

LST REVIEW

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RIGHTS OF MIGRANT WORKERS; A CASE STUDY, EXAMINATION OF LACUNAE IN THE LAW AND INTERNATIONAL STANDARDS

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CONTENTS

LST Review Volume 21 Issue 278 December 2010

Editor's Note	i-ii
Remittances and Poverty-Reduction: Polhena in Southern Sri Lanka <i>- H. M. P. Sanjeewanie -</i>	1-10
Rights of Migrant Workers <i>-Law & Society Trust-</i>	11-41
Concluding Observations of the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families- International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families Eleventh session, 19 October 2009, UN Doc Ref: CMW/C/LKA/CO/1	42-50

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Editor's Note

This last Issue of the Review for the year 2010 contain a variety of perspectives on the rights of migrant workers, factors for labour migration and its context thereto together with recent observations by an international monitoring body.

Our first paper is by independent researcher *H.M.P. Sanjeevanie* whose case findings in a Southern village relating to the assumed correlation between remittances of migrant workers and poverty reduction at the rural level, makes interesting reading.

Her findings underlines the ironic albeit common reality that in many instances, though the search for a better standard of living (along with personal circumstances) had propelled migration, women migrant workers continue to be blamed for the fact that their absence had resulted in the shattering of the unity of the family. Though the size of the sample and the fact that respondents were deliberately selected for the research prevents us from coming to general conclusions as a result of the findings, a vivid picture is presented thereby of the context for labour migration in this Southern village as well as the relevant factors and direct consequences. Her conclusion that overseas remittances have had considerable impact on raising the standard of well being of recipient households but that this was a complex outcome impacted on by various other factors such as education needs of children and their mental and psychological well being is reflected in previous findings of similar case studies.

Complementary to this discussion, we publish a paper on the rights of labour workers in the context of applicable practices, policies and the law by researcher, LST's Economic, Social and Cultural Rights Programme, *Miyuru Gunasinghe*. This paper combines an examination of each successive step in the migration process with a critique of the applicable legal standards and deficiencies thereto relating to the protection of the rights of migrant workers. In a background where reports of the abuse, torture and deaths of women migrant workers have become a regular occurrence, the extreme difficulties that these workers are compelled to undergo together with the gamut of risks that they run, including that of vulnerability to sexually transmitted diseases and being employed for prostitution, are highlighted.

Importantly, a major part of this research concentrates on the applicable local laws and deficiencies therein when assessed against international standards. Her observation in this regard is unequivocal;

“The most conspicuous factor about the SLBFE Act is that it is singularly devoid of provisions for sound, equitable, humane and lawful conditions for migrant workers and their families. The essence of this Act is almost wholly bureaucratic...”

Examination of relevant constitutional standards, criminal justice provisions, Sri Lanka’s National Labour Migration Policy (2008) and the country’s ratification of relevant international instruments form part of this analysis. As comparative illustration, Filipino legislation relating to migrant workers that holds good lessons to be learnt for Sri Lanka is also looked at. This paper concludes by outlining a number of recommendations that are aimed at improving legal, practical and policy responses in the interests of migrant workers.

Lastly, we publish the Concluding Observations of the United Nations Committee on the Protection of the Rights of all Migrant Workers and Members of their Families (2009) in terms of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Significantly, the Government of Sri Lanka has been called upon by the Committee to negotiate bilateral agreements on labour migration with major labour-receiving countries in order to secure protection of the rights of migrant workers. The need to progressively and verifiably mainstream relevant and appropriate provisions of the Convention into these agreements has been emphasized. Providing all consulates and embassies with well trained labour welfare officers who possess adequate knowledge of the local language and of the labour laws of the receiving country is a key recommendation.

Sri Lanka has been urged to monitor and investigate all complaints of abuse or violence against migrant workers and to carry out gender training and sensitisation for those providing legal and consular assistance to Sri Lankan nationals abroad seeking justice against abuse in the workplace.

Kishali Pinto-Jayawardena

REMITTANCES AND POVERTY-REDUCTION: POLHENA IN SOUTHERN SRI LANKA

H. M. P. Sanjeewanie*

1. Introduction

Sri Lanka has been recording growing numbers in cross-border labour migration since the inception of liberalised trade policies in late 1970s, as well as since the outbreak of communal violence in early 1980s that resulted in a sizeable ethnic Tamil diasporic community – mostly in first world countries. Migrant remittances constitute the highest or second-highest source of foreign earnings for Sri Lanka and are as great as 7.5% of the country's gross domestic product (GDP). Sri Lanka has continuously reported many times higher amount of remittances, than foreign direct investments (FDI) in recent years. In the context of the present global economic downturn with its impacts on export revenues, remittances have increased in importance to the national economy at the macro-level.

Given the above, remittances have received a great deal of attention in recent times; while the development linkage of migrant remittances has emerged as a dominant theme in the research and policy agenda in developing countries in recent times. Migration has some direct impacts at the household level mainly by increasing household income and thereafter on consumption and livelihood developments. Remittances are believed to have the ability of working as a safety-net mechanism for the poor. The main purpose of this study is to analyse the assumed correlation between remittances and poverty reduction at the rural level through a case-study based on fieldwork in a village in southern Sri Lanka known as Polhena.

2. Profile of Polhena

Polhena¹ is a *Grama Niladari* (local level administrative) division, located in the Matara district in the Southern Province. Also it is a peripheral village of the Matara Municipal Council. According to the *Grama Niladari* (local level administrative officer)² the village is home to 2,450 villagers in 665 families. Almost all villagers are Sinhala Buddhist. Equally, four Buddhist temples located close to each other evidently reflect the predominance of the Sinhala Buddhist community in the village. *Durawa* is the predominant caste in the village. The existence of caste-inclusiveness in the village is reflected in the fact that all four temples are affiliated to the Amarapura Nikaya.³ Also, in the area,

* Economist and independent researcher; among her recent publications are: "Recovering from the tsunami: people's experiences in Sri Lanka", *Contemporary South Asia*, Vol. 16, Issue 3, [2008]: 339-351 (with Dr. Muttukrishna Sarvananthan). This previously unpublished paper was edited by B. Skanthakumar for the *LST Review*.

¹ The village of Polhena borders the village of Pamburana where the research investigator/writer of this paper lives. Consequently, the research investigator/writer is substantially aware of the dynamics of the nature and the structure of the socio-economic situation and demographic profile of the village and has been witness to its transformation in the recent past. Both villages are conveniently situated off the main Galle Road between Colombo and Matara. The assistance of Ms Priyanga Dehigahawatta in identifying remittance recipient families in Polhena village is greatly appreciated.

² Interview with the *Grama Niladari* on 1st August 2008 at his office in Polhena.

³ Amarapura Nikaya is a sect or religious order within the Theravada Buddhist tradition in Sri Lanka. It was established in the early 19th century to enable the ordination of non-*govigama* caste men into the monastic community (*sangha*), when the Siyam Nikaya barred ordination to non-*govigamas*. The Amarapura Nikaya is believed to wield great influence in southern Sri Lanka as the *durawa* caste is numerically predominant in Matara.

caste is said to be the most decisive factor in continued lay support to these temples. The village remains the most attractive in the area and is surrounded by villages with the same caste profile.

As a coastal village with a beautiful beach and naturally grown coral reefs, Polhena has been one of the most famous tourist sites in the Southern Province. Prior to the *tsunami* there were many hotels and guest houses along its seashore. As a result tourism has been the means of subsistence for many of the village inhabitants. The coir-product industry is the other traditional source of livelihood of many villagers. In recent times the women's participation in this income-earning activity seems to be higher than the men's involvement in it. It is worth noting here that even though this village is located in the coastal belt, none of the villagers fish as a means of livelihood. To the best of the researcher's knowledge, Polhena is one of few seaside villages in the area whose inhabitants are not involved in fishing. This striking aspect with regard to livelihoods in the Southern villages underlines the strict adherence to the deeply rooted traditional caste system of the area. Villagers belonging to the *durawa*⁴ caste do not engage in the fisheries sector at all. Instead, catching shoals of ornamental fish which are plentiful around coral reefs for the foreign market is a good source of self-employment among the good swimmers in the village.

Ownership of land has been fairly and evenly spread across villagers. The unsaid reason behind the lesser number of land disputes among villagers (in comparison to other areas) is that the entire village is bound by close and robust ties of kinship; either of ancestry or marital connections among families of the same race, religion and caste. Traditionally, it would be unthinkable for villagers to sell their lands to non-*durawa* caste people, and in rare instances of such transactions, the tranquillity of the village had been affected. However, this traditional pattern of land alienation among well-rooted villagers had been shaken by *ad-hoc* official policies in the aftermath of the *tsunami* devastation.⁵

Polhena was probably the worst affected village in the district by the Indian Ocean *tsunami* of December 2004. The first-ever natural devastation of any kind in the recent history of Southern Sri Lanka caused an unimaginable upheaval in every sphere of the lifestyle of villagers. Through the timely response of local and foreign non-governmental organisations (NGOs) the recovery from the devastation in the village is visible to a great degree. The tourism industry that had been the livelihood of many was severely affected by the *tsunami*. The destruction took away the main source of income of many villagers and threw their lives in disarray; compelling many of the younger workers to leave the industry altogether for other sectors of employment. A number of those who left the tourism sector had migrated to foreign destinations in search of work. In terms of the number of remittance recipients, Polhena is said to be the highest among other villages in the vicinity, which explains its selection for the study.

3. Research Methodology

At the outset, in order to make a greater observation of the nexus between migration and development at village levels by conducting in-depth interviews with identified respondents, a 26-item guide

⁴ The *durawa* caste is believed to originate from the South Indian descendants of soldiers and elephant-riders of the armies of Sinhalese kings. The belief that their traditional occupation is toddy-tapping appears to be unfounded.

⁵ Although the *tsunami* resettlement programmes then in place sought to relocate affected families of the buffer zone or lands in the close proximity of the coastal belt, residents refused to move from their previous areas of habitation.

questionnaire⁶ was designed as a research tool for the field survey investigator. The questionnaire comprised three segments. The first two segments were mainly focused on the in-depth information of the respondent and his or her migrant relative and remittances. In the final section in order to ascertain the welfare impact of migration at family levels, questions related to the level of development and welfare are added. Aside from the questions on basic personal information of the respondent and his/her migrant relative, all other questions were listed in the open-ended method. Therefore, a participatory approach was entailed as the questionnaire included a number of open-ended questions. The selection of the village itself was entirely determined by its high number of remittance recipient families and the ease of access to their information via personal contacts. In fact, acquaintance of the research investigator with the villagers helped immensely to loosen their inhibitions and generate interviews that were more free-flowing and informative. A total of seven respondents whose characteristics were assumed or deemed to be of relevance to the research were deliberately identified for interviews. The field work of this case-study was conducted during the period of 2nd to 16th August 2008.

4. Interviewees and their Migrant Relatives

Four out of seven interviewees were women: two wives, one elderly woman and a young girl whose husbands, daughter and mother respectively have been in overseas jobs for years. Three boys – two out of whom were Advanced-Level students and the third a tourist guide were interviewed to note down the required particulars of their migrant mothers and the brother respectively. Hence the gender distribution of all seven migrant workers was four females and three males.⁷ Wealthy oil-producing Gulf countries have been the common host destination for all migrant workers. One female migrant was reported to be in Israel as a housemaid after a fifteen year long working stint in several Middle Eastern countries. By age group, all migrants were in the age group of 25 - 50 years.

According to information received from their relatives, all migrant workers who were the subject of the case study were married and were main breadwinners in households with not less than two or three children in each family. All female migrants had left their homes and families to work as housemaids for wealthy families while men had been engaged in unskilled or semi-skilled labouring jobs in their particular host countries. A contextual observation in this regard was that Sri Lankan migrants appeared to lack the appropriate skills and experience for better-remunerated employment and with better working conditions in international labour markets. Consequently, there appeared to be an inverse relationship between the migration and level of education of migrant workers, whereby the level of education of the migrants under study were less than the GCE Ordinary-Level qualification.

With no special training for any specific occupation, all of them had migrated for employment at the bottom of the occupational hierarchy such as domestic servants, helpers in hotels and bakeries, and garment workers in labour-intensive apparel industries. It is noteworthy to mention here that two out of three male migrants of the sample had been unaware of the nature of their jobs in the host destinations before their arrival. Such occupational uncertainties of unskilled or semi-skilled migrant

⁶ The Guide-Questionnaire is available for perusal at the Law & Society Trust.

⁷ According to official figures of Sri Lanka Bureau of Foreign Employment, female migrants are outnumbering male migrants since 1980s. Yet in 2006 alone as a percentage of total migrants by manpower levels, female migrants accounted for more than 55%. However, actual figures on total migration could be due to unregistered and illegal migration, higher than the official figures of SLBFE. Official statistics on labour migration are available on-line at http://www.slbfe.lk/feb/statis_main.asp.

workers had pushed both migrant workers and their dependents (at home) towards vulnerability in poverty related outcomes due to the loss of income at home and the absence of income from abroad. First-time migrants are more likely to be victims of such occupational uncertainties rather than the experienced migrants who by their repeated migration for work would have an edge over the others. A spouse of one such semi-skilled migrant worker spoke at length on the hardship they had undergone at the early stage of her husband's migration:

“When my husband went abroad for the first time we had undergone so many difficulties. Many of those were related to the loss of a regular income. During the first three to four months he was there (in the destination country) like a vagabond – looking for a job from place to place. We did not receive any news of him. His job agent sent him to a security firm – a job in which he had no work experience – as he made his career as a coir brush maker here. Finally he had found a job in a bakery, where he took some time to remit us some money”.

Subsequently, there is another notable revelation in her story: as in several other cases, her husband had also borrowed money to finance the costs of migration from a village-based informal moneylender at a high monthly interest rate.⁸ Aside from the occupational uncertainty at the host destination, being a borrower with the burden of repayment of a debt at home the starting period of his migration had become a disaster. It appears often that first-time migrant workers cannot afford the entry cost of migration, unless they find funding from a secondary source. Besides the case above, three other interviewees (out of seven) confirmed that their relatives had borrowed informally to finance the cost of the first-time departure for work abroad.

The youngest person out of three male migrant workers of the sample who had left his employment in the local tourism industry had easily found a similar position in the same field. Apparently – as his younger brother who still remains in the local tourism industry commented – young migrant workers with some experience in the hotel or tourism industry, and a basic grasp of English, could easily find hotel sector jobs in these countries of destination. Aside from one male migrant, all others including all four female migrants in the sample had been overseas for years, staying for two or three years at a stretch with only a few months in between at home. The re-migration of female housemaids had been sometimes sponsored by their previous employers or migrant-worker friends. Although there is only fragmentary evidence, it appeared from the sample that the finances necessary for repeat migration were easier to secure than the first time around.

5. Factors for Labour Migration

What actually influenced these migrant workers in their choice between employment in the country of origin and in a foreign destination? The answers of all respondents were clear and consistent: the ‘push’ for migration for work was the long-term and periodic unemployment or lack of alternative jobs in the country of origin, whereas the ‘pull’ was the lucrative wage rate offered by foreign employers.

However, there is greater complexity and variation than may initially be admitted. From closer discussion with the respondents, there could be three types of push factors that compelled them to

⁸ The presence of informal moneylenders at village levels in the area is covertly widespread. Usually they charge an interest rate ranging from 10% to 20% monthly. In case of long term debts borrowers sometimes have to mortgage or pawn immovable properties and jewellery against the security of loans.

work abroad: firstly, due to long-term and periodic unemployment, particularly amongst males but also resulting in female migration to substitute for the lack of stable income; secondly, women's vulnerability to both domestic and sexual harassment which had driven some women to leave home for migrant work, (as evident in the two narratives of female migrants' to Middle East countries); and thirdly, foreign employment was looked upon as being likely to increase prestige at village level, through improving the standard of living of their family and therefore the social status of that family in general. In a nutshell, all three male migrant workers lacked the skills necessary to secure employment in the formal or productive sectors (particularly in the emerging service sector) in the country of destination; while female labour migration can partly be regarded as the means by which the household could secure permanent housing, purchase durable household appliances, accumulate livelihood assets, and support their children's education.

In two cases, migration for a housemaid job had been a response to the desperate state of long-term unemployment or under-employment of spouses. These migrant women had never worked before and being less-educated could not get paid much for their unskilled labour. One person's husband was a carpenter and he could not make enough money to afford all household needs. The other person's spouse was subject to voluntary unemployment, while his wife had been playing a decisive role in carrying the burden of providing for their family that included two children. In these two cases of female migration, their spouses were now undertaking household tasks including caring for their children. The other two cases of female migrants in the sample were single-parent families. An informant revealed that one woman had become a migrant worker after having her child outside of marriage; while the other, had been deserted by her husband and was solely responsible for her three children, and thereafter had migrated for work abroad. In these two cases, the children left behind by their mothers had been cared for by their grandparents. Again, there appears to be no better alternative source of income for these two economically and socially oppressed women other than migrating to the Middle East for work.

After listening to the lament of an elderly mother of one of the women discussed above, on how terribly depressed her daughter had become after her broken marriage, it seemed that seeking work abroad was also a coping mechanism for the woman concerned in response to her pain and suffering. Presumably, even if this woman could find employment at home, she had realised that she would be affected by personal stress at home. Regardless of their motivations that compelled them to leave their families to take up employment abroad, the women's resolve and determination had been strengthened in their realisation that they contribute the largest share to the 'family income iceberg', while also contributing to their high job satisfaction. However, it is important to note that not all the factors explaining female migration could be established in the course of limited fieldwork.

All seven migrant workers focused in this case study can be considered to have been drawn from the poor or lower-middle class layer of the village. Due to the relatively low entry cost of the migration and the kinds of skills of village labour, the Gulf States remained a popular choice of destination among the migrant labour in Polhena. As noted earlier, female migrants are predominantly unskilled and have migrated abroad to the least prestigious and low-paid jobs (i.e. as domestic labour). Implicitly these women have spurned similar work at home, that is, as domestic help in wealthy households nearer their village. Of course, the salaries of housemaids in the Middle East countries are much higher than domestic work in the home country. However, the social cost of the female migration on the families or children left behind may offset or exceed the wage differential between the home and host countries. However, once again, there could be non-monetary reasons that explain

why some rural women would rather migrate abroad than do similar work in a neighbouring household or industrial work in a local factory.

6. Channelling Migrant Remittances Home

The core question for investigation in the present case study was the extent to which remittances could improve the welfare of the recipients, particularly from the poverty reduction and development perspectives. Clearly the wage rate of migrants is highly dependent upon their skills (relative to the labour market) and the prosperity of the labour-receiving countries. On the other hand, the volume of remittances may have positive correlations with wage levels of migrant workers and economic needs of families in the home.

Disappointingly in all three cases of male migrants, the respondents did not give straight answers to the questions relating to the monthly income of their migrant relatives. However, in all cases of male migrants, it will not be wrong to suggest, as discovered through conversations with respondents, that they remit on average between Rs. 20,000 to Rs.25,000 per month consistently. Typically, female migrants to Middle East states are known to be low-wage earners; aside from the one who has been in Israel, the monthly rupee income of each of the three other housemaids may not be more than Rs. 15,000. Again responses by the respondents to the question in relation to female migrant workers' monthly income were vague and inadequate to estimate their exact figures for monthly wage. Interestingly for the same sort of questions, a young respondent whose mother has been working in Israel answered promptly: the bulk of his mother's monthly salary of over Rs. 100,000 had been regularly remitted to them.

However, the available information shows that there is a noteworthy difference in receipt of earnings of male migrant workers in Middle East countries compared to the housemaids in the same host destination except in Israel. Families with female migrant workers to whom the foreign remittances are the main source of income are not in the habit of receiving remittances month by month as in the case of male migrants. Instead, housemaids remit their income home once every two or three months. Perhaps this pattern of remitting money varies according to the needs of the households: for instance during the Sinhala New Year in April inevitably migrant workers tended to remit more to their kith and kin. Conversations with relatives of low paid housemaids made it increasingly clear that the amount they received (i.e. once every two to three months) was insufficient to survive with the prevailing high cost of living in the country.

All seven respondents interviewed for the case study simply confirmed that their relatives remitted money through official or trusted channels such as banks (particularly through the government-owned banks) and Western Union; the latter was very rarely used unless there was an urgent demand for money transfer by the kith and kin. In addition to those official channels, migrant workers may carry on their person, a certain amount of their earnings, or send it via their friends or relatives who are returning from the Middle East. Further, not all earnings emanating from migrant labour work had flowed to home in the form of currency. The interior appearance of the homes of respondents suggested a considerable amount of remittances had been in the form of clothing, durable consumer goods, electrical and electronic appliances, computers and toys for kids etc. Some of those durable consumer goods had been bought for duty-free prices at the Bandaranaike International Airport in

Katunayake.⁹ This practise appeared to be more prevalent among female migrants than that of their male counterparts.

From the responses received, all respondents took a favourable view of the efficiency of formal banking channels in transferring remittances. When questioned about any knowledge of informal means of money transfer functioning at village level, surprisingly all respondents claimed to be unaware of the presence of any such mechanism. That a substantial amount of remittances had been flowing to the village through the formal banking channels is clear. Further, the largest share of remittances received by respondents seemed to have channelled through the government-owned banks namely the Bank of Ceylon and the Peoples Bank. Ironically, none of the respondents' migrant relatives held Non-Resident Foreign Currency (NRFC) accounts¹⁰ that are available at the same banks through which the migrant workers mostly remit their earnings. The awareness of the benefits of the NRFC Accounts among respondents was at a very low level.

7. Migration and Well-being

This section focuses on the controversial role of migrant worker remittances in improving the well-being of recipients. As has been widely observed, the importance of migrant labour cannot be purely viewed in terms of the economic progress of families left behind, because the social impacts must also be factored. The extent of well-being achieved by respondent households decisively varies from case to case. For the purpose of this case study 'well-being' is examined in a selective approach in which only a few related aspects of quality of lifestyle are described.

7.1 Housing

All seven respondents lived in newly built concrete houses owned by them. Every household had access to pipe-borne water, electricity and telephone. Two out of seven were modern two-storey houses, and others were more typical single storey houses of two or three bed rooms. One of the two two-storeyed houses belonged to the female migrant worker in Israel while the other was the house of a male migrant worker who was employed in the hospitality sector in Qatar. Only in two instances – of female migrant workers who are single parents – were they gifted (by their parents) the land on which their homes are built. In all other five instances, migrant workers had acquired land through their own earnings abroad.

It is notable that whatever the size of the housing of respondents, remittances had largely been spent on building or improving their homes and buying wooden furniture as well. In the case of low-waged migrant workers (that is housemaids) this is financed through repeat migration. Among all households in the sample of the study, obviously the level of well-being achieved by the two families living in the aforesaid large two storey houses was greater than the others in terms of the dimensions of their

⁹ While such hand-carried and in-kind remittances do not contribute to the external sector of the economy at the macro-level, durable consumer goods, electronic appliances and computers can upgrade the social status and well-being of poor beneficiaries. Further, given that many migrant workers' households are unable to save or save little for the future, expenditure on such durable goods, for which normally a second-hand value exists, could be construed as a form of saving rather than expending the entire remittance on daily needs and conspicuous consumption.

¹⁰ Sri Lankan citizens employed outside Sri Lanka are eligible to save their foreign earnings in Non-Resident Foreign Currency (NRFC) accounts. Special facilities are offered to the NRFC account holder in addition to a higher interest rate for foreign currency savings. The NRFC Account is a special monetary product designed to draw a higher volume of remittances through official mechanisms while encouraging migrants and their relatives at home to save and manage their earnings well.

homes, the modern furniture, and facilities such as fixed telephone and internet connections, attached bathrooms, front gardens and direct access onto the main road etc. Hence, remittances had contributed to the overall improvement of the standard of living at the household level. Using the same yardstick, the extent of well-being achieved by the two single-parent families (where the women had re-migrated to work), seemed to lag far behind others.

7.2 Children's Well-Being

Apart from spending on building or improving their home, and purchasing durable consumer goods, remittances were usually spent on meeting regular consumption needs such as food, clothing, medicine, transport and education. Interviewees indicated that a bulk of their total monthly domestic budget was allocated for children's education – particularly for private tuition classes. The utilisation of remittances for children's education augured well for the future of migrant families. In the seven sample households there were fifteen children of the age range of 10 years to 23 years. By gender five out of fifteen were girls. Referring to levels of education of children of respondent households, it must be underlined that all children had studied at least up to GCE Ordinary-Level qualification. In other words, none of them had dropped out from school education prior to sitting for the GCE Ordinary-Level examination. Interestingly, in the absence of one or both parents, girls obviously did better than boys in the field of education. That is, out of all five girls, two were university students, two were Advanced-Level students and the other was following a course in stenography in a nearby private polytechnic.

Among all ten male children, only four were attending school at the time of interview. The majority of the male children of respondent families were neither school-going nor in employment. That is, they were searching for jobs after sitting for the Ordinary-Level examination. All the children of respondent households attended or had once attended nearby government schools, out of which two were prominent 'national schools'. The inconsistencies of the educational performance between male and female children of the same respondent household was indicative of a sequence of circumstances that might have influenced the boys to drop out of schools after sitting the Ordinary-Level examination while girls (in the same family) were entering the field of higher education. Mainly the responsibility of four out of six unemployed male children fell on their grandparents. Those grandparents were not satisfied with the financial and material gains as migrant workers of their children, in terms of assuring a prosperous future for their grandsons.

Ruwina,¹¹ the eldest girl-child of a household which also included two unemployed male children, and whose mother had been a migrant labourer for a lengthy period of time, responded to her grandmother's complaint on the adverse consequences of their mother's absence in the family on her younger brothers' education. Being a university student, the way she candidly weighed the possible pros and cons of her mother's departure to a foreign job on overall well-being of their family is worth reproducing here. In her own words:

“When our father left us with her, she [Ruwina's mother] was desperately looking for help from our relatives to bring up the three of us. Finally she went abroad. We have done so much out of our mother's earnings so far. Look! This house and everything else is from what she has earned over there. She spent equally on our

¹¹ The name has been changed to protect the identity of the respondent.

education, and even from there (Kuwait) she is often concerned about us, particularly our studies.”

When speaking of her younger brothers, Ruwina comments:

“I do not think that our mother’s absence is the only reason for them to show such failure in their studies. Even if our mother was here with us they would not heed her. But the absence of a father in our family is the main reason for all our problems.”

Ironically, though the need to support and provide for the household compelled the woman in single-parent families to leave for a foreign job, her absence from the home is blamed by some respondents for undermining the cohesion and welfare of the family members left behind. If one’s primary focus is the children of respondent households, one could say that migration has had a serious negative impact on them in comparison to the spouses of the migrant workers. This opinion particularly holds true for male children of respondent families. Even after interviewing the first few respondents, it became clear to this researcher that the majority of adult male children in the household were not obedient to their guardians. The aggressive behaviour shown by the majority of these children might have caused by the absence of one or both parents particularly during their transition from adolescence to adulthood. As Ruwina aptly summed up further:

“Though food, clothes, textbooks and all other primary needs of ours were well taken care of, we missed the most important thing: that is the much needed opportunity to live with our parents. At least if our father could be with us things might have turned out to be much better. We lost them both at once”.

Obviously children of two respondent households had missed the chance to benefit from both their parents’ care. Further, in the case of female migration, the respondents commonly attributed the root cause for behavioural problems of children to the ‘absence’ of a mother’s love and caring for their children, and in particular the boys. The older boy-children, some already young adults, were notorious loiterers in their village as a result of unemployment. Unlike boys, almost all girl-children of the respondent families had household responsibilities especially of caring for their younger siblings. Happily, no evidence could be found to prove any involvement of any child of remittance recipient households in drug abuse or anti-social behaviour. Although those children may have experienced psychological or emotional problems and also the stigmatising effect of the absence of one of their parents’, they were not seen suffering as from any serious deficiency in terms of levels of nutrition and growth.

8. Savings and Investments

It is widely known that migrant workers save nothing or very little for the future. When asked about savings, most of the respondents poignantly claimed that the amount they received was not sufficient to apportion even a little to be saved or invested. Again, the high cost-of-living was blamed by respondents. Some revealed that once they received remittances via their bank accounts they did not withdraw the whole amount at once – instead they used to retain a little amount in the bank account itself. However, such remaining marginal balance in their bank accounts cannot be considered as productive savings as when initial withdrawal has been exhausted or there is delay in receipt of the next remittance, then the remaining funds are depleted too. (In the case of housemaids in the Middle East, dependents at home had to wait for the money to arrive at intervals of two to three months.) The

majority of respondents revealed that when such a delay occurred they tended to borrow, or mortgage jewellery, in order to meet day to day family needs.

However, although there were no savings to speak of in monetary terms for the migrant workers in the research sample, neither could they be classified as poor either, contrary to the belief of their families. The evidence in hand is that all the migrant workers had invested their earnings in some productive assets such as buying land, three-wheelers, motor cycles and multi-purpose carpentry machines etc. Remittances were also often used improve small business investments (e.g. carpentry workshops). As discussed above, the durable goods (electrical appliances and furniture) bought from the remittances for which normally a second-hand value exists could be considered as in-kind savings of migrants. Moreover, the majority of respondents were of the opinion that the expenditure on their children's education is an investment greater than saving money in bank accounts at lower interest rates. In other words, their opinion underlined the critical importance to them of children's education for the future well-being of the household. It was surprising that except in the case of the female migrant worker in Israel all other respondents were apparently not concerned about savings and the future livelihood security of their returning migrant relatives. Instead, the respondents commonly appreciated the continued role of remittances for their survival. It is important to understand that all respondents expected their family member abroad to be in foreign employment for as protracted a period as possible. Interestingly in two cases, the respondent households' foresaw the possibility of the unemployed male children obtaining visas and references for employment through their migrant mothers to the same destination country in the future.

The case of the female migrant worker in Israel could be seen as a success story in comparison to that of others in the sample. In the recent past a large portion of remittances sent was invested in building a large modern house and buying another plot of land near her existing home. As her son revealed, his father who is unemployed has been in the habit of saving a portion of remittances in a bank account with the intention of buying a vehicle one day. It is important to note that this migrant woman was the oldest one in the sample of seven and had left for Israel with fifteen years of similar experience in several other Middle East countries. The progress her household has made could not only be attributed to the relatively high salary she receives from her current employer, but also the accumulation of earnings through long period of employment abroad, and perhaps too the prudent use of remittances by the recipients at home.

9. Conclusion

Migrant remittances – the main source of income of all seven respondent households – had empowered recipients in many ways to attain a higher standard of living similar to that of middle class non-remittance recipient families in the village. Though there appeared to be a low correlation between spending on male children's education and their outcomes, the overall well-being achieved by all respondent households was noticeable. Migration is commonly a solution to the lack of alternative employment opportunities particularly among rural women. As noted above, at village-level in southern Sri Lanka a bulk of remittances is derived from un-skilled and semi-skilled labour migration to the Middle East countries. In none of these cases that were part of the research sample was there any family migration or presence of influential diasporic ties among low-paid migrants in the same host destination.

RIGHTS OF MIGRANT WORKERS

*Law & Society Trust*⁶

1. Introduction

The globalisation of labour markets induces thousands of workers to seek their fortunes upon foreign soil each year and sell their labour. These are the migrant workers¹ of the world. Sri Lanka is no stranger to this phenomenon. In 2008 and 2009, over 1.8 million Sri Lankan migrants worked abroad with annual outflows of approximately 250,000 people.²

The preponderance of this labour outflow is to the Middle East³ for unskilled and semi-skilled work; by May 2010 there were over 1.2 million migrant workers in this region alone.⁴ Until the 1970s and the oil boom in the Middle East, economic migration consisted primarily of professional or skilled migrants to European countries.

The Sri Lanka Bureau of Foreign Employment (SLBFE, also known as the Bureau), created to promote and regulate migration, was brought under the aegis of the Ministry of Foreign Employment Promotion and Welfare in 2007, and under the aegis of the Ministry of External Affairs in 2010. It is, however, the Bureau, rather than the ministries, which acts as point of contact for unskilled and semi-skilled migrant workers. The Bureau is responsible for regulating agencies, setting standards for employment, undertaking the training and orientation for workers, verifying employment documentation and providing for the welfare and protection of migrants

The Sri Lankan labour force for 2008 was 7,569,000⁵ persons with an estimated 1,800,000⁶ employed abroad and 285,021 migrating in 2008⁷. During the 1970s and after, professionals migrating to the United States, Europe, or Australia often remained in these countries, and thus remained apart from Sri Lanka's labour force and economy.⁸ It is not the purpose of this report to follow the evolution of such expatriates but to explore the migration of the national labour force with special accentuation upon the plight of female domestic migrant workers.

Poverty, unemployment, underemployment⁹ and a three decades long civil war¹⁰ have been the main dictators behind international migration in Sri Lanka. In 2009, the unemployment rate in this country

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¹ Article 2.1 - International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families - a 'migrant worker' is defined as 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'.

² Sri Lanka Bureau of Foreign Employment (2008), Annual Statistical Report of Foreign Employment 2008, SLBFE, Battaramulla, <http://www.slbfe.lk/downloads/Annual%20Statistical%20Report%202008%20%20SLBFE.pdf>.

³ For the purpose of this report, this includes: North Africa, GCC, and the Levant.

⁴ Ministry of Foreign Employment Promotion and Welfare.

⁵ *Supra* note 2, p.96.

⁶ *Supra* note 2

⁷ *Supra* note 2, p.99

⁸ *Supra* note 8, pp.166.

⁹ International Migration Outlook Sri Lanka (2008). Institute of Policy Studies / IOM; p.16.

was 5.7% with male unemployment being especially high, at 4.3%.¹¹ Employment opportunities abroad are therefore highly sought after.

From 1988 till 2008 the majority of migrants going abroad were female domestic migrant workers. In 2008, with a push by the government for males to go abroad, there was a predominance of male migrants (51.12%) over females (48.88%).¹² Numerous protection and welfare issues affecting female migrant workers within the host country and social and cultural issues they face at home, as well as efforts made by successive governments to change migratory patterns to ones of skilled, male labour have been responsible for this change.¹³

The role and rights of these migrant workers need to be analyzed within the framework of their contribution to the economic development of the country. The remittances of this invisible workforce have been one of the cornerstones of the Sri Lankan economy; a fact which was highlighted during the recent recession. According to Central Bank, Sri Lanka Reports, migrant worker remittances in 2008 amounted to USD 2.8 billion, which increased to USD 3.3 billion in 2009. Migrant worker remittances for 2008 were only topped by apparel exports in generating foreign exchange. Initial reports in 2010 place remittances as the largest generator of foreign exchange.¹⁴

Central Bank Report 2008¹⁵

Sector	Income in USD (\$) for 2008
Apparel Exports	3.5 billion
Remittances from foreign workers	2.9 billion
Income from tea exports	1.3 billion

Sector	Women as a Percentage (%)
Apparel Exports	75-80%
Remittances from foreign workers	48%
Tea exports	75%

During a global recession, and recovering from a 30-year war, the contribution of these women workers has helped to keep the economy afloat and foreign remittances flowing in. The level of foreign reserves which is perceived as healthy by IMF standards is equivalent to 3 months worth of imports. Sri Lanka's foreign reserves, however, were down to 1.5 months worth of imports in 2009.

¹⁰ Gamburd, Michelle R. (2000). *The Kitchen Spoon's Handle; Transnationalism and Sri Lanka's Migrant Housemaids*, Cornell University Press. Ithaca, p.30.

¹¹ *Supra* note 2.

¹² *Supra* note 2.

¹³ Presidential Directive in March 2009.

¹⁴ 'Remittances top Forex earnings', *Daily News*, 05 July 2010 via [Tops.lk](http://www.tops.lk) - <http://www.tops.lk/article22608-remittances-top-forex-earnings.html>.

¹⁵ 'Contribution of Women in Sri Lankan Society', *The Island*, Financial Review, 16/06/2009.

The temporary suspension of GSP Plus and global recession took its toll on both the apparel and tea industries. However, migrant worker remittances continued to rise, acting as a safety net for a plunging economy; with remittances from the Middle East amounting to 59% of total private remittances.

Unfortunately, the enormous contribution that Sri Lankan women in general and migrant women in particular make to the Sri Lankan economy remains unacknowledged. Not only are their contributions underappreciated, but they are subjected to social and cultural discrimination in both host and sending countries.

It is the objective of this report to analyze the existing national legal, political and administrative provisions and international conventions for the protection of migrant workers (with a focus upon female workers) and their families in both labour sending (with a primary focus on Sri Lanka) and host countries (with a focus upon countries in the Middle East). A brief overview of the issues faced by female migrant workers in both the host state and Sri Lanka is provided. The scope, role and issues relating to the SLBFE, ALFEA (Association of Licensed Foreign Employment Agencies) and foreign employment agencies (FEA) are outlined. Gaps and recommendations are highlighted.

2. The Abuse of Female Migrant Workers

Violations of the rights of female migrant workers are not uncommon in the migration process from the pre-departure stage to the re-integration phase. The violations faced need to be understood and evaluated in order to formulate viable policies for the protection of migrants. The following assesses the migration process: pre-departure, employment, and re-integration.

2.1 Pre-departure

2.1.1 Sub-agents and Fraudulent Foreign Employment Recruitment Agencies

Sub-agents¹⁶ play an important role in the migration process. They are the middlemen who put the potential migrant in contact with the foreign recruitment agents. However, they are currently not recognised within Sri Lankan law. Sub-agents often charge exorbitant rates for their services – charging both the registered recruitment agent and potential migrants. To date, a sub-agent earns Rs. 15,000 to Rs. 25,000¹⁷ for each potential domestic migrant worker he/she puts in contact with a legitimate recruitment agent.¹⁸

Reports of sub-agents promising jobs which do not exist, charging excessive fees, forging documents for employment and travel are not uncommon. Often potential migrants are unaware that sub-agents operate outside the ambit of the law and charge fees illegally.

¹⁶ Sub-agents are individuals who are affiliated to the main foreign employment agencies but are unregistered and unlicensed and therefore outside the scope of the law. It is common practice for each subagent to be affiliated to more than one agent at a time giving rise to problems related to accountability.

¹⁷ Human Rights Watch (2007). *Exported and Exposed; Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon and the UAE*, p.24. <http://www.hrw.org/en/reports/2007/11/13/exported-and-exposed-1>.

¹⁸ This fee is charged from the migrant workers irrespective of the fact that Foreign Employment Agents in the Host country have already paid the local agents for the ticket and visa fees.

2.1.2 Abuse by Agents and Other Officials

Physical and sexual abuse of female workers in the host country is a much publicised topic. A lesser known phenomenon is the sexual abuse which at times takes place during the pre-departure stage, within Sri Lanka. Agents and sub-agents have been accused of abusing potential female migrant workers. Sri Lanka airport officials have also been involved in drugging and sexually abusing migrant workers in unused areas of the airport.¹⁹

2.2 During Employment

Most migrant complaints relate to the period of employment and residence in the host country. These complaints are wide ranging - non payment of wages; long hours; prohibitions on freedom of movement; lack of communication with consular officials, agents and family members; sickness and related lack of health care; physical and sexual abuse, especially in the case of female workers; non-repatriation after the end of the contract; being stranded through lack of reception or false promises by agents; premature termination of contract; breach of contract including forcing the worker to toil for several employers or households; illegal money transactions and even death through unnatural causes.

2.2.1 Abused by Employer

Protection from the Police...

Interviewed on 07/05/2010

S.A. Nazira,²⁰ a 28 year old mother of an 11 year old boy, departed for Kuwait in 2008, but returned within 6 months. She had been a housemaid for a family of 14 which meant an extremely heavy workload. In addition, there had been a policeman in the family who had attempted to sexually abuse her several times. She had complained to her agency but as her abuser was a policeman the agency had not taken any steps to resolve this situation. Finally, she had run away from her employers. Fortunately, she had a sister working in Kuwait who had assisted her. She gained hairdressing skills with her sister's help

She returned to Sri Lanka only to discover that her husband had become addicted to heroin. She pawned her jewellery, her only possession, to pay off some of the debts. However, she still owes over Rs 2 lakhs. Her creditors are demanding the money back in a lump sum. With no other option, she has decided to re-migrate with the help of her sister. Her child will be left with one of his grandmothers.

Housemaids are often expected to be on call 24 hours per day and are subject to brutal treatment. Physical abuse includes, but is not limited to: severe beatings,²¹ scaldings with boiling water and oil, burnings with hot implements,²² deprivation of food and water,²³ and restriction of movement.²⁴ Many

¹⁹ Women and Media Collective and Action Network for Migrant Workers (2008). Sri Lanka NGO Shadow Report on the International Convention on the Protection of the Rights of All Migrant Workers' and their Families, WMC and ACTFORM, Colombo, p.10.http://www2.ohchr.org/english/bodies/cmw/docs/ngos/ANMW_WMC_SriLanka11.pdf.

²⁰ Name has been changed.

²¹ Human Rights Watch (2007). Exported and Exposed; Abuses against Sri Lankan Domestic Workers in S Arabia, Kuwait, Lebanon and the UAE, p.58 ,<http://www.hrw.org/en/reports/2007/11/13/exported-and-exposed-1>.

²² Ibid.

migrant workers report experiences of sexual abuse by employers or other nationals and migrants. With some, sexual abuse is a one off incident; with others, they are expected to provide sexual services as part of their employment.

2.2.2 Children Born to Migrant Workers Abroad

Many cases exist where migrant women conceive and give birth to children while working abroad. In some cases conception is due to rape, but in other instances it is through mutual consent. Nonetheless, severe social taboos or marital status prevents migrant workers from bringing these children back. In most cases, these children are not accorded the host country nationality, unless proof exists that the father is a national of the given host country. However, Sri Lankan law does allow mothers to pass on citizenship to their children, regardless of the father's nationality. Sri Lankan embassy officials are mandated to assist Sri Lankan women with the correct procedures. However, this information needs to be made both available to Sri Lankan embassies and migrant workers.

2.2.3 Incarceration in Detention Centres and Welfare Camps

Female migrant workers who attempt to flee abusive situations, at times, are subsequently incarcerated in detention centres or welfare camps. Other times, they are forced to return to their employers and complete their contract. Unlike some detention centres, welfare camps are really another form of detention with a dearth of health and sanitation facilities where social workers are prohibited from visiting.²⁵

From Rags to Rags...

Interviewed on 07/05/2010 in North Central Province

Sriyanthi²⁶ is 49 years old and lives in a house made of corrugated iron and plastic sheets, which is held up by wooden poles. She makes wicks for a living. She migrated to Kuwait in 2003 as a housemaid and left her 5 teenage children behind with relatives. Her husband, now remarried, had abandoned her. She worked in Kuwait for 6 months without any wages before she finally went to the Sri Lankan embassy. She stayed in an overcrowded and insanitary embassy shelter for a month before she was repatriated. According to Sriyanthi, the embassy officials ill treated those taking shelter. Before leaving she was given a document allegedly recording her loss of wages and personal property. However, an inspection of this document, written in English and not translated properly to her, showed that she had actually signed a statement declaring that her property had been recovered.

2.2.4 'Kafala' or Sponsorship System²⁷

A root cause for violations of migrant workers' rights has been the *kafala* system of sponsorship prevailing in most Middle East countries (it was recently banned in Bahrain).²⁸ Under the *kafala*

²³ Human Rights Watch (2010). *Slow Reform; Protection of Migrant Domestic Workers in Asia and the Middle East*, p.10, <http://www.hrw.org/en/reports/2010/04/28/slow-reform-0>.

²⁴ Personal interviews with returnee migrant workers.

²⁵ *Supra* note 19

²⁶ Name has been changed.

²⁷ United Nations Development Programme (2008). *HIV Vulnerabilities of Migrant Women: from Asia to the Arab States – Shifting from silence, stigma and shame to safe mobility with dignity, equity and justice* UNDP RCC, Colombo, http://www2.undprcc.lk/resource_centre/pub_pdfs/P1105.pdf.

(literally, 'guaranteeing and taking care of' in Arabic) programme in the Middle East, an employer is required to sponsor a migrant worker's visa and assume full economic and legal responsibility for him/her during the contracted period. Legally, the sponsored worker can work only for his/her sponsor. In the case of a domestic worker, the programme makes it mandatory for her to remain in their employer/sponsor's home.

While the *kafala* system was created to provide the government with a way to regulate foreign labour flows, critics charge that the system can lead to the exploitation of migrant workers in general, and women domestic workers in particular.

2.2.5. Sharia Law and Gender Discrimination

Sharia law, also known as 'way' or 'path' in Arabic, is believed to be God's law by many Muslims.²⁹ It is derived primarily from the Quran. Punishment and equality are two important areas governed by Sharia law. There are five *hadd*³⁰ crimes³¹ and punishments include: flogging, stoning, amputation, exile, or execution. Due to its views on adultery, victims of sexual violence are rarely served justice in Sharia courts.³² Saudi Arabia, Kuwait and Bahrain, countries with great numbers of Sri Lankan migrant workers, adhere to this law. An example of the danger this situation poses to migrant workers was highlighted in the controversial case of Rizana Nafeek, a 17-year old³³ Sri Lankan girl who was working as a babysitter when she was accused of choking an infant who she was trying to feed. A child herself at the time of the incident, a Saudi court sentenced her to death by beheading. Due to public concerns expressed internationally and locally and due also to the speedy intervention of a regional human rights body, the death sentence was delayed in its implementation. Her case is still pending.

However, despite some problematic laws, host countries have also shown a resolve to strengthen the protection accorded to migrant workers in general, and domestic workers in particular. In April 2007, the UAE issued a standardised contract for domestic workers which explicitly spells out their rights and entitlements; Jordan soon followed, and Lebanon is planning to do so.³⁴ In Bahrain, the newly established Labour Market Regulatory Authority has amended existing laws to accord greater freedom to migrant workers to change jobs following the completion of their initial contracts. Other

²⁸ 'In April 2009, the *kafala* system was changed in Bahrain. In particular it allows employees to switch from one employer to another without the employer's consent': 'Bahrain scraps sponsorship system', *The Situation of Women Migrant Workers in Bahrain* (2008) via Migrant Rights, online, 06 May 2009. <http://www.migrant-rights.org/2009/05/06/bahrain-scraps-sponsorship-system/>.

²⁹ Gibb, H.A.R. (1950). *Mohammedanism, An Historical Survey, 'The Shari'a'*, p72-84, Oxford University Press, London, <http://www.answering-islam.org/Books/Gibb/sharia.htm>.

³⁰ Hadd crimes are crimes which are prescribed a specific punishment in the Quran: Council on Foreign Relations. Johnson, Toni and Lauren Vriens, (2010). *Islam: Governing under Sharia*. <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

³¹ Unlawful sexual intercourse, false accusation of unlawful sexual intercourse, wine drinking, theft and highway robbery: Council on Foreign Relations. Johnson, Toni and Lauren Vriens (2010). *Islam: Governing under Sharia*. <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

³² Human Rights Watch (2004). *Bad Dreams – Exploitation and Abuse of Migrant Workers in Saudi Arabia*, Vol. 16, p.20, <http://www.hrw.org/en/reports/2004/07/13/bad-dreams-0>.

³³ This was highlighted as a case of underage trafficking although questions were raised as to who should be held responsible as she had been issued a national identity card and a passport by different government authorities.

³⁴ United Nations Development Programme (2008). *HIV Vulnerabilities of Migrant Women: from Asia to the Arab States – Shifting from silence, stigma and shame to safe mobility with dignity, equity and justice* UNDP RCC, Colombo, http://www2.undpcc.lk/resource_centre/pub_pdfs/P1105.pdf.

positive responses include the recognition by the Jordanian government of domestic work in its labour laws.³⁵

2.2.6 Lack of Medical Care

As domestic workers in most of the Middle East fall outside local labour laws (with the exception of Jordan), in many instances, they are also denied access to health care. Often their only access to such services is to pay for it themselves or through their employers who have to provide them residency permits.³⁶ There have been instances of private and public hospitals turning migrants away whom they suspect of remaining in the country irregularly.³⁷ Yet, at times, due to the *kafala* system, migrants are often not in possession of their passports or related visas.

2.2.7 Long Working Hours without Overtime Pay

This is a recurrent complaint of many domestic workers. Whilst labour laws in Middle East countries specify standards for daily work and rest and have clear provisions for overtime pay,³⁸ these laws remain inapplicable to domestic workers.

Paid Slaves...

Interviewed on 28/07/2010

Gunawathie (name changed) - went to Kuwait as a housemaid. She was promised 50 dinars a month, but was only paid 45 dinars. In addition to this, she was forced to work in three houses. Her day started at six in the morning in the main house in which she stayed, where she worked until 6 in the evening. Her employer then drove her to a relative's house where she worked until 10 pm and was then taken to the third house in which she had to work till 2 am. Her employer then took her back home again. She worked for this employer for two years before demanding to be sent back home. Her employers agreed but she was forced to pay for her ticket with two months of her salary.

2.2.8 Unpaid Salaries

Whilst many migrant workers are forced to work long hours, and under difficult conditions, many employers do not pay them on time, pay the agreed wages or, in the worst cases, pay them at all. Statistics for the 'non-payment of agreed wages' category in 2008 remained the highest category of complaints according to the SLBFE.³⁹

2.3 Problems Facing the Families Left Behind

Another important facet of migration is the family members workers leave behind. The impact of the separation, especially on children is life shattering. Children are left behind to be cared for by the father, grandparents or extended family. Most children will be neglected for lack of a family unit with

³⁵ Ibid.

³⁶ *Supra* note 32, p.33.

³⁷ Ibid.

³⁸ *Supra* note 32, p.38.

³⁹ Male - 346 & Female - 1,352 = Total - 1,698 - Sri Lanka Bureau of Foreign Employment (2008), Annual Statistical Report of Foreign Employment 2008, SLBFE, Battaramulla, <http://www.slbfelk/downloads/Annual%20Statistical%20Report%202008%20-%20SLBFE.pdf>.

a resultant breakdown in education, health and nutrition.⁴⁰ There are however, many instances when remittances have assisted to obtain better education and healthcare as well. Sexual and physical abuse by fathers – due to the absence of their partners or by others – due to lack of protection, is not uncommon.⁴¹ Studies have linked separation with psychological trauma for these children.⁴² Husbands often heavily rely on wives' earnings, and subsequently give up working or not seek work themselves. With an excess of free time and money, husbands often turn to drinking, gambling and adultery.⁴³ There is also a certain amount of resentment about their change in social status from bread winner to homemaker which sometimes leads them to abandon duties considered to be 'a woman's job' in a bid to re-establish their position as dominant male.⁴⁴ This in turn leads to a breakdown of the family unit.

A Mother's Woes...

Interviewed – 07/05/2010

Saradha is a migrant worker returnee from Kurunegala. She is a single parent with a 17 year old daughter, Sadeepa. She was earning a livelihood through the sale of stringhoppers when she decided to migrate in order to provide for her daughter's future. Sadeepa, who was 15 at the time, was left in the care of family friends.

Saradha left in January 2008 only to be informed in March 2008 that her daughter had died. She flew back to discover that her daughter was alive, but had attempted suicide after claiming that she had been physically abused by the surrogate family. Sadeepa had been taken to the Kurunegala hospital and transferred to the Colombo General. A children's court placed her in an orphanage in Moratuwa. Saradha went to the orphanage but was informed that her daughter had been transferred elsewhere and the details lost. She has been searching for her daughter who is now a 17 year old girl for the past 2 years.

2.4 Re-integration

The final area of the migration process is migrants' return and re-integration .

⁴⁰ 'Caregivers observed certain negative behavior in children after the departure of the mother; 22.1% of children under 5 showed loss of appetite, and 5% in the same group showed weight loss. On average 20% of children in all age groups showed increased temper tantrums after the departure of their mother.' Save the Children in Sri Lanka (2006). *Left Behind, Left Out – The Impact on Children and Families of Mothers Migrating for Work Abroad*, Save the Children in Sri Lanka, Colombo, p.6, http://www.crin.org/docs/save_sl_left_out.pdf, (Extracts from the Summary Report compiled by Save the Children in Sri Lanka and Kishali Pinto-Jayawardena can be found in *Law & Society Trust Review*, Volume 17 Issue 226 (August 2006): pp19-46).

⁴¹ Save the Children in Sri Lanka (2006). *Left Behind, Left Out – The Impact on Children and Families of Mothers Migrating for Work Abroad*, Save the Children in Sri Lanka, Colombo, p.7, http://www.crin.org/docs/save_sl_left_out.pdf, (Extracts from the Summary Report compiled by Save the Children in Sri Lanka and Kishali Pinto-Jayawardena can be found in *Law & Society Trust Review*, Volume 17 Issue 226 (August 2006): 19-46) and interview with the Programme Officer – HRC, Puttalam.

⁴² Save the Children in Sri Lanka (2006). *Left Behind, Left Out – The Impact on Children and Families of Mothers Migrating for Work Abroad*, Save the Children in Sri Lanka, Colombo, p.5 – 6, http://www.crin.org/docs/save_sl_left_out.pdf, (Extracts from the Summary Report compiled by Save the Children in Sri Lanka and Kishali Pinto-Jayawardena can be found in *Law & Society Trust Review*, Volume 17 Issue 226 (August 2006): pp19-46).

⁴³ *Supra* note 10, p.175.

⁴⁴ *Ibid.*

2.4.1 Breakdown in Mother-Child Ties

Years spent away from their families, with little or no contact, can at times break ties between migrant workers and their children. With time, these children miss their mothers less and less, developing closer relations with their immediate caregivers.⁴⁵ At times, the material benefits they gain from having a mother working abroad, may even overshadow the need to have their mothers present. At times, mothers who leave behind very young children are not recognised upon return⁴⁶ and have to strive to be accepted by them.

2.4.2 Failed Marriages

Studies show that the incidence of divorce among migrants is above average.⁴⁷ Many female migrant workers who return do not want to remain with their husbands. This may come about due to long separations, breakdowns in communication and trust, migrant worker's adaptation to a modern lifestyle, a spouse or migrant worker's adultery, and refusal by the migrant worker to be confined to a housewife's role.

2.4.3 Shunned by Sri Lankan Society upon Return

Village society also appears to view returnees as loose women with few morals and subsequently treat them with suspicion and disdain.⁴⁸ This is especially applicable to those who undergo a transformation in dress style and behavior;⁴⁹ the most common image being housemaids returning covered in gold jewellery and in fitting jeans and top. They are often shunned for 'abandoning' their husband and children. Some migrant women report that if they send home additional remittances or gifts, for example, milk packets, that family and villagers question if the extra spending power came through 'immoral behavior with men while abroad.'⁵⁰

2.4.4 Change in the Woman's Role at Home

The Asian emphasis on the woman's role as the caregiver of the family means that any collapse of the family system is attributed to her. Married migrant females are expected to play an all encompassing role of provider, caregiver and protector. As a result, returnee women may take over responsibilities usually considered a man's domain such as attending to financial transactions.⁵¹ This may further aggravate relations between spouses.

2.4.5 Squandering of Remittances

Rural migrants' families appear to often carelessly spend remittances, with little consideration for future economic plans. Earnings are utilised to cover daily household needs. A lack of understanding in money management on the part of the returnees results in a lack of shrewd investments or

⁴⁵ *Supra* note 10, p.196.

⁴⁶ *Ibid.*

⁴⁷ *Supra* note 8, p.208.

⁴⁸ *Supra* note 10, pp.218-220.

⁴⁹ *Supra* note 10 and interviews with SLBFE training unit officials 2010.

⁵⁰ Smith, Monica (2010). The state of the Sri Lankan migrant worker in the Middle East. Diss, National University of Singapore (as quoted by the editor of this article, Dr. Monica Smith).

⁵¹ *Supra* note 8, p.208.

entrepreneurship.⁵² There are also many instances of alcohol and drug abuse by the spouses as a result of new found wealth.⁵³

2.4.6 Debts Owed to Loan Sharks

Often prospective migrant workers borrow money to pay agency fees and cover other expenses of migration at crippling interest rates. This is usually through local moneylenders or sub-agents as they do not have sufficient security to borrow from a bank.⁵⁴ There will also be accumulated household debts. In most cases the migrant worker's income /savings are insufficient to pay off these debts – leading to re-migration.

2.4.7 AIDS/HIV Vulnerabilities

Sexual exploitation or freedom, insufficient awareness, heavy debts leading to prostitution, make both male and female migrant workers equally vulnerable to contracting AIDS/HIV.⁵⁵ Sri Lanka has traditionally been categorised as a low AIDS/HIV prevalence nation. UNAIDS estimates that approximately 3500 people are living with AIDS in Sri Lanka.⁵⁶ However, an interview with Lanka Plus,⁵⁷ an NGO which provides care and support to those who are living with HIV/AIDS,⁵⁸ revealed that there is a much higher prevalence than authorities suspect as most cases go unreported; this poses the added danger of the silent spread of this virus.

Following an overview of issues relating to migration, this report now analyzes the preventive mechanisms – especially legislation - in place and the problems, gaps and loopholes relating to their implementation.

3. Legislation

There is a growing awareness on national and international levels of the necessity for more comprehensive legislation for the regulation and monitoring of all aspects of the migration process. International bodies and governments want to safeguard the rights of migrant workers and their families as well as the economies of both labour-receiving and labour-sending countries. The present national legislation for migrant workers in Sri Lanka consists of the Sri Lanka Bureau of Foreign Employment Act No 21 of 1985 and its Amendment Acts - No 4 of 1994 & No 56 of 2009.

In 1996 Sri Lanka acceded to the International Convention on the Protection of All Migrant Workers and their Families which came into force in 2003. It has also ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); certain contents of which are found in the Women's Charter. The civil and political rights enshrined in the Bill of Rights are contained in the Fundamental Rights Chapter of the Sri Lankan Constitution of 1978. Sri Lanka has

⁵² P.207, *ibid*.

⁵³ Personal Interviews with returnee migrant workers in Kurunegala 2010.

⁵⁴ *Supra* note 10, p.75.

⁵⁵ United Nations Development Programme (2008). HIV Vulnerabilities of Migrant Women: from Asia to the Arab States – Shifting from silence, stigma and shame to safe mobility with dignity, equity and justice UNDP RCC, Colombo, p.14-17 http://www2.undprcc.lk/resource_centre/pub_pdfs/P1105.pdf.

⁵⁶ P.85, *ibid*.

⁵⁷ Interview with the Programme Officer on 22.06.2010.

⁵⁸ During the interview on 22.06.2010, a case was mentioned involving a returnee female migrant worker who had contracted HIV/AIDS from her husband who had an extra-marital affair with another woman later diagnosed with HIV/AIDS leading to her husband's death.

also ratified some of the core ILO⁵⁹ conventions but is yet to ratify Conventions C97,⁶⁰ C143⁶¹ and C181.⁶² The issue of human trafficking is dealt with in the Penal Code (Amendment) Act No 16 of 2006.

Owing to the inadequacy of the SLBFE Act in protecting migrant workers' rights, the Government of Sri Lanka (GoSL) saw fit to propose the National Policy on Migrant Workers in 2008 which is yet to be completely and effectively implemented.

The following is an overview of the legislation and ergo the rights pertaining to migrant workers which are directly applicable to Sri Lanka as a labour-sending country. The report points to gaps, especially in the implementation of the legislation.

3.1 International Convention on the Protection of All Migrant Workers and their Families

The main goal of this Convention is to promote the *human rights* of all migrant workers and their families taking into consideration the principles, standards and conditions set forth in the Universal Declaration of Human Rights (UDHR), International Convention on the Elimination of All Forms of Racial Discrimination (CEARD), International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Labour Organisation (ILO) Conventions and various UN Resolutions on Migrant Workers. The following are provisions most important to Sri Lanka *as a State of Origin*.

Articles 8-35 (Part III) – Human rights of all migrant workers and members of their families:

- Freedom of movement of migrants and their kin to leave the state of origin of their own free will. Yet, if the GoSL's suggestion to ban all mothers of toddlers less than 5 years of age from migrating for work was implemented it would violate this right.
- Freedom from torture. Yet, at present there are mostly only non-legal MOUs (memorandum of understanding) for the protection of migrant worker's rights in host countries.
- The state of origin has the responsibility of disseminating information on Convention rights to migrants and their families through adequate training. This shall be done free of charge. Therefore, the fees levied by SLBFE⁶³ are in contradiction of this regulation.

Articles 36–56 (Part IV) – Other rights of migrant workers and members of their families who are documented or in a regular situation.

- The right to participate in the public affairs of the state of origin; right to vote and to be elected. Yet, Sri Lanka has no procedures in place allowing its migrant workers to vote in national elections.

⁵⁹ ILO Conventions; C26, C29, C87, C95, C100, C105, C111, C131, C138 etc – out of 40 Conventions ratified, 31 are in force – International Labour Organisation; <http://webfusion.ilo.org/public/db/standards/normes/appl/applbyCtry.cfm?lang=en&CTYCHOICE=1750>.

⁶⁰ Migration for Employment Convention (Revised) 1949.

⁶¹ Migrant Workers (Supplementary Provisions) Convention 1975.

⁶² Private Employment Agencies Convention 1997.

⁶³ Section 51 SLBFE Act No 21 of 1985.

- Right to liberty of movement in the state of employment. The *kafala* system which allows employers to control the movement of domestic migrant workers needs to be addressed as a priority in MOUs & bilateral agreements.
- To ensure the protection of the unity of the families of migrant workers. The new reintegration programme being implemented by the SLBFE should shift its focus from being mainly economic to include familial psycho-social issues relating to migration.
- Right to transfer earnings and relief from import duties and taxation. Yet, there is insufficient tax relief at present to encourage savings and investment.

Articles 64-71 (Part VI) – Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families.

- Provision of consular services to meet the social, legal and other needs of migrant workers and their families. This includes the establishment of safe houses in embassies. Existing safe houses lack qualified staff due to politicised selection methods, sanitation, resources and the requisite supportive and conducive atmosphere.⁶⁴
- Recruitment agencies: recruitment of workers for employment in another state to be restricted to public services or state bodies established for that purpose or employment agents who are authorised by the state. As sub-agents are an important part of the process, the GOSL should extend authorisation registration to sub-agents.
- Trafficking of migrant workers: State parties should collaborate to prevent illegal or clandestine movements and employment of workers in irregular situations and to impose sanctions against those involved. Trafficking is currently dealt with almost on a case by case basis rather than through an organised system of information networking and preventive measures between countries.
- Bilateral and multilateral agreements between states for the betterment of the living and working conditions of migrants and to regularise the migration process. At present there are approximately five MOUs and one bilateral agreement which is still being discussed. MOUs are not legally binding and therefore ineffective.

3.2 The Sri Lanka Bureau of Foreign Employment Act No 21 of 1985

The most conspicuous factor about the SLBFE Act is that it is singularly devoid of provisions for sound, equitable, humane and lawful conditions for migrant workers and their families. The essence of this Act is almost wholly bureaucratic and can be summed up as follows:

- To provide for the establishment and regulation of the SLBFE and its board of directors. The board consists entirely of ministerial appointments⁶⁵ and only includes one female appointee and no returnee migrants, representatives⁶⁶ from

⁶⁴ Personal interviews with returnee migrant workers in Puttlam and Kuruncgala 2010.

⁶⁵ Section 5 (1) (a) - (d) SLBFE Act No 21 of 1985.

⁶⁶ The SLBFE Board of Directors consists of 11 members in total – Section 5 (1) SLBFE Act No 21 of 1985.

activist organisations or trade union members. However, it does consist of four agency representatives rendering its decisions automatically more favourable to the agencies than the workers. (Articles 3-16)

- To promote and develop foreign employment opportunities and marketable skills. The Act advocates economic migration without an accompanying emphasis on safeguards in contrast to the Filipinos Act.⁶⁷ (Articles 20-23)
- Regulating foreign employment agencies (FEA) (Articles 24-44). All agencies are required to carry a license issued by the SLBFE,⁶⁸ enter into both a contract and a bond with the Bureau⁶⁹ and maintain records as prescribed by the Bureau.⁷⁰ The Bureau may refuse to grant approval for a license for defined reasons⁷¹ and conduct investigations into complaints received. Every licensed foreign employment agency shall also become a member of the Association of Licensed Foreign Employment Agencies (ALFEA) which shall regulate and resolve complaints and advise the Bureau.

However, a later substitution of the words 'every licensee shall' by 'every licensee may' has diffused the effectiveness of the registration procedure as it allows licensees a choice in registering.⁷² This has lessened the accountability of agencies which now have the *option* of becoming a member of ALFEA and coming under its radar. Implementation of this amendment has brought the SLBFE under criticism from ALFEA.

The Act proscribes licensees from charging fees except those payable to the Bureau;⁷³ although according to the Convention, the state is under an obligation to provide free services to these workers.

- To undertake the welfare and protection of Sri Lankans employed abroad.⁷⁴ The only provision made in furtherance of this objective is to appoint a representative to the host country.⁷⁵ These representatives are often not versed in host country legislation or language however and are ineffective in safeguarding migrant workers.
- To establish a workers welfare fund which shall contain donations and contributions from Sri Lankans employed abroad and be used to disburse expenses incurred by the Bureau in providing services to migrant workers and their families;⁷⁶ including the outwardly state sponsored training.

⁶⁷ Migrant Workers and Overseas Filipinos Act of 1995 (Republic Act No. 8042).

⁶⁸ Section 24 (1) SLBFE Act No 21 of 1985.

⁶⁹ Section 28, SLBFE Act No 21 of 1985.

⁷⁰ Section 41, SLBFE Act No 21 of 1985.

⁷¹ Section 39, SLBFE Act No 21 of 1985.

⁷² SLBFE (Amendment) Act No 56 of 2009.

⁷³ Section 34 & 51 SLBFE Act No 21 of 1985.

⁷⁴ Section 15 (m), SLBFE Act No 21 of 1985.

⁷⁵ Section 21, SLBFE Act No 21 of 1985.

⁷⁶ Section 45-50, SLBFE Act No 21 of 1985.

The fund is also to compensate workers for matters not covered by insurance. However, according to the SLBFE,⁷⁷ this information is not usually disseminated to the workers.

- To undertake training and orientation of Sri Lankan workers going abroad and rehabilitation programmes for returnee migrant workers. Migrants to pay the Bureau a sum specified by the minister⁷⁸ for services provided, usually half of the course fee. However, this is in direct contradiction to the Convention.
- Any person who assists a person to emigrate except in accordance with the provisions of this Act shall be guilty of an offence.⁷⁹ Any licensee who forges documentation or coerces a person in any way to emigrate shall also be held guilty.⁸⁰ However, trafficking is not so named or defined, and misleading migrant workers regarding the nature of employment and payments are not included as offences.
- Benefits such as insurance, loans and scholarships currently being offered by the SLBFE are not regulated by the Act. There are no provisions for the migrants and their families to equitable conditions of work and life; equal opportunities and wages; freedom of movement, expression, assembly and religion; to vote and be elected; consular protection and state support structures for reintegration.

3.3 The Sri Lanka Bureau of Foreign Employment (Amendment) Acts - No 4 of 1994 & No 56 of 2009

Amendment Act No 56 tightens regulations on foreign employment agencies. The Principal Act was amended to widen the definition of a licensee,⁸¹ increase fines and expand the composition of the ALFEA Executive Committee.⁸² Article 62 dealing with illegal recruitment and Article 67 regarding failure of agencies to comply with Bureau procedure have been amended to increase the resulting penalties. Article 72 has also been revised regarding private sector undertakings⁸³ to include all 'individuals' and not just 'self-employed' persons. Amendment Act No 56 has made it optional for recruitment agents to register with ALFEA by substituting the words 'every licensee *may*' in lieu of 'every licensee *shall*'⁸⁴ in contrast to the previous position where registration was compulsory. This could make ALFEA redundant.⁸⁵ However, there is no attempt to incorporate or enhance migrant worker's rights, which should have taken precedence in any attempt to amend the original legislation.

3.4 The National Labour Migration Policy for Sri Lanka 2008

The Ministry of Foreign Employment Promotion and Welfare (MFEPW) working together with various stakeholder groups formulated the National Policy in 2008. Its main objective is to promote

⁷⁷ Personal interview with SLBFE staff member.

⁷⁸ SLBFE (Amendment) Act No 4 of 1994.

⁷⁹ Section 62 SLBFE Act No 21 of 1985.

⁸⁰ Section 63 SLBFE Act No 21 of 1985.

⁸¹ Section 44 SLBFE Act amended by Article 3 Amendment Act No 4.

⁸² Section 56 SLBFE Act amended by Article 5 Amendment Act No 4.

⁸³ Foreign Employment Agencies.

⁸⁴ Section 54 SLBFE Act No 21 of 1985.

⁸⁵ Interview with ALFEA staff 2010.

opportunities for all to engage in migration for decent and productive employment in conditions of freedom, equity, security and human dignity.⁸⁶ It would also establish a clear state migration policy.

The Policy consists of 3 sections –

- (1) Governance of the Migration Process;
- (2) Protection and Empowerment of Migrant Workers and their Families &
- (3) Linking Development and Migration Processes.

(1) An Inter-Ministerial Committee will be established to assist better coordination between government agencies and with nongovernmental stakeholders. This should include; SLBFE, MFEPW, Department of Immigration and Emigration, Department of Census, Ministries of - Finance, Trade and Consumer Affairs, Women's Affairs, National Child Protection Authority (NCPA), Labour, External affairs, Education and non-government stakeholders. The state will also train potential migrant workers to match the global skills demand and issue globally recognised certificates. It will work with the private sector and agencies in pursuance of this goal. Current trainings are limited to female domestic workers. Reviews will be conducted of the composition & functioning of the SLBFE, the SLBFE Act & its amendments, wages policy for migrant workers and irregular migration & trafficking laws.

(2) Establishes minimum requirements for labour migration such as age and literacy. The state will also frame model contracts which will be included in MOUs and bilateral agreements. Employment contracts at present have no common format. Legislative provisions to regulate sub-agents, health testing and clauses, country specific trainings, HIV awareness programmes and counseling will be set up for the further protection of migrant workers. Provisions will be made to establish a return and reintegration plan to promote local employment and tap skills. Migrant worker's children will be protected through the appointment of the Judiciary as the Upper Guardian with monitoring mechanisms in place.⁸⁷ The state will also set up Resource Centres in its Consular offices which will include specifically recruited, trained officers. Return and reintegration will be reorganised and new programmes implemented to assist returnees to enhance their skills and find local employment. A repatriation policy will also be developed which will hold the state and private agencies responsible for repatriation.

(3) There will be promotion of overseas employment which will incorporate new MOUs/bilateral agreements. The state will also focus on promoting skilled worker migration and market analysis and monitoring will be carried out for this purpose. There will be a focus on raising remittance volumes, reducing transfer costs and widening the choice of channels for transferring money.⁸⁸ A complementary process of reviewing existing incentives for migrant savings and investment and promoting enterprise creation will be implemented to assist returnees. The broad aims are to encourage savings, promote local employment, skills transfer and direct funds into children's education and health. Existing SLBFE data will be improved in coverage and quality to establish a comprehensive information network on migration. The National Policy is both comprehensive and timely. However, as with the Migrant Worker Convention, the problem lies in its implementation.

⁸⁶ National Labour Migration Policy for Sri Lanka 2008.

⁸⁷ Monitoring to be undertaken by the National Child Protection Authority and the Dept of Probation and Childcare under supervision of the district court.

⁸⁸ This should include promoting official money transfer mechanisms through media as is the case in Bangladesh.

3.5 ILO Conventions

Sri Lanka has ratified 40 ILO Conventions to date with 31 in force.⁸⁹ These include the Abolition of Forced Labour Convention 1957 (No. 105), Minimum Age Convention 1973 (No. 138) and Equal Remuneration Convention 1951 (No. 100), which are particularly relevant in combating trafficking. There are however, a number of migrant worker specific conventions which would highly benefit migrants but are not yet ratified.

The Migration for Employment Convention (Revised), 1949 (No.97), promotes free service and information to migrants by the state. Presently, the GoSL charges potential female migrant workers for their pre- departure training.⁹⁰ This presents an obstacle in ratifying this Convention which requires such services to be rendered free of charge. It also legislates that a copy of the employment contract needs to be delivered to the migrant worker before departure. There is currently no statutory requirement, and whilst such a practice exists, in most instances, the agents retain the contract. The Migrant Workers (Supplementary Provisions) Conventions, 1975 (No. 143) establishes rules for the adoption of measures to suppress clandestine movement of workers, illegal employment of migrants and against organisers of such movements. States are also expected to establish systematic exchanges of information on the subject. Traffickers can be prosecuted in whichever country they operate.

Private Employment Agencies Convention, 1997 (No.181) deals with the regulation of employment agencies and is most important for its provision in Article 7 that private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers. Only a competent authority may specify exceptions to these provisions; the SLBFE may be considered such an authority.

3.6 Fundamental Rights Chapter and the International Convention on Civil and Political Rights (ICCPR)

The FR Chapter of the Sri Lankan Constitution of 1978 guarantees its citizens important ICCPR civil and political rights - except the right to life. However, this right has been established as an implied right through case law.⁹¹ The death penalty dealt under sharia law is therefore a major concern for the GoSL in the protection of its migrant workers.⁹² Although countries such as the US, Singapore and China also carry out life sentences, in countries following the Shari' a, even adultery is punishable by death. Saudi Arabia in fact has one of the highest State deaths each year.⁹³

⁸⁹ International Labour Organisation - <http://webfusion.ilo.org/public/db/standards/normes/appl/applbyCry.cfm?lang=en&CTYCHOICE=1750>.

⁹⁰ Training for Middle East migrant workers – Rs.1504/= and Non Middle East migrant workers – Rs.2300/= plus registration fees – Interview with an SLBFE employee 2010.

⁹¹ *Bulankulama v. Minister of Industrial Development*, SC (FR) Application No.884/99, Sri. LR. 243 at p.258 - http://www.lawnet.lk/docs/articles/sri_lankan/IITML/CV45.html, *Kottabadu Durage Sriyani Silva v Chanaka Iddamalgoda* SC (FR) Application No 471/2000 - www.alrc.net/doc/mainfile.php/supremecourt/cases/224/, *Lama Hewage Lal v Officer in Charge, Minor Offences, Seeduwa Police Station* SC(FR) Application No.700/2002 – <http://www.ruleoflawsrilanka.org/>.

⁹² *Case of Rizana Nafeek* - a 17year old Sri Lankan girl who was working as a babysitter when she was accused of choking the infant she was trying to feed. A child herself at the time of the incident, a Saudi court sentenced her to death by beheading. Murphy, Caryle (2010), 'Saudi Arabia: Foreign maid faces death penalty', *Global Post*, 29 November 2010, <http://www.globalpost.com/dispatch/saudi-arabia/101128/saudi-arabia-foreign-maid-faces-death-penalty>.

⁹³ 'Amnesty Fights for Rizana'. *Daily Mirror* Online, 02 November 2010, <http://www.dailymirror.lk/index.php/news/7399-amnesty-fights-for-rizana.html>.

Certain fundamental rights are especially pertinent to migrant workers and Sri Lanka as a sending state, and thus, need to be incorporated into both national legislation and MOUs/bilateral agreements; for example, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment⁹⁴ and the freedom to engage in any lawful occupation and freedom of movement.⁹⁵ Rights of equality before the law, non-discrimination, and freedom of assembly and association also need to be addressed at the inter-state level. Female domestic migrant workers, in particular, often suffer from a complete deprivation of these rights. Article 88, which although not a part of the FR Chapter, is nonetheless a constitutional right which allows citizens to take part in the conduct of public affairs, directly or through freely chosen representatives. There are no provisions banning citizens temporarily abroad from participating. Overseas workers are yet to be allowed to cast their vote, however, as despite the fact that nearly a tenth of the current population of the country is employed abroad, Sri Lanka is yet to establish overseas voting measures. Additional rights are made available to these workers through Sri Lanka's accession to the ICCPR in 1980. Article 8 prohibits slavery and forced or compulsory labour. Yet, non-payment of wages and slave-like, abusive working conditions are the most common complaints by migrant workers.⁹⁶

3.7 International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Women's Charter

CEDAW recognises that "extensive discrimination against women continues to exist" and that such discrimination violates the principles of equality of rights and respect for human dignity.⁹⁷ It attempts to eliminate such discrimination by setting extensive legal standards for member countries. Sri Lanka has adopted certain provisions of CEDAW through its Women's Charter of 1993. The Charter directly addresses female migrants in Article 12 (2) which asserts that the state must take all appropriate measures to ensure the interests of migrant women are protected within the country and in the host country through bilateral agreements. It also requires the state to collect, classify and make available gender disaggregated data in order to reflect the economic, social and cultural contribution of women.

Article 14 of the Women's Charter requires the state to take measures to eliminate all forms of exploitation, trafficking in and prostitution of women, which are areas of tremendous concern within the migration process. The state is also required to take all measures to prevent gender-based violence in the workplace, family, and in custody. This includes rape, incest, sexual harassment, physical and mental abuse, torture and cruel, inhuman or degrading treatment.⁹⁸ Such provisions are also applicable to the female children left behind. Of particular interest is the provision that the state should support NGOs and other community based organisations which counsel and support such victims of violence. The National Policy, formulated through the joint efforts of the government and stakeholders, attempts to further establish this link.

3.8 Child Rights Convention (CRC)

The Child Rights Convention was ratified by Sri Lanka in 1991 and the National Plan of Action for Children 2004-2008 (NPA) was designed to achieve its ideals. The CRC deals with the best interests

⁹⁴ Article 11 Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

⁹⁵ Article 14 Constitution of the Democratic Socialist Republic of Sri Lanka 1978.

⁹⁶ *Supra* note 2 and interviews with migrant workers.

⁹⁷ Preamble to CEDAW.

⁹⁸ Article 16 Women's Charter.

of the child,⁹⁹ the duty of the state to provide assistance to parents,¹⁰⁰ prevention of maltreatment and abuse,¹⁰¹ provision of social security¹⁰² and education.¹⁰³ Article 34 addresses a child's right to be free from sexual exploitation and abuse. Some of the NPA focus areas are: education, health, child protection and child labour. The special needs of migrant workers' children are highlighted under the area of child protection. The Plan has set aside an estimated Rs. 25 Million to contribute towards ensuring adequate care and a safe and healthy environment for children of migrant workers under the child protection goals. However, this should include monitoring of their education and psycho-social support.

The SLBFE has commenced projects to provide scholarships, financial awards, nutritional intervention programs and a hostel for female children of migrant workers in Karadeniya¹⁰⁴ (in association with the Department of Child Care Services). However, information regarding these programs is yet to be effectively publicised and, therefore, they are yet to make a noticeable impact or difference.

The UN Committee on the Rights of the Child has applauded the ratification of the CRC but stated dissatisfaction that families of migrant workers receive little assistance with child rearing.

3.9 The Penal Code (Amendment) Act No. 16 of 2006

The Amendment was brought in especially to address issues of human trafficking. Article 360 gives an extensive definition of the offence of trafficking. The buying, selling, bartering of any person or instigating another to do so for money or other consideration; recruiting, transporting, harbouring or similar act by the use of threat, force or deception for the purposes of securing forced or compulsory labour or sexual exploitation, would amount to trafficking.¹⁰⁵ Any person found guilty of trafficking will be punished with imprisonment for a term not less than two years and not exceeding 20 and may also be fined. If the victim in question is under the age of 18, the punishment will be for a term not less than three years and not exceeding 20.¹⁰⁶ However, these measures need to be incorporated into migrant workers legislation and National Policy in order to be directly applicable in MOUs and bilateral agreements with host countries.

4. Synopsis of International and National Legislation

It is commendable that the state has ratified or acceded to the UN Convention Against Transnational Organised Crime of 2000, The Vienna Convention on Consular Relations of 1963 and ILO Convention No.105 (1957) on the Abolition of Forced Labour.¹⁰⁷ It is, however, regrettable that the state has not yet ratified ILO Conventions No 97 and No. 143. Although the state has signed the

⁹⁹ Article 3 Child Rights Convention.

¹⁰⁰ Article 18, 23 & 27 Child Rights Convention.

¹⁰¹ Article 19 Child Rights Convention.

¹⁰² Article 26 Child Rights Convention.

¹⁰³ Article 28 Child Rights Convention.

¹⁰⁴ Malsiri Dias (2000). Problems of Children of Migrant Workers. Paper presented at SAARC Regional workshop on children of the SAARC Region with special focus on the impact of the SAARC on the girl child, organised by Colombo YWCA, 6th-8th June 2001. (on file at the Centre for Women's Research library in Colombo).

¹⁰⁵ Section 360 (1) Penal Code (Amendment) Act No 16 of 2006.

¹⁰⁶ Section 360 (2) *ibid*.

¹⁰⁷ Concluding observations of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, it has not been ratified.

The original SLBFE Act was formulated at a time when the scale and dynamics of economic migration were drastically different to those prevailing now. As a result, it provides inadequate protection for the migrant workers of today with little or no consideration for the rights of the migrant. The GoSL did accede to the international convention, which emphasises the rights of migrant workers, and proposed the National Policy on Migration, which combines the protection of migrant workers with the promotion of skilled economic migration. Unfortunately, there has been very little progress in implementation.

The lacuna in existing bodies of law should be filled with laws which take into consideration internationally lauded migrant worker laws in countries such as the Philippines. The following is a review of those provisions in the Filipinos Act, streamlining government policies, agencies and services for the protection of migrant workers' rights, directly applicable to Sri Lanka as a state of origin.

5. Republic Act No. 8042, Migrant Workers and Overseas Filipinos Act of 1995 ("Filipino Act")

Section 2, Declaration of Policies: asserts that overseas employment will not be promoted as a means to sustain economic growth and national development and that the state shall therefore undertake to continuously create local employment opportunities.¹⁰⁸ This places a responsibility upon the state¹⁰⁹ to develop the local job market to compete with the overseas market. It also assures that the overseas employment program rests solely on the assurance that the dignity and fundamental rights of these workers shall not be compromised at any time.

The right of all overseas Filipinos to participate in the democratic decision-making process of the state is guaranteed.¹¹⁰ In comparison, the right to vote is yet to be granted for overseas Sri Lankan workers. It also guarantees the representation of migrant workers in relevant overseas employment institutions.

Gender sensitive criteria will form the basis for migrant worker policies, programs and the composition of related bodies.¹¹¹ This will accord more recognition to the economic contributions made by female migrant workers as well as the gender specific problems they face.

The state will undertake that recruitment, introduction, placement, and assistance to migrant workers be rendered free of government fees and administrative costs.¹¹²

Under Section 4, Deployment of Migrant Workers: the state shall deploy workers only in countries where the rights of Filipino workers are protected.¹¹³ The government will regard the existing labour laws in host countries, whether they are signatories to conventions, bilateral agreements and other

¹⁰⁸ Section 2 (c) Migrant Workers and Overseas Filipinos Act of 1995.

¹⁰⁹ Masnavi, Nura (2004). Reforming the Sri Lankan Foreign Employment Act: Increasing Protection for Migrant Workers and Employing Lessons from the Philippines. LST Review. Volume 14 Issue 201 (July 2004): p.3.

¹¹⁰ Section 2 (f) Migrant Workers and Overseas Filipinos Act 1995.

¹¹¹ Section 2 (d) Migrant Workers and Overseas Filipinos Act 1995.

¹¹² Section 2 (I) Migrant Workers and Overseas Filipinos Act 1995.

¹¹³ The State ensures this protection through articulating 4 measures by which the Host country can guarantee the migrant workers's welfare and safety. This enables the Filipino government to hold the Host country responsible: *Supra* note 109, p.13.

positive measures taken by these states to protect migrant workers as guarantees of their safety and welfare.

Section 8 on Prohibitions on Officials and Employees makes it unlawful for any official or employee of any department or administration to engage directly or indirectly in the business of recruiting migrant workers. Yet, the SLBFE Board includes four foreign employment agency representatives. It does not include – labour unions or migrant workers’ representatives however.¹¹⁴

The state shall establish a re-placement and monitoring centre for returning Filipino migrant workers which shall provide a mechanism for their reintegration into society and tap their skills for local employment and national development.¹¹⁵ In Sri Lanka, to date (although it is being considered by SLBFE), there is no monitoring centre for reintegration of returnees.

Another very important provision is the definition of the role of government agencies in relation to the welfare and protection of the rights of migrant workers.¹¹⁶ While such a definition has been guaranteed under the Sri Lankan National Policy, the common areas of responsibility as well as the areas which do not come under the governance or purview of any state agency, are yet to be assessed and defined. In a specific example, the GoSL has yet to adequately define trafficking and instead refers to it as illegal recruitment,¹¹⁷ which is defined comprehensively.

6. MOUs and Bilateral Agreements

At this juncture it is important to have some understanding of the MOUs and bilateral agreements existing between Sri Lanka and various host countries.

An MOU is a written statement detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement; it is not meant to be binding.¹¹⁸ A bilateral agreement is a contract between two parties creating obligations that are enforceable or otherwise recognisable by law.¹¹⁹

Sri Lanka has signed MOUs with the governments of Jordan, Qatar, UAE, South Korea and Malaysia. Currently, a bilateral agreement is being discussed with Lebanon. MOUs provide inadequate protection as they are legally unenforceable in the event of non compliance. Unfortunately, almost all agreements with host countries are currently in the form of MOUs.

Some MOUs contain provisions which are contrary to the Migrant Workers Convention. The MOU between Sri Lanka and Malaysia, signed in June 2006, has several such provisos,¹²⁰ for example, Article 8 allows the employer to keep the worker’s passport in their custody to be handed over to the high commission in the event the worker absconds. This violates Article 39 (1) of the Migrant Workers Convention on the worker’s right to freedom of movement. Even existing MOUs therefore need to be revised and strengthened.

¹¹⁴ *Supra* note 109, p.3.

¹¹⁵ Section 17 Migrant Workers and Overseas Filipinos Act 1995.

¹¹⁶ Section 23 Migrant Workers and Overseas Filipinos Act 1995.

¹¹⁷ *Supra* note 109, p.6.

¹¹⁸ Black’s Law Dictionary (2004), Eighth Edition, Garner A. Bryan (Ed), West, USA, p.1006 & 924.

¹¹⁹ p.172 & 341, *ibid*.

¹²⁰ *Supra* note 25

7. ALFEA and Foreign Employment Agencies

With the increase in the number of migrant workers bound for the Middle East, the number of registered foreign employment agencies has also increased from a mere 139 in 1985 to 626 in 2008.¹²¹ This is mainly due to the large numbers of unskilled workers requiring third party intervention in accessing foreign job opportunities.

Foreign employment agencies have acquired a Shylock-like reputation with many forms of accusation leveled at them from fraud to trafficking. The most common charges are:¹²² extortion of money; disseminating false or misleading data, including the guarantee of jobs and work conditions which do not exist; abandoning workers upon foreign shores; and trafficking of women and under age persons. Sub-agents, an important part of the migration process and yet are not required to register, are a main cause of concern. They are not directly accountable to the SLBFE, ALFEA or any other registered FEA.¹²³ Despite being aware of the illegal operations of sub-agents, the GoSL has yet to take control of the situation.

In a positive response to reports of abuse of migrant workers, the GoSL is attempting to regulate and monitor these agencies through increasingly stringent legislation¹²⁴ and a regulatory framework. This includes: SLBFE approval of the initial job order, SLBFE registration of all prospective migrant workers, pre-departure medical examinations, and SLBFE compulsory 15 day pre-departure trainings for domestic migrant workers going to the Middle East.¹²⁵ However, there continues to be vast discrepancies between the information disseminated by agencies, the employment contract approved by the Bureau¹²⁶ and the actual working conditions. The efforts made to regulate sub-agents continue to be insufficient.

The SLBFE Act established ALFEA to regulate, monitor and discipline employment agencies through compulsory membership of ALFEA. However, subsequent changes to compulsory registration¹²⁷ have reduced its powers of disciplinary control.¹²⁸

ALFEA aims to ensure and encourage best ethical practices in the foreign employment trade. In pursuance of this, it runs a website containing lists of blacklisted agencies and employers; a job bank; details of licensed agencies and links to other stakeholder websites. It is important that this organisation continues to be a forum for agencies, a regulating mechanism and coordinator between agencies and the SLBFE. The above changes in legislation have, however, made this task more difficult.

8. SLBFE Projects

Over the past few years, the Bureau has initiated many projects and services for the welfare of prospective migrant workers, their families and returnee migrants. These services include: insurance

¹²¹ *Supra* note 2.

¹²² Human Rights Watch (2007). *Exported and Exposed; Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates*, p.31-37, <http://www.hrw.org/en/reports/2007/11/13/exported-and-exposed-1>.

¹²³ Interview with ALFEA staff 2010.

¹²⁴ SLBFE Act No 21 of 1985 & SLBFE (Amendment) Act No 4 of 1994.

¹²⁵ For potential migrant workers with no prior work experience abroad.

¹²⁶ Section 37-39 SLBFE Act No 21 of 1985.

¹²⁷ SLBFE Amendment Act No 56 of 2009.

¹²⁸ Interview with ALFEA Staff 2010.

schemes; pre departure, housing and self-employment loan schemes; scholarships and financial assistance for migrant workers' children; a welfare centre for returnee migrants; and skills training.

There is however a severe lack of knowledge about these benefits amongst migrant women and contradictions within the schemes which hamper their effectiveness. The insurance schemes do not cover non-payment of wages - the most common problem encountered.¹²⁹ Housing loans are only accessible to those who maintain a balance of \$500¹³⁰ over six months in an NRFC a/c; a feat beyond most migrant workers. Children need to be registered three years prior to the relevant exams to obtain scholarships, a prerequisite which requires great planning and faultless timing. Training programs for housemaids do not teach them new skills to move to a higher grade of employment. Whilst a range of benefits is available, access is blocked by unattainable *sine qua non*.

Other services covered:

- Dispute settlement: the Bureau is required to liaise with embassies and resolve employment disputes arising abroad.¹³¹
- International relations: to enhance relations with embassies/high commissions in order to settle issues swiftly.¹³²

Used and Abused...

Interviewed on 07/05/2010

S. Sumanalatha,¹³³ a 32-year-old female migrant from Kurunegala, left her husband and two-year-old daughter in November, 2002 to go to Kuwait as a housemaid. She worked in a house for a period of five months but was not paid. There were 19 members in the household and she had been beaten constantly. She was on call 24 hours a day and overloaded with work from babysitting to cooking and cleaning.

As her employers refused to pay her, she escaped and headed for the Sri Lankan Embassy. There she encountered hundreds of other women, unpaid or abused and awaiting repatriation. Along with other migrants, Kusumalatha was forced to await repatriation for a month before being sent home. The Embassy had taken the 34 dinars she had with her to pay for her air ticket. No effort had been made to recover her salary.

Migrant workers are however, often left to languish for months in embassies or shelters, with all the hardships this entails before they are repatriated.¹³⁴

- Informative and development programs: there is an attempt to circulate information through divisional secretariats on migration related topics. However, a lack of coordination between the different government agencies has resulted in a breakdown of communication flow.

The SLBFE has initiated a reintegration program to register and assist returning migrant workers.¹³⁵ They intend to work with government agencies, banks, companies and NGOs in order to provide employment, financial assistance and skills training for returnees. The focus will be on those who

¹²⁹ SLBFE brochure on Welfare Benefits for 2009.

¹³⁰ People's Bank requires a balance of \$770.

¹³¹ SLBFE website - <http://www.slbfe.lk/article.php?article=28>.

¹³² SLBFE website - <http://www.slbfe.lk/article.php?article=28>.

¹³³ Name has been changed.

¹³⁴ Interviews with Migrant Workers 2010.

¹³⁵ Interviews with Sociology and Marketing Department staff of SLBFE 2010.

have returned within the last three years to try and match their skills and needs to grants, trainings and employment proffered by stakeholders. A deeper probe into this programme has shown that it is actually for those returnees with either employable skills or savings to invest - which for the most part excludes housemaids.¹³⁶ The programme also lacks measures to deal with the social, cultural and psychological problems facing most returnees. However, the most crucial setback is the lack of awareness, not just amongst migrant workers, but within the various SLBFE branches. The SLBFE staff in district offices have merely been requested to collect information for a database without any further elucidation of the programme.

There is, however, a compulsory requirement to access any of these benefits; the workers need to have registered with the Bureau before departure.¹³⁷ Deadlines for benefit applications are narrow and many fail to apply in time. Even those who have registered are mostly unaware of these benefits and their right to them and continue to remain so.¹³⁸

9. Issues Faced by the GOSL and SLBFE

This will be a brief outline of the primary causes for abuses of migrant workers' rights which come within the domain of the GOSL and SLBFE. National and international migrant workers legislation is ineffectual in the face of a lack of corresponding legislation in host states. Most Middle East states have not ratified international conventions and many still adhere to shariah laws and the *kafala* system. Their national labour laws¹³⁹ exclude domestic workers from key protections such as minimum pay, limits to working hours, restrictions on salary deduction, rest days and decent working conditions.¹⁴⁰ However, Jordan amended its Labour Laws in 2008 to include domestic workers¹⁴¹ and Bahrain has modified the *Kafala* system.¹⁴² The Sri Lankan consular missions in these countries also appear to be ill-equipped in protecting these workers against abuse, legal charges or disaster.¹⁴³ Overseas missions remain understaffed to deal with the volume of complaints, and do not have specialised staff, such as social workers and lawyers, or staff conversant in host country languages. They often fall short in meeting minimum requirements to provide temporary shelter, case management, and other services to domestic workers.¹⁴⁴

There is ineffective networking at an international level on irregular migration and trafficking. National legislation on trafficking is also inadequate to combat this problem.

¹³⁶ Interviews with SLBFE staff in Colombo, Chilaw and Kandy 2010.

¹³⁷ Interview with Welfare Department Staff, SLBFE 2010.

¹³⁸ Interviews with returnees from the Kurunegala, Puttalam and Kandy areas 2010.

¹³⁹ Human Rights Watch (2008). 'As if I'm Not Human': Abuses against Asian Domestic Workers in Saudi Arabia, p.25, <http://www.hrw.org/en/reports/2010/04/28/>; Saudi Arabia Labor Law, Royal Decree No. M/51, September 27, 2005, Part VI.

¹⁴⁰ Human Rights Watch (2008). 'As if I'm Not Human': Abuses against Asian Domestic Workers in Saudi Arabia, p.72-81, <http://www.hrw.org/en/reports/2010/04/28/>.

¹⁴¹ Jordan issued the implementing regulations in 2009: "Rights group praises Jordan for granting protections to domestic workers", *The Jordan Times*, 23 September 2010, <http://www.jordantimes.com/?news=26127>.

¹⁴² Sponsorship of migrant workers has now been transferred from private employers to the Labour Market Regulatory Authority: "Middle East: Iraq, UAE", *Migration News*, July 2009 Volume 16 No 03, http://migration.ucdavis.edu/mn/more.php?id=3540_0_5_0.

¹⁴³ Human Rights Watch (2007). Exported and Exposed; Abuses against Sri Lankan Domestic Workers in Saudi Arabia, Kuwait, Lebanon, and the United Arab Emirates, p.102-110, <http://www.hrw.org/en/reports/2007/11/13/exported-and-exposed-1>.

¹⁴⁴ Human Rights Watch (2008). 'As if I'm Not Human': Abuses against Asian Domestic Workers in Saudi Arabia, p.116, <http://www.hrw.org/en/reports/2010/04/28/>.

The SLBFE Act itself provides inadequate protection for migrant workers and has the potential to be used as a political tool due to its composition and the scope and powers of the minister under it.

The SLBFE which was under the Labour Ministry previously, has now come under the purview of the Ministry of External Affairs subsequent to general elections in April 2010. As a result, the labour officers in each district secretariat, who used to maintain a database on the migrants workers of the area and of their families, have been relieved of this duty and the SLBFE has lost an important link in the reintegration process, especially since the SLBFE does not maintain branches in all districts.

A lack of knowledge amongst migrants on their rights and the services and benefits provided upon return has led to a corresponding lack of cooperation and confidence towards the SLBFE. The Bureau is however taking preliminary steps to rectify this situation by providing compulsory trainings and written material during pre-departure. Unfortunately, the large numbers of illiterate and unskilled migrant workers means the cumulative result is relatively inconsequential. Migrant workers who return abused and penniless pose another major issue. Unfortunately, this has remained unaddressed in the past. The new reintegration programme under the National Policy is intended to provide assistance to these returnees to resume their lives again. A solely economic perspective of their needs and lack of transparency, however, may create obstacles to its effective implementation.

10. Recommendations

- The SLBFE Act needs to: be amended to incorporate migrant workers rights as laid down by the Convention;¹⁴⁵ expand the definition and penalties for trafficking; include stakeholders and prohibit board members from engaging in recruitment activities;¹⁴⁶ eradicate fee levying for services to migrant workers; enhance tax concessions; make the information data bank accessible to the public; define roles for all related ministries and departments; and establish a re-integration and monitoring unit.
- The National Policy¹⁴⁷ needs to be implemented and state officials involved need to be trained regarding its contents and goals.
- Special legal provisions and procedures need to be made to afford citizenship and protection for the children of migrant workers born abroad and who have not been brought back to the state of origin.
- State should ensure bilateral agreements with stringent measures for the protection of migrant workers with countries which have a history of human rights violations against migrant workers.¹⁴⁸
- The Sri Lanka Human Rights Commission should have a special unit for the protection of migrant workers' rights, which would coordinate with the workers,

¹⁴⁵ International Convention on the Protection of All Migrant Workers and their Families.

¹⁴⁶ Masnavi, Nura (2004). "Reforming the Sri Lankan Foreign Employment Act: Increasing Protection for Migrant Workers and Employing Lessons from the Philippines", *Law & Society Trust Review*, Volume 14 Issue 201 (July 2004): p.5.

¹⁴⁷ Ministry of Foreign Employment Promotion and Welfare, Sri Lanka (2008). National Labour Migration Policy for Sri Lanka.

¹⁴⁸ As per the National Policy and legislation of the Republic Act No. 8042 - Migrant Workers and Overseas Filipinos Act of 1995 (Filipino Act).

diplomatic missions and host country governments, including a complaints procedure.

- Department of Probation and Childcare, with the support of the NCPA, should initiate programs that support primary caregivers to address the emotional and intellectual needs of children.¹⁴⁹
- The state must strengthen database on migrant workers to reflect changing trends, gender sensitive data and migrant workers' contributions to the national economy. The population and labour force survey format should be amended to obtain better quality information on migrant workers.¹⁵⁰ Migration data should also include return migration data; the Department of Immigration and Emigration should assist the SLBFE in this task and an airport monitoring unit should be re-established until the registration system is fully functional.
- A study has now been initiated by the Research Division of the SLBFE on reintegration. There should also be a corresponding study on return migration. Studies should include: success and failure rates in migration, expenditure, impact of remittances on savings and investments, Balance of Payment, inflation covering the prospects, and issues of re-integration and return migration.¹⁵¹ There should also be in-depth studies on trafficking, children left behind by migrant workers and employment of children abroad (eg- for camel riding).
- The SLBFE committees in the divisional secretariats should maintain separate databases on the children of migrant workers and monitor their welfare, education, and health and ensure a safe environment within their homes or surrogate families.¹⁵² These committees should work in collaboration with the National Child Protection Authority in order to take appropriate action against child abusers.
- Consular services need to be restructured to maintain databanks, provide counseling, monitor the country situation and maintain 24 hour hotlines and desks for migrant workers in need of assistance.
- Government must enforce the Penal Code amendments on trafficking through awareness raising programs for civil society, police and potential migrants.
- GoSL should facilitate the establishment of trade unions for migrant workers, and strengthen their presence in host countries and assist to formulate a model trade union contract.
- Establish a taskforce consisting of returnee migrant workers and stakeholders to research: the problems which migrants face, solutions and reintegration assistance.

¹⁴⁹ Save the Children in Sri Lanka (2006). *Left Behind, Left Out – The Impact on Children and Families of Mothers Migrating for Work Abroad*. Save the Children in Sri Lanka, Colombo, http://www.crin.org/docs/save_sl_left_out.pdf (Extracts from the Summary Report compiled by Save the Children in Sri Lanka and Kishali Pinto-Jayawardena can be found in *Law & Society Trust Review*, Volume 17 Issue 226 (August 2006): pp19-46).

¹⁵⁰ Department of National Planning, Ministry of Finance & Planning (1996), *Study on Migrant Workers: A Literature, Survey and Identification of Data Needs and Policy Action*.

¹⁵¹ *Ibid.*

¹⁵² *Supra* note 25.

- There should be a separate and independent monitoring mechanism to check the functioning of each branch of the SLBFE in the implementation of their stipulated tasks. This could be carried out by a unit of the Ministry of External Affairs and include jurisdiction to hear complaints against SLBFE officials.

10.1 Recommendations by the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (19 October 2009) –

The Committee encourages the state party to –

(1) Legislation -

- Take all necessary measures for prompt harmonisation of its legislation with the provisions of the Convention.
- Consider making the declarations provided for in Articles 76¹⁵³ & 77¹⁵⁴ of the Migrant Workers Convention.
- Accelerate consideration of ratification of ILO Conventions No.97 & No.143.
- Ratify the Protocols to the Convention.

(2) Data Collection –

- Adopt a harmonised mechanism for gathering sex and nationality disaggregated statistics on foreign migrant workers in Sri Lanka & on Sri Lankan irregular migrants abroad.
- Strengthen collaboration with Sri Lankan embassies and consulates, as well as host countries receiving Sri Lankan migrants, to improve data collection –especially with regard to irregular migrants.

(3) Training in & Dissemination of the Convention –

- Carry out specific training programmes on the Migrant Workers Convention for relevant public officials working in the area of migration.
- Ensure training and programmes for migrant workers and their families address all provisions of the Convention.
- Translate the Convention into the National Languages.

(4) Human rights of Migrant Workers and their Families –

- Promote the enhancement & empowerment of migrant women by -
 - Continuing to negotiate more secure employment opportunities & terms and conditions for women in vulnerable sectors through bilateral agreements where discrimination and abuse are more frequent.

¹⁵³ Article 76 Migrant Workers Convention - ‘a State party may at any time declare that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Convention.’

¹⁵⁴ Article 77 Migrant Workers Convention – ‘a State party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim that their individual rights as established under the Convention have been violated by that State party.’

- Carrying out gender training and sensitisation for government staff and particularly for those providing legal and consular assistance to Sri Lankan nationals abroad.
- Taking measures to ensure safety of migrant workers in the international airport prior to departure, including gender and sensitisation training for airport personnel.
- Take measure to ensure that its labour welfare officers are knowledgeable about the labour laws & procedures of the country of deployment & that legal assistance is available for migrant workers in embassies & consulates.

(5) Other Rights of Migrant Workers and Members of their Families – in documented or regular situations -

- Take all necessary steps to ensure that Sri Lankan migrants working abroad have the possibility to register & participate in elections.
- Create links between banks, financial institutions, NGOs etc to facilitate formal remittances.

(6) Promotion of sound, equitable, humane & lawful conditions in connection with international migration of workers and members of their families –

- Strictly monitor the activities of recruitment agencies and that the guidelines for recruitment are respected by the recruiting agencies both in Sri Lanka and host countries.
- Raise awareness amongst returning migrant workers and their families about the reintegration programme, allocate sufficient funds for it and set up local institutional mechanisms to facilitate voluntary return and durable social and cultural reintegration.
- Implementation of legislation to prevent human trafficking and smuggling of persons.
- Evaluate the phenomenon of trafficking in persons and compile disaggregated data with a view to better combating trafficking in persons – especially women & children.
- Take steps to ensure those responsible for trafficking are brought to justice and appropriately sanctioned, while ensuring the migrants are not penalised for having irregularly migrated.

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**CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER
ARTICLE 74 OF THE CONVENTION-
CONCLUDING OBSERVATIONS OF THE COMMITTEE ON
THE PROTECTION OF THE RIGHTS OF ALL MIGRANT
WORKERS AND MEMBERS OF THEIR FAMILIES**

**International Convention on the Protection of the Rights of all Migrant Workers and
Members of their Families**

**Committee on the Protection of the Rights of all Migrant Workers and Members of their
Families**

Eleventh session

19 October 2009, UN Doc Ref: CMW/C/LKA/CO/1

Sri Lanka

1. The Committee considered the initial report of Sri Lanka (CMW/C/LKA/1) at its 119th and 120th meetings (see CMW/C/SR.119 and 120), held on 12 and 13 October 2009, and adopted at its 125th meeting, held on 15 October, the following concluding observations.

A. Introduction

2. The Committee, while regretting the delay in submission of the State party's initial report, welcomes the receipt of the report as well as the replies to the list of issues. The Committee appreciates the constructive and fruitful dialogue with a competent, high-level delegation, which built on the report and the written responses to the list of issues by giving more specific information on questions of both a legal and practical nature concerning the implementation of the Convention.

3. The Committee recognises that Sri Lanka is mainly a country of origin, with a large number of migrant workers overseas.

4. The Committee notes the fact that many of the countries employing Sri Lankan migrant workers are not yet parties to the Convention, which may constitute an obstacle to the enjoyment by those workers of the rights to which they are entitled under the Convention.

B. Positive aspects

5. The Committee notes with appreciation the State party's commitment to migrant workers' rights, as illustrated by the national constitutional, legislative, judicial, and administrative frameworks that include several institutional mechanisms.

6. The Committee welcomes the State party's recognition of the importance of labour migration issues and the establishment in 2007 of the new Ministry for Foreign Employment Promotion and Welfare.

7. The Committee also welcomes the adoption in 2008 of a National Labour Migration Policy for Sri Lanka, elaborated with technical assistance from the International Labour Organisation (ILO), and looks forward to receiving information in the State party's next report on the impact of this policy on the rights of migrant workers and their families.

8. The Committee notes with appreciation the State party's active role in the regional consultative processes on the management of overseas employment and contractual labour for countries of origin in Asia, including the Colombo process and the Abu Dhabi dialogue.

9. The Committee also notes with appreciation the active role that the State party is playing at the international level to promote the ratification of the Convention by countries of origin, transit and destination.

10. The Committee further welcomes the recent ratification of, or accession to, the following instruments:

- (a) The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;
- (b) The United Nations Convention against Transnational Organised Crime of 2000;
- (c) The Vienna Convention on Consular Relations of 1963; and
- (d) ILO Convention No.105 (1957) on the Abolition of Forced Labour.

C. Principal subjects of concern, suggestions and recommendations

11. The Committee notes with interest the initiatives and programmes undertaken by the State party, including, inter alia, training programmes by the Sri Lanka Bureau for Foreign Employment (SLBFE) for registered migrants prior to departure, the establishment of eight pilot regional Migrant Information and Service Desks, measures to facilitate the transfer of migrant workers' earnings and savings, the creation of a "welfare fund" and the operation of an insurance scheme and a pension scheme for registered migrant workers, the provision of scholarships to children of migrant workers and the conducting of a nationwide Anti-Illegal Recruitment Programme, in order to protect the rights of migrant workers and their families. The Committee regrets, however, the lack of information on these programmes and is concerned that, in practice, awareness and implementation of some of these programmes may be inadequate.

12. **The Committee recommends that the State party take effective measures to improve the visibility and implementation of these programmes in consultation with migrants' groups, relevant international specialised agencies and other stakeholders.**

1. General measures of implementation (Articles 73 and 84)

Legislation and application

13. The Committee notes the State party's indication that existing legislation provides many of the standards and guarantees of the Convention and that a mapping exercise is being carried out in the framework of the development of the National Action Plan for the Promotion and Protection of Human Rights in order to identify the changes that will need to be made to national law in order to bring it into line with international standards. However, the Committee regrets that the State party has not taken any measures to ensure that its legislation is in conformity with the Convention.

14. **The Committee encourages the State party to take all necessary measures for prompt harmonisation of its legislation with the provisions of the Convention.**

15. The Committee notes that Sri Lanka has not yet made the declarations provided for in Articles 76 and 77 of the Convention recognising the competence of the Committee to receive communications from States parties and individuals.

16. **The Committee encourages the State party to consider making the declarations provided for in Articles 76 and 77 of the Convention.**

17. The Committee notes that the State party has not yet ratified ILO Convention No. 97 (1949) on Migration for Employment (Revised) or Convention No. 143 (1975) on Migrant Workers (Supplementary Provisions).

18. **The Committee invites the State party to accelerate consideration of ratification of ILO Conventions No. 97 and No. 143 as soon as possible.**

19. The Committee notes that the State party has signed but not ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime.

20. **In the light of the importance of the Protocols to the effective implementation of the provisions of the Convention, including those contained in Article 68, the Committee recommends that the State party proceed to ratify the Protocols as soon as possible.**

Data collection

21. The Committee notes with interest the statistics provided by the State party on Sri Lankan migrant workers abroad and persons prosecuted for illegally recruiting Sri Lankan migrant workers. However, the Committee notes with regret that little information is provided by the State party with regard to foreign migrant workers in its territory or Sri Lankans who have migrated abroad irregularly.

22. **The Committee recalls that reliable, quality information is indispensable to understand the situation of migrant workers in the State party, to assess the implementation of the Convention and to develop adequate policies and programmes. In this regard, the Committee encourages the State party to:**

- (a) **Adopt a harmonised mechanism for gathering sex and nationality disaggregated statistics on foreign migrant workers in Sri Lanka and on Sri Lankan irregular migrants working abroad, including through studies or estimated assessments when information is insufficient; and**
- (b) **Strengthen collaboration with Sri Lankan embassies and consulates, as well as host countries receiving Sri Lankan migrants, to improve data collection, in particular with regard to irregular Sri Lankan migrants.**

Training in and dissemination of the Convention

23. The Committee notes with interest that the Sri Lanka Bureau for Foreign Employment highlights provisions of the Convention during its programmes and in other forums. However, the Committee remains concerned that not all the provisions of the Convention are publicised and that there are no specific training programmes on the Convention for relevant public officials, including border police officers, embassy and consulate workers, social workers, judges, prosecutors and relevant

Government officials. The Committee also regrets that the Convention has not been translated into the national languages.

24. The Committee encourages the State party to:

- (a) Carry out specific training programmes on the Convention for relevant public officials working in the area of migration, including border police officers, consular officials, social workers, judges and prosecutors;**
- (b) Ensure that training and programmes for migrant workers and their families address all provisions of the Convention; and**
- (c) Translate the Convention into the national languages in order to ensure that it is accessible to the general public.**

2. General principles (Articles 7 and 83)

Non-discrimination

25. The Committee notes with appreciation that most provisions of the Sri Lankan Constitution apply to all persons on Sri Lankan territory. However, the Committee expresses concern that the rights provided under Articles 12(2) and 14 of the Constitution, which guarantee respectively protection against discrimination and the right of peaceful assembly, freedom of association and freedom to form and join a trade union, apply only to citizens.

26. The Committee recommends that the State party take the necessary steps to ensure that all migrant workers and members of their families within its territory or subject to its jurisdiction enjoy the rights provided for in the Convention without any discrimination in conformity with Article 7 of the Convention.

3. Human rights of all migrant workers and members of their families (Articles 8-35)

27. The Committee recalls the concern of the Committee on Cultural, Economic and Social Rights (E/C.12/1/Add.24, para. 13) that hundreds of thousands of Sri Lankan women were working abroad as domestic helpers and many of them underpaid and treated as virtual slaves. While noting the information provided by the State party with regard to the development of standard approved contracts and minimum average salaries for migrant domestic workers, the Committee remains concerned at reports of physical and sexual abuse of female migrant workers, particularly by employers in the host countries, but also by airport personnel prior to departure.

28. The Committee urges the State party to focus efforts on promoting the enhancement and empowerment of migrant women facing situations of vulnerability by inter alia:

- (a) Continuing its efforts to negotiate more secure employment opportunities and terms and conditions for women in vulnerable sectors through bilateral agreements in those countries where discriminatory treatment and abuse are more frequent;**
- (b) Carrying out gender training and sensitisation for Government staff dealing with migration issues, in particular those providing legal and consular assistance to Sri Lankan nationals abroad seeking justice against abuse in the workplace; and**

- (c) **Taking measures to ensure the safety of migrant workers in the international airport prior to departure, including gender and sensitisation training for airport personnel and monitoring and investigation of all complaints of abuse or violence against migrant workers.**

29. The Committee welcomes the appointment of labour welfare officers to serve abroad as representatives of the Sri Lanka Bureau for Foreign Employment. While the Committee notes with appreciation that Labour Welfare Officers receive training in a number of areas prior to deployment, including counseling, conflict management and welfare assistance, it regrets that only some consulates and embassies are equipped with legal assistance desks managed by host country lawyers and that labour welfare officers do not consistently receive training to ensure adequate knowledge of the local language and of the labour laws of the receiving country.

30. The Committee encourages the State party to take measures to ensure that its Labour Welfare Officers are knowledgeable about the labour laws and procedures of the countries to which they are deployed, and that legal assistance is available for migrant workers in all embassies and consulates of the State party.

4. Other rights of migrant workers and members of their families who are documented or in a regular situation (Articles 36-56)

31. The Committee notes with regret that while the guarantee of freedom of association and the right to form a trade union is provided for under Article 14 of the Sri Lankan Constitution, this right is limited to citizens and does not extend to migrant workers.

32. The Committee recommends that the State party take the necessary measures to guarantee to all migrant workers and members of their families lawfully residing within Sri Lanka the right to form, and to form part of the leadership of, associations and trade unions, in accordance with Article 40 of the Convention on Migrant Workers, as well as with ILO Convention No. 87 (1948) on Freedom of Association and Protection of the Right to Organise.

33. While taking note of the constraints, as explained by the State party, regarding the facilitation of participation in elections of Sri Lankan migrants working abroad, the Committee is nevertheless concerned that Sri Lankans working abroad are unable to exercise their right to vote in elections in their country of origin.

34. The Committee encourages the State party to expeditiously take all necessary steps to ensure that Sri Lankan migrants working abroad have the possibility to register and participate in elections.

35. The Committee notes that remittances by Sri Lankan migrant workers are a significant component of the State party's economy and that various measures have been adopted by the State party to facilitate the transfer of migrant workers' earnings and savings. The Committee also notes that, in addition to formal remittances, large sums of money are sent through informal channels, often due to high transaction costs.

36. The Committee recommends that the State party conduct a study involving all stakeholders, including migrants, financial services providers and policy makers, in order to gain a better understanding of the patterns of remittance flows, volumes and the motivations for using informal channels to send remittances. The Committee further recommends that the State party

create links between banks, financial institutions, non-governmental institutions and microfinance institutions in order to facilitate formal remittances by increasing and strengthening the availability and outreach of channels and products through which migrant workers can send remittances.

5. *Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families (Articles. 64-71).*

37. The Committee notes with interest that the National Action Plan for the Promotion and Protection of Human Rights being developed by the State party will focus on, inter alia, migration issues, including trafficking, irregular migration, strengthening protection of migrants, voting rights of migrants, training and awareness, as well as the situation of migrants workers in Sri Lanka. The Committee welcomes the State party's information that civil society is involved in the drafting and development of this National Action Plan. However, the Committee notes that the National Action Plan is still in the drafting stages and not expected to be launched until the beginning of 2010, and that there is no indication as to the form that protection of migrant workers' rights will take in the final document.

38. The Committee urges the State party to ensure that the National Action Plan takes into account the Committee's concerns and recommendations expressed in these concluding observations, as well as those of civil society. The Committee recommends that the State party take measures to ensure that the National Action Plan for the Promotion and Protection of Human Rights be adopted without delay so that it can be launched at the earliest possible date.

39. The Committee notes with interest the Memoranda of Understanding and bilateral agreements entered into with major labour receiving countries, the State party's compulsory registration scheme requiring registration prior to departure for foreign employment, as well as the requirement that service contracts be signed in the presence of SLBFE officers and that service contracts be approved by Sri Lankan missions overseas, among other measures taken by the State party to safeguard the rights of migrant workers. However, the Committee remains concerned at reports of abuse and ill-treatment of Sri Lankan migrant workers in the host countries, including sexual and physical violence, threats, work in degrading conditions, overly long working hours, insufficient food, no medical care, illegally low salaries, withheld pay and forced overtime.

40. **The Committee recommends that the State party:**

- (a) **Continue its efforts to negotiate bilateral agreements on labour migration with major labour-receiving countries in order to secure protection of the rights of migrant workers and to progressively and verifiably mainstream relevant and appropriate provisions of the Convention into these agreements;**
- (b) **Strengthen collaboration of the State party's consular services and Labour Welfare Officers abroad and the countries which receive Sri Lanka workers to promote sound, equitable, humane and lawful conditions for migrant workers; and**
- (c) **Take steps to further improve the services provided to migrant workers by embassies and consulates of the State party including through the**

provision of legal assistance as a routine matter and the provision of psychosocial counselling.

41. While noting that social protection and insurance programmes are conducted by receiving Governments in a number of countries and that the aspect of social security is included in some memoranda of understanding between the State party and host countries, the Committee notes with regret information provided by the State party that it has no social security agreements with the States of employment of Sri Lankan migrant workers and that Sri Lankan migrant workers cannot claim pensions and other social security benefits from receiving countries in which they have worked, with the exception of Italy and Cyprus.

42. **The Committee encourages the State party to consider negotiating social security agreements with receiving and sending countries, thus allowing migrant workers and members of their families to receive social security benefits from the country in which they worked when applicable.**

43. The Committee welcomes the establishment by the State party of policy guidelines for the recruitment of migrant workers. The Committee also welcomes the recent amendments made to the Sri Lanka Bureau of Foreign Employment Act aimed, inter alia, at penalising recruitment agencies that charge exorbitant fees. Nevertheless, the Committee is concerned at reports that some recruitment agencies or agents still engage in exploitative or abusive practices, particularly once the migrant workers have arrived in the host country.

44. **The Committee recommends that the State party take all necessary measures to ensure that the guidelines for recruitment of migrant workers are respected by the recruiting agencies and agents both in Sri Lanka and in the receiving countries. The Committee urges the State party to strictly monitor the activities of recruitment agencies in order to ensure that the rights of migrant workers and prospective migrant workers are protected both in the State party and after their arrival in the host country.**

45. The Committee notes that the State party is planning, in cooperation with the International Organisation for Migration, an organised system to monitor and record returning migrant workers. The Committee also notes with interest that a Reintegration Programme for returning migrant workers has been formulated by the SLBFE which aims to facilitate the reintegration of returnees into the mainstream of society by, inter alia, addressing the psychosocial and economic needs of both the returnees and their families. However, the Committee regrets the absence of detailed information available to the Committee on this programme.

46. **The Committee recommends that the State party:**

- (a) **Take steps to raise awareness of returning migrant workers and their families about the Reintegration Programme;**
- (b) **Allocate sufficient funds to the Reintegration Programme; and**
- (c) **Consider setting up local institutional mechanisms to facilitate the voluntary return of migrant workers and members of their families as well as their durable social and cultural reintegration.**

47. While the Committee notes that the State party has concluded readmission agreements with the European Union (EU) and with Switzerland and that it is in the process of drafting implementing

protocol agreements with a number of EU Governments, it is concerned that these agreements may not include procedural guarantees for the migrants they cover.

48. **The Committee recommends that the State party, taking into account Article 22 of the Convention, ensure that current and future readmission agreements and protocol agreements concluded between Sri Lanka and host countries include appropriate procedural guarantees for migrants.**

49. While the Committee takes note of the State party's indication that a number of studies have been carried out on the subject, it regrets that no information has been provided by the State party on the impact of migration on children in Sri Lanka.

50. **The Committee encourages the State party to analyse, and to carry out new studies if necessary, on the impact of migration on children, with the aim of developing adequate strategies to ensure the protection and the full enjoyment by children of migrant workers of their rights.**

51. The Committee notes that new legislation in the area of immigration and emigration law has been adopted in order to deter human smuggling and illegal migration. However, the Committee regrets that little or no information has been provided by the State party on the phenomena of human trafficking and human smuggling. The Committee also notes with concern that those who irregularly leave or enter Sri Lankan territory are penalised for the crime of "illegal migration".

52. **The Committee recommends that the State party:**

- (a) **Take steps to ensure implementation of legislation to prevent human trafficking and smuggling of persons;**
- (b) **Evaluate the phenomenon of trafficking in persons and compile systematic disaggregated data with a view to better combating trafficking in persons, especially women and children; and**
- (c) **Take steps to ensure that those responsible for trafficking or smuggling of human beings are brought to justice and appropriately sanctioned, while at the same time ensuring that migrants are not penalised for having irregularly migrated.**

6. Follow-up and dissemination

Follow-up

53. The Committee requests the State party to include in its second periodic report detailed information on measures taken to follow up on the recommendations made in these concluding observations. The Committee recommends that the State party take all appropriate measures to ensure that these recommendations are implemented, including by transmitting them for consideration and action to all relevant national and local authorities.

54. The Committee encourages the State party to involve civil society organisations in the preparation of the State party's second report.

Dissemination

55. The Committee likewise requests the State party to disseminate these concluding observations widely, including to public agencies and the judiciary, non-governmental organisations and other members of civil society, and to take steps to make them known to Sri Lankan migrants abroad and foreign migrant workers residing or in transit in the Sri Lanka.

7. Next periodic report

56. The Committee notes that the State party's second periodic report was due on 1 July 2009. In the circumstances, the Committee requests the State party to submit its second periodic report not later than 1 November 2011.

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Is Land Just for Men?

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(From the Foreword)
Prof. Bina Agarwal, University of Delhi, India

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