope of protective labour legislation. Migrant worker advocacy groups can therefore draw on international norms to pressure the Sri Lankan government into extending national labour legislation to cover domestic workers. This in turn will go some way in challenging discriminatory gender norms, ingrained cultural attitudes, and the devaluation of domestic work in social and economic terms.

⁹⁰¹ Women and Media Collective *Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women* (January 2017) Submitted for the 66th Session of the CEDAW Committee. Geneva, Switzerland; Philippine Migrant Worker Civil Society Organisations *Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women* (22 September 2015) Prepared by the Center for Migrant Advocacy; Sri Lanka Civil Society Organisations *Shadow Report to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Members* (August 2016) Submitted for the 25th Session of the UN Committee; Philippine Migrant Rights Groups’ *Written Replies to the List of Issues Relating to the Consideration of the Initial Report of the Philippines* (March 2009) Submitted to the UN Migrant Workers Committee for its 10th Session in Geneva.

The UN process also offers opportunities for migrant worker advocacy groups to organise and directly participate, as evident from the discussions and negotiations in the lead up to the adoption of the ILO's Domestic Workers Convention (C189). Once its Governing Body put C189 onto the agenda, the ILO machinery began working on collecting a large amount of data on the situation of domestic workers worldwide in preparation for the deliberations. This led to information gathering, networking activities and multiple advocacy campaigns by migrant rights organisations, supported by global unions, and the creation of domestic worker alliances and networks.⁹⁰² Their efforts pushed governments to vote in favour of a binding convention and increased the level of awareness surrounding domestic work “as an invisible, informal yet highly important form of employment for many women, which deserves regulation in the form of a contractual relationship outlining working hours, wages and periods of rest.”⁹⁰³

Civil Society Activism and Mobilisation at the National Level

The role of civil society and migrant workers is equally important at the national level. Neoliberal policies have been the impetus for the establishment of many civil society organisations in the Philippines. Such organisations act as the voice of the most overlooked citizens and provide much needed assistance and rights protection to women MDWs at the grassroots and national level where state systems are insufficient or absent. The resistance of activist organisations to neoliberal globalisation and the commodification of migrant labour, such as Migrante International in the Philippines, are crucial in demanding that the state adopt a more transformative and liberating role in prioritising the protection of migrant workers' rights above the promotion of neoliberal export policies that reinforce gender, ethnic and class inequalities.⁹⁰⁴

⁹⁰² Nicola Piper and Stefan Rother “Let’s Argue about Migration: Advancing a Rights Discourse via Communicative Opportunities” (2012) 33 *Third World Quarterly* 1735 at 1744.

⁹⁰³ At 1744.

⁹⁰⁴ Lindio-McGovern, above n 221, at 30.

However, Gamburd notes that such high levels of labour activism in the Philippines reflects the length of time Filipinos have been migrating, which has enabled them to build networks and form alliances in destination countries to share local knowledge and provide assistance in case of difficulties.⁹⁰⁵ In contrast, Sri Lankan civil society has lagged behind the politicised groups of activists in the Philippines who are able to voice sophisticated critiques of global capitalism. Forming activist networks with Filipino civil society, through forums such as the Colombo Process and the Global Forum on Migration and Development, will help to amplify their voices and illuminate greater leverage points for their national advocacy strategies in Sri Lanka.

In adopting and implementing a rights-based intersectional approach to migration policymaking, the Philippine and Sri Lankan governments would be able to observe and address the gap between the programmes and services set up for women domestic workers and their actual recruitment, overseas and return experiences, intersectional vulnerabilities and personal goals. For instance, poorly distributed migrant services and resource centres in Sri Lanka's remote Eastern Province allows unregulated sub-agents to exploit inexperienced and uninformed Sri Lankan Tamil women who reside there. Both countries would also be able to recognise how a lack of rights-based information pre-departure results in a knowledge deficit that renders women domestic workers more susceptible to situations of abuse and deception by recruiters and employers throughout the migration cycle.

Since migrant workers and advocacy groups know the most about particular recruiters and sub-agents, allowing direct input from them in the provision of information and oversight of the recruitment industry would help to ensure better protection and accountability.⁹⁰⁶ According to Rother and Steinhilper, "governance from the bottom-up must take into consideration those most directly affected by the policies it brings about: the migrants themselves and the organisations who represent them."⁹⁰⁷ Regular consultations between government agencies, advocacy groups and migrant workers

⁹⁰⁵ Gamburd, above n 220, at 83.

⁹⁰⁶ Farbenblum, above n 33, at 184.

⁹⁰⁷ Stefan Rother and Elias Steinhilper "Tokens or Stakeholders in Global Migration Governance? The Role of Affected Communities and Civil Society in the Global Compacts on Migration and Refugees" (2019) *International Migration* 1 at 3.

will bring migrant-oriented perspectives into higher-level political dialogue.⁹⁰⁸ This in turn will push the state to adopt policies, programmes and services that respond to the needs of migrants to advance transformative equality.

However, while some advocacy groups are driven by migrant workers, others are not and therefore vulnerable to criticisms about being self-appointed and unaccountable. According to Piper and Rother, it “can be questioned how representative these organisations are, if their internal structure is democratic and whether a tendency towards ‘NGOism’ might increase tensions with grassroots-oriented organisations.”⁹⁰⁹ A further concern is how the adoption of a rights-based activist approach based on international legal standards leads to a “professionalization of feminist advocacy, thereby stripping ‘rights-talk’ of its potential role as a tool of grassroots politics.”⁹¹⁰ While these concerns are valid, I contend that civil society organisations’ expertise, commitment and hands-on experience working with migrants make them a unique and significant source of information and assistance. Therefore, it would only benefit states to harness them as partners in the migration policymaking process.

Civil society organisations, many of which are run by former migrants themselves, have proven to be indispensable in shaping and influencing state behaviour through regional activism, national advocacy efforts and by submitting shadow reports at UN Committee sessions. They employ powerful strategies, such as networking and coalition building, to connect and communicate with international allies and collect information that they can later use to exert pressure on policymakers.⁹¹¹ Where advocates experience difficulties when attempting to work alongside the state they have used alternative avenues to vocalise their criticisms, push states to revisit gender-biased and discriminatory approaches to migration, and challenge the underlying structural factors that lead to gender inequalities. While the role of civil society is not a panacea that will end all ills overnight, they are shifting the landscape

⁹⁰⁸ Atsuko Geiger “Regional Frameworks for Managing Migration and the Role of Civil Society” in Mely Caballero-Anthony and Toshihiro Menju (eds) *Asia on the Move: Regional Migration and the Role of Civil Society* (Tokyo: Japan Centre for International Exchange, 2015) at 197.

⁹⁰⁹ Piper and Rother, above n 896, at 46

⁹¹⁰ Elias, above n 162, at 853.

⁹¹¹ Hennebry, KC and Piper, above n 217, at 4.

and their concerns and demands are being heard and forcing responses more than ever before.⁹¹²

The promotion of labour export and the protection of the rights of migrant workers are two conflicting and contradictory policy objectives. When pursued simultaneously by the Philippine and Sri Lankan governments, the situation invariably leads to the subordination of a rights-based approach to neoliberal market interests premised on the commodification of reproductive labour. The measures proposed by this thesis have the transformative potential to shift the role of the state and challenge the prevailing sponsorship of labour export, which is sustainable only through the exploitation of women domestic workers and the repression of their rights.

⁹¹² At 12.

Appendix I

Research Participants

Advocacy Groups

Mission for Migrant Workers

www.migrants.net

The Mission for Migrant Workers is a charitable NGO dedicated to responding to cases of maltreatment and other exploitative labour practices affecting migrant domestic workers in Hong Kong. They empower migrant workers through rights-based gender-informed education and training workshops, provide psychological support and paralegal assistance for legal cases, and advocate for women's rights and welfare.

United Filipinos in Hong Kong

www.unifil.org.hk

Composed of twenty-five NGOs, United Filipinos is the first alliance of Filipino migrant worker organisations in Hong Kong. Initiated by Filipino domestic workers, United Filipinos is the leading organisation with a critical perspective on globalisation and the commodification of migrant labour. It promotes the rights of domestic workers and provides a platform for overseas Filipino migrant workers to unite and raise awareness of the problems facing them in Hong Kong. They often lead protests and actively lobby the Hong Kong and Philippine governments to challenge policies that violate the rights of women migrant domestic workers.

Center for Migrant Advocacy

www.centerformigrantadvocacy.com

Center for Migrant Advocacy carries out policy advocacy work to protect and promote the rights and dignity of Filipino migrant workers and their families. It delivers welfare and legal assistance to distressed migrants through its case

management programme, disseminates rights-based information, and facilitates effective reintegration. The Center launches and participates in campaigns and works with government agencies and other advocacy groups locally and regionally in pushing its reform agenda. It also conducts research and publishes reports and working papers to support its policy advocacy initiatives and public information services.

Development Action for Women Network (DAWN)

www.dawnphil.com

DAWN was originally established to assist Filipina women migrants working in Japan in the promotion and protection of their rights and welfare. In 2011, DAWN expanded its programmes to include all Filipina migrant domestic workers and their families. It provides women migrant workers, particularly returnees, with counselling, case management and legal assistance, as well as education and training through workshops and conferences.

Migrante International

www.migranteinternational.org

Following the death of Filipina domestic worker Flor Contemplacion in Singapore, Migrante International has become an active defender of the rights and welfare of overseas Filipino workers. Migrante raises public awareness on their plight and provides a critical analysis of the Philippine government's labour export policy programme as the main factor responsible for the commodification of Filipino workers. Migrante assists distressed migrant workers and their families by providing counselling services and free legal advice to push for legal and welfare actions from government agencies. It mobilises Filipinos through public information campaigns in order to challenge anti-migrant policies and pressure the Philippine government into action.

Women and Media Collective

www.womenandmedia.org

The Women and Media Collective in Sri Lanka is actively engaged in bringing about transformative change based on feminist principles through media advocacy, research, and coalition building, in order to create a just society that does not discriminate based on gender. Using their research findings, they contribute a rights-based gender-informed perspective to the formulation of new policies and engage in policy discussions to lobby for legislative reform that promotes and protects women's rights. They often coordinate civil society campaigns and work with both grassroots and national level organisations to ensure that they have a voice in policy development and implementation.

Action Network for Migrant Workers (ACTFORM)

www.womenandmedia.org/networks/about-actform

ACTFORM acts as a link between NGOs, government agencies and media groups to raise awareness on the rights of Sri Lankan migrant workers, paying special attention to their gendered needs. ACTFORM engages in a variety of activities including, collecting and disseminating information on migrant worker issues, consulting with government agencies to monitor the implementation of state policies, providing counselling and outreach programmes to migrant workers, and conducting research and advocacy work on policy reform.

Helvetas – Sri Lanka

www.helvetas.org/en/sri-lanka

Helvetas is an independent organisation for development based in Switzerland that supports poor and disadvantaged women, men and communities. In Sri Lanka, Helvetas advocates for fair and safe working and living conditions in labour migration. It works directly with migrants and their families at the grassroots level to inform them of their legal rights, assist with psychosocial issues, and how to make effective use of remittances. Since 2016 Helvetas has worked with Sri Lankan government agencies and ministries, as well as civil society organisations, to strengthen their capacity in ensuring safe labour migration.

Community Development Services (CDS)

Community Development Services advocates for vulnerable and at risk communities. It conducts work on HIV awareness and prevention, as well as the human and health rights of ‘low-skilled’ female and male migrant workers in Sri Lanka and across Asia. As a technical service provider, CDS has engaged at the national and regional level in many consultations and forums advocating for the rights of women migrant domestic workers. It collaborates with other civil society organisations to conduct awareness raising workshops for Sri Lankan migrants on issues relating to labour migration and trafficking.

Caritas

www.caritask.org

Caritas Sri Lanka is an expression of the concern of the Catholic Church for justice, peace and human development. One of their priority sectors is a safe labour migration programme, therefore Caritas works for the well being of aspirant migrant workers, in-service migrants, family members and migrant returnees. It provides rights-based pre-departure training and awareness-raising sessions in villages, legal assistance to distressed migrant workers and payment for their travel expenses to help them lodge a complaint in Colombo, psychosocial counselling, and livelihood support for returnees and their families.

Lawyers Beyond Borders – Sri Lanka

www.idwfed.org/en/resources/lawyers-directory-by-lawyers-beyond-borders-network

Lawyers Beyond Borders is an international network of legal experts interested in advocating for the rights of migrant workers, primarily in the Middle East. The lawyers identify avenues for legal redress in countries of origin and destination to provide access to justice for victims of labour exploitation and trafficking, and seek to secure favourable legal outcomes through impact litigation and policy reforms. They forge connections and liaise with government agencies and embassies, as well as grassroots organisations working with migrants on the ground.

The Centre for Women's Research (CENWOR)

www.cenwor.lk

CENWOR is a leading research organisation on gender and women's issues in Sri Lanka. It has four programme areas designed to empower women: policy and action-oriented research to provide empirical data that can be used to strengthen the application of international standards, such as CEDAW; information dissemination relating to research studies undertaken by CENWOR to provide access to knowledge on gender and women's issues in Sri Lanka; gender-sensitivity training and awareness raising for government institutions and NGOs; and advocacy and lobbying backed by research.

The Asia Foundation

www.asiafoundation.org

The Asia Foundation is an international development organisation committed to promoting the rights of women and improving lives across developing Asia. In Sri Lanka, the Foundation's projects include strengthening gender sensitivity within Sri Lanka's formal justice system, increasing women's participation in mediation, and advancing justice for survivors of sexual and gender-based violence.

International Organisations

International Organization for Migration (IOM)

www.iom.int

The IOM is the leading inter-governmental organisation in the field of migration. It works closely with governmental and non-governmental partners by offering policy and technical advice, migration research, best practices, and operational assistance. IOM activities include the promotion of international migration law, protection of migrants' rights and the gender dimensions of migration. It supports the development of policies and legislation that promote effective and transparent labour migration

flows and facilitates the recruitment of workers through pre-departure training and their reintegration.

United Nations (UN) Women

www.unwomen.org

UN Women is the United Nations organisation dedicated to gender equality, women's rights and the empowerment of women. They set global standards for achieving gender equality and work with governments and civil society in the formulation and monitoring of laws, policies and programmes to ensure standards are effectively implemented. UN Women in Sri Lanka are designing and promoting gender-sensitive employment contracts for women migrant workers in compliance with international standards of protection, with a specific focus on domestic workers.

International Labour Organization (ILO)

www.ilo.org

Through its unique tripartite structure, the ILO brings together governments, employers and workers to set labour standards, develop policies and devise programmes that promote rights and decent work for all women and men. It creates international labour standards through the International Labour Conference, which provides a forum for discussion of key social and labour questions. These labour standards are backed by a supervisory system to help ensure that countries implement the conventions they ratify.



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Appendix II

Participant Information Sheet

Project Title

The Legal Protection of Women Migrant Domestic Workers: A Comparative Analysis of the Philippines and Sri Lanka

Researcher Introduction

My name is Sophie Henderson and I am a PhD Candidate at the University of Auckland School of Law, under the supervision of Professor Jane Kelsey and Dr Jane Norton.

This Project

Rationale

Women migrant domestic workers are among the most vulnerable workers in the world and often fail to receive adequate protection in law against the risk of abuse and infringement of their rights. Therefore, the reason that I am doing this research is to provide findings that can be tested in further research, which will provide a basis for advocating and establishing stronger protections for women domestic workers against rights violations and exploitation.

Aim

The research goal is to assess the adequacy of the legal frameworks in the Philippines and Sri Lanka governing the protection of women migrant domestic workers against rights violations and abuse throughout the migration cycle.

Duration

This project will continue for 3-4 years and finish in 2020.

Funding

The funding for this research has been partly obtained through the University of Auckland International Doctoral Scholarship and the Postgraduate Research Student Support Fund.

Invitation to Participate

Why

You are invited to participate in this research because you are employed by a migrant worker organisation, international organisation or government agency whose core work and aims are in line with the focus of this research. Also, through your experience and service to migrant domestic workers, you are able to offer your thoughts and provide information that will assist me with this research.

How

To find potential participants, like you, I have carried out research to locate the most appropriate organisations and agencies in each country for this study. The organisations chosen are active defenders of the rights and welfare of migrant domestic workers, with extensive experience of handling cases involving migrant workers who have suffered abuse and rights violations.

Voluntary Participation

Your participation in this research is entirely voluntary and you may decline this invitation to participate without penalty. If you choose to not participate, you do not have to provide a reason for this.

Your employer has given assurance that your participation or non-participation will not affect your employment and your relationship with the organisation or access to its services.

Project Procedures

If you agree to participate, you will be asked to participate in an individual interview or focus group discussion. It is expected that the interview or focus group will take place in a private space within your organisation building. I will ask semi-structured questions, which will cover topics including your experience assisting migrant domestic workers who have suffered rights violations and whether the government regulations are currently providing such workers with adequate rights protection.

The interview will be audio-recorded. It is possible for the recorder to be paused and turned off during the interview if you wish. You can choose not to answer a question or leave the room and withdraw from the interview at any time.

The expected time commitment from you for this will be a maximum of 60 minutes for the individual interview.

Benefits

I expect that the results from this research will help to highlight and improve the standard of legal protection afforded to migrant domestic workers against abuse and rights violations. I hope that the research will contribute to future advocacy efforts to overcome the invisibility and vulnerability of domestic workers.

Risks

I do not anticipate any risks with this study. However, if you find a question particularly sensitive and difficult to answer then you can refuse to answer the question or leave the interview at any time.

Data Storage, Retention, Destruction and Future Use

How

I will collect the data by recording the interview, as well as by writing notes and transcriptions during the process. The researcher will carry out the transcription of the data.

Where and How Long

The data will be stored in the form of audio and computer files on a secure computer for six years. The data will be accessible only by the researcher and supervisor.

Destruction

The data will be deleted, and any hard copies destroyed, after the six-year period.

Future Use

The data will be used for the research thesis. There is also a possibility that the data will be used for future journal publications and conference presentations.

Right to Withdraw from Participation

You have the right to withdraw from the interview at any time without giving a reason. If you initially consent but later wish to withdraw your support for the research, you can withdraw the data collected during the interview at any time up until the 1st January 2019 by contacting Sophie Henderson. You will be offered the opportunity to review the transcript of the interview and you will be given a four-week timeframe from receipt of the transcript to undertake any editing of your data.

Confidentiality

Your identity will remain confidential during the interview.

Your confidentiality will be protected by not identifying you as the source of the information provided once it is reported in the research. You can be confident that your identity will never be revealed in any dissemination related to this study, although the organisation will be identifiable.

A copy of the research findings will be made available to you, if you wish.

Contact Details and Approval

Researcher	Main Supervisor	Co-Supervisor
Sophie Henderson Faculty of Law shen668@aucklanduni.ac .nz Research Mobile Number: 0761001902	Professor Jane Kelsey Faculty of Law j.kelsey@auckland.ac.nz +64 9923 8006	Dr Jane Norton Faculty of Law jane.norton@auckland.ac. nz +64 9923 8118

For any queries regarding ethical concerns you may contact the Chair, The University of Auckland Human Participants Ethics Committee, The University of Auckland, Research Office, Private Bag 92019, Auckland 1142. Telephone 09 373-7599 ext. 83711. Email: ro-ethics@auckland.ac.nz

Appendix III

Interview Questions: Advocacy Groups

1. Pre-Departure

- Could you tell me about your experience assisting migrant domestic workers during the pre-departure and recruitment stage of the migration process?
- What kind of pre-departure training and education are prospective migrant domestic workers given by government agencies or private recruitment agencies?
- Has the government implemented post-arrival orientation seminars in receiving countries? If so, what do these seminars involve?

Family Background Report (Sri Lanka)

- Do you know about the Family Background Report? If so, what are your views on it?
- What impact has the Family Background Report had on the rights of women domestic workers and their ability to migrate for work overseas?
- Do you know whether any women have bypassed the restrictions enforced by the Family Background Report?
- If prospective women domestic workers do not migrate for work overseas, are there alternative forms of local employment for them in Sri Lanka?

Recruitment Agencies

- Are the activities of recruitment agencies supervised and monitored by the government?
- If so, is the government's system for monitoring recruitment agencies effective?

2. Employment Overseas

- Could you tell me about your experience assisting migrant domestic workers while they are employed overseas?
- In what ways does the government negotiate with host states to safeguard the rights of migrant workers overseas?
- What is the degree of involvement of the government when women migrant domestic workers report rights violations overseas?

3. Return and Reintegration

- Are there government initiatives and services for returning migrant domestic workers?
- If so, in your experience how successful are such initiatives in supporting the reintegration of returning domestic workers?
- Is there any special support for returnee women migrant domestic workers who have suffered exploitation, violence and rights violations overseas?

4. Questions Relating to Theory

Gender and Intersectional Discrimination

- Does the current legal framework governing migrant domestic workers in your country address the specific needs and interests of women?
- Do the laws and policies address and protect intersectional forms of discrimination?

Participation of Advocates and Migrant Domestic Workers:

- To what extent is your voice as an advocate, and the voices of migrant workers, taken into account by the government when they are designing and implementing their laws on the protection of migrant workers?
- If taken into account – what impact has this had on the standard of rights protection provided to migrant workers in your country?

International Law

- Was your organisation involved in the debates leading up to the ratification of the CEDAW and the ICMW and in writing any reports on its implementation?

- Are you and your organisation engaged in the monitoring process and shadow reports for the CEDAW and/or the ICMW? If not, why not?

Political Economy and Commodification

- What do you think the government is prioritising when implementing its policies on the migration of domestic workers?
- Do you think migrant workers have become a source of profit for recruitment agencies and the government?

Appendix IV

Interview Questions: Government Agencies

1. Pre-Departure

- How does the agency ensure the protection of the rights of migrant domestic workers during the pre-departure stage?
- Does the agency assist migrant domestic workers prior to departure in terms of training and education? If so, what does this involve and focus on?
- Is the training offered at different locations and accessible to those in remote rural communities?

Family Background Report (Sri Lanka)

- What was the motivation of the government for implementing the Report?
- How has the Report being received at different policymaking levels and by women migrant workers?
- What have the consequences of the Report been?
- Has the Report caused women to migrate irregularly?
- Given that the government is attempting to reduce the number of women domestic workers migrating overseas through the Report – what measures are being taken to ensure secure livelihoods and adequate incomes for women in Sri Lanka?

Restrictions on Migration (The Philippines)

- What were the reasons behind the most recent ban on the migration of women domestic workers to Kuwait?
- How effective is the ban in terms of preventing abuse?
- What have the consequence of the ban been in practice for migrant domestic workers?

Recruitment Agencies

- How does the government monitor the activity of recruitment agencies to help minimise illegal recruitment and the abuse of migrant domestic workers seeking employment overseas?
- Does the government hold recruitment agencies legally accountable if they are found to be acting illegally and exploiting the rights of migrant workers?
- How does the government monitor the illegal activities of sub-agents? (*For Sri Lanka*)
- Does the government work with destination states to ensure illegal recruitment fees are not charged and employment contracts are not replaced upon arrival with less favourable ones?

2. Employment Overseas

- How does the government protect the rights of migrant domestic workers while employed overseas?
- To what extent does the government attempt to negotiate with host states on minimum standards and rights for women MDWs?
- How does the Philippine or Sri Lankan government guarantee compliance by the government in the receiving country?
- What is the level of involvement of the government when migrant domestic workers experience rights violations and abuse overseas?
- Are welfare services available to migrant workers in all host countries, including psychosocial support and gender-sensitive counselling?

3. Return and Reintegration

- How does the government agency assist migrant domestic workers who return home after experiencing abuse or rights violations overseas?
- Does the agency provide returnees with economic and social support by preparing them for employment opportunities at home? If so, what kind of support does it provide?
- How does the agency ensure that migrant workers are provided with adequate information on their rights and remedies available to them to obtain effective redress when pursuing claims?

4. International and Domestic Law

- Does the government include and consult with migrant worker advocacy groups, NGOs and migrant domestic workers themselves in policymaking processes?
- Why has the Sri Lankan government not ratified the International Labour Organization's Domestic Workers Convention? Does it have any plans to?
- When does the Sri Lankan government plan to enforce its new legislation – the Sri Lanka Employment Migration Authority Act? And how will this law better protect the rights of migrant workers?

Appendix V

Interview Questions: International Organisations

1. Pre-Departure

- How does the organisation work with government agencies to help protect the rights of women migrant workers during the pre-departure stage of the migration process?
- How is the organisation involved in the development of policies relating to the pre-departure stage and recruitment of migrant workers?
- Did the organisation advise the government with respect to the Family Background Report? (*For Sri Lanka*)
- What impact have the requirements in the Family Background Report had on women migrant domestic workers in Sri Lanka?

2. Employment Overseas

- Does the organisation work with the government to provide services and assistance to migrant workers while they are on site in the host country?
- What is the level of involvement of the organisation and government in the host country when migrant workers experience abuse and rights violations overseas?
- How does the organisation ensure the compliance of a host country to a bilateral labour agreement or memorandum of understanding with the sending state on the rights of migrant domestic workers?

3. Return and Reintegration

- What government agencies and programmes is the organisation involved with to help facilitate the successful reintegration of women migrant domestic workers?
- Are these programmes concerned with economic, social or community reintegration?

- To what extent does the government ensure that the reintegration services and programmes cater to the specific needs, interests and capabilities of women returnees?
- Do the government agencies have an integrated data collection and management system to keep track of return migrants and to capture the number and profile of returnees?
- If so, how is this information generated and shared for policy review and development?

4. International Law

- Does the organisation monitor the compliance of the government with standards comprised in international labour conventions?
- To what extent does the government comply with and implement the provisions in the CEDAW and ICMW with respect to its laws governing women migrant workers?
- How does the organisation ensure that the government's approach to the migration of domestic workers is rights-based and gender-informed in practice?
- Is the organisation working with the Sri Lankan government on the new draft legislation – the Sri Lanka Employment Migration Authority Act?
- Does the organisation (and the government) work with civil society organisations and migrant workers in formulating and implementing policies pertaining to the protection of migrant domestic workers?

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